BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

TO THE

GOVERNOR OF THE STATE OF MINNESOTA

FOR THE PERIOD ENDING
DECEMBER 31, 1916

LYNDON A. SMITH, Attorney General

SYNDICATE PRINTING COMPANY
Minneapolis, Minn.
1917

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ATTORNEYS GENERAL OF MINNESOTA.

Territorial.

Lorenso A. Babcock	June	1, 1849	to	May 15,	1853
Lafayette Emmett	May	15, 1853	to	May 24,	1858

State.

Charles S. Berry	May	24, 1858	to	Jan. 2,	1860
Gordon E. Cole	Jan.	4, 1860	to	Jan. 8,	1866
William Colville	Jan.	8, 1866	to	Jan. 10,	1868
F. R. E. Cornell	Jan.	10, 1868	to	Jan. 8,	1874
George P. Wilson	Jan.	9, 1874	to	Jan. 10,	1880
Charles M. Start	Jan.	10, 1880	to	Mar. 11,	1881
W. J. Hahn	Mar.	11, 1881	to	Jan. 5,	1887
Moses E. Clapp	Jan.	5, 1887	to	Jan. 2,	1893
H. W. Childs	Jan.	2, 1893	to	Jan. 2,	1899
W. B. Douglas	Jan.	2, 1899	to	April 1,	1904
W. J. Donahower	April	1, 1904	to	Jan. 2,	1905
Edward T. Young	Jan.	2, 1905	to	Jan. 4,	1909
George T. Simpson	Jan.	4, 1909	to	Jan. 1,	1912
Lyndon A. Smith	Jan.	1, 1912	to	.....	

ATTORNEY GENERAL'S STAFF.

LYNDON A. SMITH ..... *Attorney General*
CLIFFORD L. HILTON ..... *Assistant Attorney General*
C. LOUIS WEEKS ..... *Assistant Attorney General*
WILLIAM J. STEVENSON* ..... *Assistant Attorney General*
ALONZO J. EDGERTON† ..... *Assistant Attorney General*
JOHN C. NETHAWAY‡ ..... *Assistant Attorney General*
HENRY C. FLANNERY§ ..... *Assistant Attorney General*
EGBERT S. OAKLEY¶ ..... *Assistant Attorney General*
JAMES E. MARKHAM‖ ..... *Assistant Attorney General*
ROLLIN L. SMITH ..... *Assistant Attorney General*
GENEVIEVE SPANGENBERG ..... *Department Clerk*
DAISY G. STRUTZEL ..... *Stenographer*
EDITH GRAHAM ..... *Stenographer*
KATHERINE ROBINSON ..... *Stenographer*
C. S. BROWN ..... *Inheritance Tax Agent*
T. E. CASSILL ..... *Inheritance Tax Examiner*

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*Resigned Mar. 7, 1916.
†Died Aug. 28, 1915.
‡Resigned Jan. 12, 1916.
§Appointed Jan. 29, 1916.
¶Appointed Mar. 6, 1916.
‖Appointed Mar. 8, 1916.

LETTER OF TRANSMITTAL

Hon. J. A. A. Burnquist, Governor of Minnesota,

Sir: The attorney general's office has remained in the same condition it was at the time of my report two years ago with the exception of a few changes due to the death of one assistant and the resignation of four other persons connected with the office. Alonzo J. Edgerton, who had been for some time the attorney in charge of the legal business of the railroad and banking departments, died on the 28th day of August, 1915; John C. Nethaway resigned on January 12, 1916, to accept appointed as judge of the nineteenth judicial district; and William J. Stevenson, who had been for several years in charge of the legal business connected with taxation, resigned March 7, 1916, to engage in business. Louis S. Headley gave up the department clerkship, and Fred E. Tydeman the position of inheritance tax agent, both to engage in private professional work. Mr. Edgerton was succeeded by Henry C. Flannery, who had been special counsel in certain railroad work for some time prior to his promotion, and Judge Nethaway was succeeded by James E. Markham, a prominent attorney of St. Paul, who had had many years of experience as a public legal official. Mr. Stevenson was succeeded by Egbert S. Oakley, who has enjoyed long experience in public life, beginning with the holding of the position of county attorney of Wright county and followed by some ten years of work for the United States in its land and legal departments. These men have brought training and ability of a high order to the legal work of the state. The state was fortunate in obtaining as a successor to Mr. Tydeman, as inheritance tax agent, Claude S. Brown, who was our deputy state auditor for nine years prior to assuming this work.

ACTIONS AND PROCEEDINGS.

Since the last report to the governor an unusual amount of work has devolved upon the attorney general. Each session of the legislature adds some duties to his increasing list. Although more than the usual number of cases have been disposed

of, there has been an accumulation to some extent of work and there are now pending seventy-three (73) civil actions. During the last two years one hundred and seventy-seven (177) cases have been handled in district court, of which twenty-two (22) have been appealed to the supreme court of the state and three (3) to the supreme court of the United States. Thirty-nine (39) civil cases have been argued in the supreme court of the state, of which six (6) have been carried to the supreme court of the United States. Eleven (11) cases have been argued in the United States supreme court, nine (9) have been up in the United States district courts, five (5) in municipal courts, five (5) in probate courts, one before the Interstate Commerce Commission, one in a county court in Wisconsin and eight (8) in the Department of the Interior at Washington.

The criminal cases in the supreme court have numbered twenty-nine (29), in district courts twenty-four (24), municipal court two (2), justice court one (1).

The opinions which have been rendered by the attorney general and his assistants during the last two years have numbered about thirty-eight hundred.

Further particulars with regard to the cases that have had the attention of the attorney general during the last two years, with facts concerning their nature and results, are given mainly in a special statement and annexed as an appendix to this report. Since January 1, 1915, one hundred eighty-six requisition matters have been passed upon by this office.

Notices of two hundred thirty-seven proceedings for the registration of land, in which the state was named as a defendant, have been served upon the attorney general.

COLLECTIONS.

The amount of fines, penalties and other moneys collected by or through the attorney general's office during the years 1915 and 1916 are as follows:

Timber trespass	$168,950.25
Oil inspection fees	17,109.32
Taxes, including telephone, inebriate, freight line, railroad and insurance	45,401.98
Miscellaneous	36,343.14
Total	$267,804.69

In addition to the foregoing amounts, collected largely through suit, the office has passed upon and either adjusted or collected the inheritance taxes of the state, which amounted to $2,213,027.05, of which $1,658,372.50 was collected through probate courts and county treasurers and $554,654.55 directly through this office as non-resident taxes and taxes on gifts made in contemplation of death.

INHERITANCE TAXES.

The collection of inheritance taxes has become more difficult on account of the methods of evasion which have become somewhat familiar to men of wealth and to the legal profession. The total amount collected is gradually increasing, although there are still some estates of persons deceased for a considerable time which have not as yet paid their full amount of inheritance taxes. Investigations are proceeding with a view to obtaining the information necessary to secure to the state the payment of all that should have been or should be secured by the state as revenue from the tax on the transfer of the property included in these estates. The official force assigned to this work is efficient and zealous and could hardly be improved in quality, but is not sufficient in quantity to secure for the state the largest possible amount of inheritance tax. The change in the amount of revenue from this source during recent years is indicated by the following statistics:

Amount collected in year ending July 31, 1911	$450,405.70
Amount collected in year ending July 31, 1912	678,512.99
Amount collected in year ending July 31, 1913	437,261.55
Amount collected in year ending July 31, 1914	650,756.84
Amount collected in year ending July 31, 1915	1,142,539.41
Amount collected in year ending July 31, 1916	672,814.37
Amount collected since August 1, 1916	716,232.67

It is no doubt more than a coincidence that the only years when less was collected a succeeding year than the previous year were those when there was a change in the person in immediate charge of the work of inheritance tax collection. The probabilities are that before the end of the present fiscal year the inheritance tax collections for the year will more than exceed two million dollars. The increase in the work of this department of the attorney general's office is such as to make it probable that the expenses will be somewhat larger in the

years immediately ensuing than they have been in the past. In one estate in which the value of the property depended on real estate scattered from Mexico to Alaska it was estimated that if a complete appraisal of the properties from which the value of the estate was derived had to be made instead of taking the market value of shares of corporations owning such real estate, it would cost, for such appraisal, well toward eight thousand dollars. Such an amount is not to be considered large when applied to an estate on the transfer of which the tax may amount to hundreds of thousands of dollars. The inheritance tax is a method of obtaining revenue which has come to be accepted as fair and just and imposing as little relative hardship upon the taxpayers as any that has been devised. The effect on our law of the adoption of a federal inheritance tax is uncertain. Inheritance taxes should be imposed only by states.

RAILROAD CONDITIONS.

The most important matters calling for the attention of the attorney general at the present time are those connected with the railroads of the state. In the opinion in the Minnesota Rate Cases it was stated by the Justice of the Supreme Court writing it, that "The power of congress to regulate commerce among the several states is supreme and plenary. * * * The authority of congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried on; and the full control by congress of the subject committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations * * * the states may act within their respective jurisdictions until congress sees fit to act, and when congress does act the exercise of its authority overrides all conflicting state legislation."

A year later the supreme court held in what is known as the Shreveport case (234 U. S. 342, 353-354): "Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms."

The court said that the laws of congress applied to unreasonable discriminations between localities in different states as well when arising from an intrastate rate as compared with an interstate rate as when due to interstate rates exclusively, and

held that carriers who are entitled to maintain interstate rates conforming to what the Interstate Commerce Commission found to be reasonable were free to comply with an order of the Interstate Commerce Commission by adjusting intrastate rates so as to remove discrimination against such interstate rates.

One result of the Shreveport decision is to cause railroads to bring actions whose ultimate purpose is to destroy rates made by state legislatures. There are now pending in Illinois twenty-eight suits of this kind, by which almost every state passenger rate between points in Illinois is attacked, as well as the laws prescribing those rates. These twenty-eight cases are being prosecuted by the united effort and co-operation of the various railroads of that state. If these cases are won it will be practically settled that the legislature of Minnesota cannot longer prescribe or enforce railroads rates, but that such rates will be wholly fixed by federal authority. No one can tell the exact effect upon the shippers and travelers of this state of the change from state regulation of intrastate commerce to federal control. The idea is that the regulation of intrastate commerce necessarily is a regulation of interstate commerce because of the intimate relation which exists between the two. The first effect would be to change the passenger rate from two cents to 2 4-10ths cents per mile. The number of passengers carried each one mile in intrastate traffic in Minnesota in the year ending November 30, 1915, was 915,940,671. An addition of 4-10ths cents per mile for each of these passengers would amount to $3,663,762.00, which would seem to be approximately the amount that the passenger traffic of the state would cost under federal supervision more than it would cost under state supervision. The cost of intrastate freight traffic under federal supervision cannot be estimated with any degree of accuracy, but it would seem that the excess would not be less than the excess cost of passenger traffic just set forth. However patriotic we may be, it is hard to ascertain any advantage to intrastate traffic from its control being changed from state to federal authority. Theoretically there is some, but practically it would seem otherwise.

It is for the comnig legislature of this state to meet squarely the question of whether Minnesota shall surrender without contest its right to supervise and fix rates for its railroads to

the Interstate Commerce Commission or other expanding federal authority, or do its utmost to preserve its control over its own transportation rates and facilities. If the state is to preserve its control over its railroads it cannot trust to other states to fight its battles for it, though the results of their litigation will be influential, and in some cases controlling, over later litigation by this state. On the other hand it should take such action as is necessary to enable its railroad and warehouse commission and its attorney general to take prompt and adequate action for the preservation of the supervisory control by this state over the transportation of freight and passengers wholly within its own boundaries. It is for this purpose in part that the attorney general has asked for additional help in his office, and an ample emergency fund.

CRIMINAL MATTERS.

The statements made in the report of the attorney general two years ago as to the laws relating to the duties of county attorneys should be repeated until his recommendations are adopted by the legislature and consequently I reproduce them here.

Each county attorney should be required to advise all persons bringing to him any facts which seem to them to constitute a violation of a penal law, as to whether or not such facts would, if proven, constitute a public offense. If he should so advise, then he should be required to draw a complaint in legal form for the person complaining to present to a magistrate; and if such magistrate decide to issue a warrant, the county attorney should prosecute the consequent action from the time of the granting the prayer of the complaint. The county attorney should attend from the hearing of informal complaints to the final proceedings in district court, in the enforcement of all state criminal laws, except as a similar duty as to misdemeanors may be imposed on city attorneys in cities having municipal courts.

The time has come when the question of providing a state constabulary should be earnestly considered. Localities will not enforce their laws when such laws are unpopular. The very localities where enforcement of the law is most needed are the localities where it is hardest to secure it. There are but three objections to a state constabulary. First: The cost.

Second: The unpopularity of the purpose for which it would be organized. Third: The danger of its becoming a political force. The constabulary would be used; first, in the detection of crime and arrest of offenders; second, in the prevention of unlawful assemblages, riots and the commission of other crimes by reason of a protest by the people of the locality against some unpopular law; third, the securing of evidence for the state in cases under prosecution. Something should be done to increase our instrumentalities of law enforcement. If a state constabulary should be provided it should be placed under such control as to secure the greatest good from its services and to insure against any evils resulting therefrom.

OFFICE ADMINISTRATION.

I renew here the recommendations of two years ago to the effect that enlarged quarters should be given to the office of the attorney general. It is impossible for attorneys to give the thought to their work which is demanded unless they can have quiet. To have two or more attorneys in a single room is to cut down the value of their services from twenty to thirty per cent. The state should provide a place for its legal department and a room for each attorney connected with such department, as well as suitable quarters for the incidental employes which are required for the conduct of a large law office. Generally the legal department of a corporation doing about the same amount of business as the attorney general, has more than three times the office space in which to do such work as have the attorney general and his assistants.

The attorney general should not be a member of administrative boards. It diverts his attention from law questions to business questions. The attorney general of the state should no more be required to be an administrator of the affairs of the state than should those administering the business of the state be permited to control the law business of their several departments. Neither the implication of the constitution nor the principles of good business administration justify either.

There are something like fifty departments now in our state government and each of these departments has more or less law work. Assistant attorneys general are assigned to the work of the more important departments and become experts along those lines. For example: Mr. Hilton gives

special attention to matters connected with the state land department, education, health, public examiner and municipal matters; Mr. Markham,—dairy and food department, labor department, drainage matters, timber cases, matters pertaining to cities of the first class and criminal law; Mr. Oakley,—inheritance and other taxes, mining interests, United States practice; Mr. Weeks,—highways, insurance, extradition, board of control and state university; Mr. Flannery,—railroad and warehouse commission and banking department.

The work of the office could be lessened by refusing to advise citizens with regard to legal matters involved in public affairs. For years it has been customary not to give any opinions on private matters but to advise men in public life and official position as to matters of high public importance. It is probably advisable to continue this practice. Members of the legislature are by the force of the statutes of this state excluded from the benefits of contact with and advice from the attorney general and his assistants. This should not be, and is not, because of custom and the attitude taken by the attorney general and his predecessors. Public officials should have a chance to confer with the highest legal officer of the state, and not feel that they intrude or infringe on the law. It is necessary, in view of the increasing work of the attorney general's department, to either eliminate all of its work not specifically required by statute or to have more assistance. This has been asked for in the budget heretofore presented to you. A deputy and another assistant is needed. An emergency fund has also been asked for, which fund it may not be necessary to use, but which should always be at hand for actions where the interests of the state must be protected or promoted through the courts and at a considerable expense. One case is now pending in this office involving over half a million dollars which cannot be tried properly and completely without an expenditure of several thousand dollars and the attorney general has no fund which will enable him to enter upon the trial of this case with a certainty that he can carry that trial to the end and to the higher courts to which it will be appealed, and, through all its stages, have ample means at hand to employ legal assistance and to find, produce and examine witnesses. It can be tried without additional funds, but it cannot be tried as things are at present with the highest

possible prospect of a successful result. The principal element of cost in the case is the obtaining under legal senctions, of the facts necessary to show whether or not the taxation of railroads by the gross earnings system is or is not reasonable in amount as compared with direct taxation. The emergency fund could well be put in the hands of specified officials, but their hands should not be tied so that needs could not be met advantageously.

The most difficult problems of the state come to the attorney general and it is for the highest good of the state that they be considered by persons of ability and industry, working without disturbance and with their minds concentrated on the facts and law which constitute the material out of which the problem is to be solved. No higher service can be rendered the state than to think for it.

I cannot but express to you my appreciation of your confidence in and appreciation of the work of my office and convey through you to the people of the state my gratitude for their continuation of my tenure of the office of attorney general.

LYNDON A. SMITH,
Attorney General.

Number Attorney General's Docket.

CIVIL CASES.

1168 Railroad Rate Cases. United States Supreme Court, 230 U. S. 352.

1357 State vs. Chicago, Milwaukee & St. Paul Railway Company. To enforce order of Railroad and Warehouse Commission prescribing switching rate from Hastings station on the Burlington Railroad to Milwaukee yards in Hastings proper. Order reversed by Judge Converse.

1371 State vs. Red River Lumber Company. For an accounting, $5,214.00. Submitted to court.

1424 State of Minnesota vs. State of Wisconsin. Boundary line. Legislature passed Chapter 545 G. L. 1913. Action dismissed in U. S. Supreme Court, new case started. See No. 2025.

1548 State vs. Itasca Lumber Co., et al. Balance due on timber permit. State received check for $2,317.98.

1670 State vs. Chicago, Burlington & Quincy Railway Co. Taxes pending.

1727 State vs. Grand Forks Lumber Co. Timber claim for $39,335.00 Pending.

1729 State vs. Boyd & Young. Timber claim, $2,430.00. Pending

1734 State vs. Brooks-Scanlon Lumber Co., et al. Timber trespass $16,438.42. Affirmed.

1736 State vs. Minneapolis, St. Paul & Sault Ste., Marie Ry. Co. Gross earnings tax $7,024.44. Submitted to court.

1738 State vs. Wisconsin Central Railway Co. Gross earnings $853.76. Submitted to court.

1739 State vs. Cudahy Packing Co. Freight car line taxes. Judgment affirmed. 150 N. W. 410. Pending U. S. Supreme Court.

1756 In re Estate of Michael Clifford, deceased. Probating estate. State received $3,721.

1767 Minnesota State Board of Medical Examiners vs. C. W. Wall. Appeal from order of the State Board of Medical Examiners.

1773 State vs. City of Barnesville. Gross earnings tax $1,567.24. Pending.

1777 State vs. Van Tilburg Oil Co. Oil inspection fees for $1,389.60. Pending.

1778 State ex rel Lyndon A. Smith vs. Chicago, Milwaukee and St. Paul Railway Co. Mandamus (Cashman law). Pending.

1796 State vs. Minnesota & Ontario Power Co. Damages for flooding state lands. Pending.

1802 John Regel vs. State of Minnesota. Swamp land. Land non-swamp.

1805 State vs. Chicago and Northwestern Railway Co. et al Joint rates. Affirmed. 158 N. W. 627.

1806 State vs. Great Northern Railway. Scales at Pelican Rapids. Order of the Commission reversed.

1807 State vs. Great Northern Railway. Scales at Park Rapids. Order of the Commission reversed.

1808 State vs. Great Northern Railway. Scales at Rothsay. Order of the Commission reversed.

1809 State vs. Great Northern Railway. Gross earnings taxes $536,402. Pending.

1810 State vs. Northern Pacific Railway Company. Gross earnings taxes $39,862. Affirmed. 153 N. W. 850.

1816 Louis Morin vs. State of Minnesota. Swamp land. State secures 40 acres.

1825 In re inheritance tax, Francis Edward Ward. Taxation of foreign held bonds. Reversed, 157 N. W. 1076.

1834 State vs. The Minnesota Farmers Mutual Insurance Co. For tax on premiums received in 1910. Dismissed per decision reported in 153 N. W. 594.

1835 State vs. The Minnesota Farmers Mutual Insurance Co. for tax on premiums received in 1910. Dismissed per decision reported in in 153 N. W. 594.

1836 State vs. The Minnesota Farmers Mutual Insurance Co. For tax on premiums received in 1912. Dismissed, per decision reported in 153 N. W. 594.

1837 State vs. The Minnesota Farmers Mutual Insurance Co. For tax on premiums received in 1913. Dismissed per decision reported in 153 N. W. 594.

1838 State vs. Bartles Oil Co. Oil inspection fees, $838.80. Affirmed, 155 N. W. 1035.

1839 A. M. Ramer Co. vs. Eliza P. Evans, W. Houk as the minimum wage commission. Injunction. Pending supreme court. Waiting outcome of U. S. Supreme court decision in Oregon case.

1842 State vs. Minnesota Farmers Mutual Insurance Co. For tax on premiums received in 1909. Dismissed per decision reported in 153 N. W. 594.

1843 State vs. Minnesota Farmers Mutual Insurance Co. Tax on premiums received in 1907. Dismissed per decision reported in 153, N. W. 594.

Number Attorney General's Docket.	
1845	State vs. Great Northern Railway Co., in re station at Ada, Minnesota. Affirmed, 159 N. W. 1089.
1846	State vs. Farmers Mutual Hail Insurance Co. Tax on premiums received in 1910. Dismissed per decision reported in 153 N. W. 594.
1847	State vs. State Farmers Mutual Hail Insurance Co. Tax on premiums received in 1911. Dismissed per decision reported in 153 N. W. 594.
1848	State vs. State Farmers Mutual Hail Insurance Co. Tax on premiums received in 1913. Dismissed per decision reported in 153 N. W. 594.
1852	State vs. State Farmers Mutual Hail Insurance Co. Tax on premiums received in 1912. Dismissed per decision reported in 153 N. W. 594.
1853	State ex rel Erik E. Lindom vs. Minnesota Tax Commission. Mandamus. Submitted to court.
1856	State vs. A. C. Otte, Binding Twine notes for $291.82. Case settled.
1857	In re Petition of George Deters et al to disqualify O. K. Dahle for the office of county attorney of Houston County. Petition dismissed.
1858	In re Application of Independent School District of Virginia for condemnation of certain lands. Verdict $9,856.50 returned. State received $10,028.98.
1859	Frank B. Pomroy vs. John C. Beattie et al—to quiet title. Dismissed as to state.
1860	State vs. Great Northern Railway, Minneapolis Western Railway. See case 1864.
1861	State vs. State Farmers Mutual Hail Insurance Co. Tax on premiums received in 1907. Dismissed per decision reported in 153 N. W. 594.
1862	Minneapolis Civic and Commerce Association vs. Minneapolis and St. Louis Ry. Co., and the Minneapolis Railway Transfer Co. Switching charges. Order of Commission sustained.
1863	Minneapolis Civic and Commerce Association vs. Minneapolis Eastern Ry. Co. et al. Switching charges. Affirmed 158 N. W. 817.
1864	State vs. Great Northern Ry. and Minneapolis Western Ry. Co. Switching charges. Order of Commission affirmed. 162 N. W. 294.
1865	In re petition of the Minneapolis Civic and Commerce Association vs. Minnesota Railway Transfer Co. et al. Switching charges.
1866	State ex rel Lyndon A. Smith vs. The Village of Hills and Dales et al. Quo Warranto. Judgment for plaintiff.
1867	In re Estate of John Beggan, deceased. Proof of claim for maintenance in Soldiers Home. Received check for $900 from administrator.
1868	State vs. John B. Evans et al, Binding twine note for $1,579.25. Received check in full payment.
1869	State vs. Pullman Co. Gross earnings taxes for 1914. $23,023. Pending.
1870	State vs. Wells-Fargo Co. Gross earnings taxes for 1914, $9,892. Pending.
1871	In re reward for arrest and conviction of George Thomas Greer. Affirmed. 152 N. W. 866.
1872	Conglomerate Land Co. vs. State of Minnesota et al. Partition. Final judgment entered for defendants.
1873	Conglomerate Land Co., et al vs. State et al. Partition. Stipulated that plaintiff pay all taxes and tax liens.
1874	Conglomerate Land Co. et al vs. State of Minnesota et al. Partition. Stipulated that plaintiff pay tax liens.
1875	Conglomerate Land Co. et al vs. State of Minnesota et al. Partition. Stipulated that plaintiff pay all taxes and tax liens.
1876	Conglomerate Land Co. et al vs. State of Minnesota et al. Partition. Stipulated that plaintiff pay all taxes and tax liens.
1877	American Beverage Co. vs. J. J. Farrell as Dairy and Food Commissioner. Injunction. U. S. district court. Pending.
1878	State ex rel Lyndon A. Smith vs. Bergit Billberg. Quo Warranto Proceedings dismissed, 154 N. W. 442.
1879	M. J. Solum vs. Northern Pacific Ry. Co. Railway refund. Affirmed 157 N. W. 996. Pending an appeal to U. S. supreme court.
1880	Anna E. Teel vs. Robert Crickmore. Conversion pending.
1881	Comstock Farmers Elevator Co. vs. Great Northern Ry. Co. Railway refund. Judgment entered for plaintiff in district court. Supreme court reversed and remanded 163 N. W. 280.
1882	In re Swamp Land in Red Lake Indian Reservation. Notice of appeal from the decision of the commissioner General Land Office filed.
1883	In re application State of Minnesota to condemn, improve and straighten the Roseau river in Roseau County. Judgment entered.
1884	State vs. International Lumber Co. to recover for burning of slashings $384.00. State entitled to recover from defendant total sum of $355.65.
1885	State vs. Pure Oil Co. Affirmed. Oil Inspection fees for $10,449. 158 N. W. 723. Defendant has appealed to U. S. supreme court.

Number Attorney General's Docket.	
1886	Bell Lumber Co. vs. Great Northern Ry. Co. Railway refund. Affirmed. 160 N. W. 688.
1887	State on relation of B. F. Allen vs. A. J. Rush, State Oil Inspector. Mandamus. Reversed. 154 N. W. 947.
1888	Patrick H. Doyle vs. C. S. Reed, Warden. Habeas Corpus. Writ quashed.
1889	In re Condemnation by City of Minneapolis of certain lands for the purpose of public docks. State's interests properly provided for.
1890	State ex rel Wm. L. Kohlman vs. John Wagener, Sheriff of Ramsey County. Habeas Corpus. (Chap. 147 Laws, 1915). Reversed, 153 N. W. 749.
1891	Northern Counties Land Co. vs. Albert H. Powers et al. Quiet title. Dismissed as to State of Minnesota.
1892	In re C. E. Johnson, Bankrupt. Note for farm machinery $172.00. Claim filed and allowed. First dividend received.
1893	In re Estate of Elizabeth Wright. Probating estate. Public sale ordered.
1894	State ex rel Theophil Basting et al vs. Probate court of Hennepin County et al. Certiorari. Affirmed. 155 N. W. 1077.
1895	Conglomerate Land Co. vs. State of Minnesota et al. Quiet title. Pending.
1896	State ex rel Lyndon A. Smith vs. Village of McKinley et al. Quo Warranto. Writ of ouster issued. 155 N. W. 1064.
1897	John Svendsgaard vs. State Board of Pharmacy. Malicious prosecution. Dismissed.
1898	State ex rel Attorney General vs. Canadian Northern Ry. Co. Order of R. R. and W. H. Com. to rebuild bridge. Temporary repairs completed in compliance with order.
1899	State ex rel Atorney General vs. Village of Pine River, et al. Quo Warranto. Judgment filed in favor of state.
1900	L. Christian Co. vs. Chicago, St. Paul, Minneapolis & Omaha Ry. Co. Railway refund. Affirmed. 159 N. W. 1082.
1901	H. C. Ervin vs. Great Northern Ry. Co. Railway refund. Pending.
1902	Chicago, St. Paul, Minneapolis & Omaha Ry. Co. vs. Railroad & Warehouse Commission. Establishment of ticket and passenger depot at Butterfield. Order of Commission affirmed. Appeal taken to supreme court. Affirmed.
1903	Matter of John Kunz, deceased. Claim for maintenance in Soldiers' Home. State consented to disallowance of claim on ground that estate consisted of pension money only.
1904	Minneapolis and Rainy River Ry. vs. Railroad & Warehouse Commission. In re application to discontinue service on the Pomeroy branch. Judgment entered vacating order of commission.
1905	In re Estate of Florence Douglass. Escheat case. Received check for $504.
1906	Marais Investment Co. vs. State et al. Quiet title. Findings filed that lands be sold to pay taxes.
1907	In re application of Wm. T. Emmet to take possession and liquidate the business of Empire State Surety Co. Claim for $143.00, assessments on premiums. Claim dismissed.
1908	James E. Trask vs. State of Minnesota et al. Quiet title. Dismissed as to state.
1909	State ex rel W. H. Smallwood vs. W. L. Windom. Quo Warranto. (Judgeship) Writ of ouster ordered, 155 N. W. 629.
1910	State vs. Gust Laettna. Ejectment. Judgment entered for state.
1911	State vs. Herman Korpi. Ejectment. Judgment entered for state.
1912	State ex rel Lyndon A. Smith vs. Peter Spina. Injunction. Spina's drinking place abated by U. S. government.
1913	Wm. H. Murray vs. Arthur B. Fately and Minnesota State Agricultural Society. Garnishment. Dismissed as to state.
1914	Jack Worst vs. State Agricultural Society et al. Dismissed as to state.
1915	Wm. G. Graves vs. State Fire Marshal. Enforcing Chapter 564 G. L. 1913. Stipulation signed, dismissing appeal. Building torn down.
1916	Northern Counties Land Co. vs. State et al. Quiet title.
1917	Charles Seppla vs. John Olson et al (State of Minnesota, intervenor) Damages for cutting timber $582. Plaintiff entitled to judgment.
1918	Charles Seppla vs. Charles West (State of Minnesota, intervenor) Damages cutting timber $582. Plaintiff entitled to judgment.
1919	In re appeal of Zelda Brown, from order of State Fire Marshal. Enforcing chapter 564 G. L. 1913. Order entered for removal of building.
1920	Henry Thompson vs. State of Minnesota. Swamp land. Affirmed.
1921	Elan P. Dodge vs. State Fire Marshal. Enforcing Chap. 564 G. L. 1913. Order complied with.
1922	L. Swift & Thorpe Brothers vs. State Fire Marshal. Enforcing Chapter 564 G. L. 1913. Order complied with.
1923	Frank H. Burnett vs. State Fire Marshal. Enforcing Chap. 564 G. L. case stricken.

1924 Jos. Rich vs. State Fire Marshal. Enforcing Chap. 564 G. L. 1913. Order complied with.
1925 Antonia Janiak vs. State Fire Marshal. Enforcing Chap. 564 G. L. 1913. Settled.
1926 Wm. E. Richardson vs. State Fire Marshal. Enforcing Chap. 564 G. L. 1913. Order complied with.
1927 Hugh J. McClearn vs. State Fire Marshal. Enforcing Chap. 564 G. L. 1913. Dismissed.
1928 Philip Greenburg vs. State Fire Marshal. Enforcing Chap. 564 G. L. 1913. Order complied with.
1929 M. W. Turner et al vs. Railroad and Warehouse Commission. Injunction (Chap. 210 G. L. 1915.) Motion denied. See case 2024.
1930 In re Deepening, Improving and Repairing State Ditches 6 and 7. Commissioners appointed. Report filed.
1931 Northern Pacific Ry. Co. vs. Railroad and Warehouse Commission. In re switching charges in City of Duluth. Order of Commission sustained.
1932 In re Estate of Christian Sanders, deceased. State received $518.18.
1933 George D. Rogers et al vs. County of Hennepin et al. Taxing membership Minneapolis Chamber of Commerce. Affirmed 239 U. S. 621 and 240 U. S. 184.
1934 Duluth & Northern Minnesota Ry. Co. vs. State of Minnesota et al. Condemnation. Dismissed as to state.
1935 State ex rel Western Union Tel. Co. vs. Minnesota Tax Commissioner. Certiorari. Reversed. 155 N. W. 1061.
1936 State ex rel Lyndon A. Smith vs. Wm. Orr. Injunction affirmed. 155 N. W. 216.
1937 I. T. Burnside vs. State Fire Marshal. Enforcing Chap. 564 G. L. 1913. Order of Fire Marshal affirmed.
1938 In re Appeal of Spaulding Hotel Co. from an order of the State Fire Marshal enforcing Chap. 564 G. L. 1913. Order complied with.
1939 S. Segal vs. State Fire Marshal. Enforcing Chap. 564 G. L. 1913. Order complied with.
1940 Anton Lehemey vs. State Fire Marshal. Enforcing Chap. 564 G. L. 1913. Order complied with.
1941 U. S. Fidelity & Guaranty Co. vs. State of Minnesota, Julius A. Schmahl et al. Injunction. Judgment entered relieving the bonding company of any further liability.
1942 State vs. Gus O. Erickson and Fred J. Jackson. Binding Twine Note for $2,318. Judgment entered, check received for $2,411.
1943 State vs. Pure Oil Co. Oil inspection fees $4,411. Findings in favor of state in district court. Defendant appealed to supreme court. Pending.
1944 State vs. Corporation Securities Co. Receivership. Receiver appointed.
1945 State ex rel Edw. Carmody vs. C. S. Reed, Warden. Habeas Corpus. Writ discharged. 156 N. W. 127.
1946 Range Sand Lime Brick Co. vs. Great Northern Ry. Co. in appeal from R. H. & W. H. Commission spur track Swan Lake. Order of commission sustained. Appealed to supreme court. Affirmed 163 N. W. 656.
1947 State ex rel Patrick Sheehan vs. C. S. Reed as Warden. Habeas Corpus. Petitioner discharged. 156 N. W. 128.
1948 In re Application St. Paul Association of Commerce and Minneapolis Civic and Commerce Association to make St. Paul, Minnesota Transfer, Minneapolis, Hopkins and St. Louis Park one common rate point. Appeal from order of the R. R. & W. H. Com., affirmed. 158 N. W. 982. Pending an appeal to U. S. supreme court.
1949 A. C. Ochs and R. R. & W. H. Com'n., Intervenors vs. Chicago & Northwestern Ry., to rearrange and construct a sidetrack near Springfield. Affirmed 160 N. W. 866. Appealed to U. S. supreme court.
1950 I. R. Burnside et al vs. State of Minnesota et al, to quiet title. Appearance for state filed.
1951 State ex rel Lyndon A. Smith vs. City of International Falls et al, injunction. Affirmed. 156 N. W. 249.
1952 Board of Education of Duluth vs. State et al. To clear title of school properties. Affirmed. 158 N. W. 635.
1953 In re Walter B. Nichols, Bankrupt. Proof of claim for $154.39 filed. $55.57 received. Final dividend.
1954 State vs. J. W. Dysart et al. Garnishment. Received check for $285.
1955 In re Walter B. Nichols, Bankrupt. Order made directing trustee to deliver personal property to agent of state.
1956 State ex rel R. R. & W. H. Com'n. vs. Northern Pacific Ry. Co. Injunction (passenger rates) restraining order and order to show cause entered by district court. Dissolved.
1957 Railroad & Warehouse Com'n. and the Attorney General of Minnesota vs. C. B. & Q. Ry. Co., C. G. W. Ry. Co. et al, Passenger rates. Original petition filed with chairman of the I. C. Com'n., Washington, D. C. Petition refused.
1958 State vs. Bartles Oil Co., Oil inspection fees $573.16. Paid $619.37 under protest.
1959 In re Appeal from order of State Fire Marshal, Simon Meyers, Appellant. Enforcing Chap. 564 G. L. 1913. Pending.

Number Attorney General's Docket.	
1960	State ex rel Walter M. Carroll vs. Julius A. Schmahl as Secretary of State. Mandamus (section 357 G. S. 1913). Order discharged. 156 N. W. 8.
1961	American Surety Co. of New York vs. State et al. Suit by surety company to have referee determine claims occurring under commission merchants bonds.
1962	State ex rel Walter M. Carroll vs. Julius A. Schmahl as Secretary of State. Mandamus (section 357 G. S. 1913). Order discharged. 156 N. W. 116.
1963	State ex rel Tri-State Tel. Co. vs. Julius A. Schmahl. Mandamus. Affirmed. 157 N. W. 1082.
1964	In re Estate of J. A. Ohms, deceased. Claim for $631.74 binding twine and machinery. Received check (60 per ceint dividend).
1965	In re Vitalis Ahlen, Bankrupt. Claim for $255.38, farm machinery. Check received in full.
1966	Wm. Devine vs. Minnesota Transfer Ry. Co., C. B. & Q. Ry. Co. et al. Rates on ice. Pending.
1967	State ex rel Lyndon A. Smith vs. Superior Manufacturing Co. Quo Warranto. Order for judgment in favor of plaintiff.
1968	State ex rel H. J. West vs. Julius A. Schmahl, Secretary of State. Presidential primary election ballot. Dismissed.
1969	Estate of Martin A. Gullickson. Order filed denying the will. Admission to probate.
1970	Ilmon Curtis vs. State. Swamp land.
1971	Wm. T. Curtis vs. State. Swamp land. Affirmed.
1972	State ex rel Claude May vs. C. S. Reed, Warden. Habeas Corpus. Writ quashed.
1973	State ex rel St. Paul Gas Light Co. vs. Minnesota Tax Com'n. Certiorari. Writ discharged. 157 N. W. 639.
1974	State ex rel Minneapolis Gas Light Co. vs. Minnesota Tax Com'n. Certiorari. Writ discharged 157 N. W. 638.
1975	State vs. J. Emil Johnson and Oscar W. Peterson, $610. Binding twine. Judgment entered against defendants.
1976	In re Estate of Wm. W. Gibbs, deceased. Inheritance taxes. Papers and records transmitted to clerk of district court.
1977	State ex rel Justin Stoddard vs. C. S. Reed, Warden. Habeas Corpus. Order made discharging relator.
1979	Missabe Ice Co. vs. Duluth, Missabe & Northern Ry. Co. (state intervenor). Appeal from R. R. & W. H. Com'n. dismissed.
1981	Duluth Banking Co. vs. State of Minnesota et al. Partition. Pending.
1982	Duluth Banking Co. vs. State et al. Partition. Pending.
1983	State vs. Bartles Oil Co. Oil Inspection fees $574. Paid $644.95 under protest.
1984	Wash Sand Gravel Co. vs. Great Northern Ry. et al. Switching rates. Reversed.
1985	Thomas Bannon vs. State Fire Marshal. Enforcing Chap. 564 G. L. 1913. Order complied with.
1986	John P. McElver vs. State Fire Marshal. Enforcing Chap. 564 G. L. 1913. Order complied with.
1987	J. T. Schain et al, vs. Great Northern Ry. Co. In re appeal from order of R. R. & W. H. Com'n. Services on Browns Valley branch. Order of Commission affirmed. Pending on appeal to supreme court.
1988	Harry Brewster vs. George E. Wood, as State Game Warden. Replevin. Dismissed. See case 2007.
1989	In re appeal of A. T. Clavin and G. A. Tanner from order of State Fire Marshal, enforcing Chap. 564 G. L. 1913. Order of Fire Marshal set aside and repair order substituted by court.
1990	First State Bank of Elkader, Iowa vs. State et al. Quiet title. Dismissed as to state.
1991	State vs. Great Northern Ry. Co. In re proceedings to enforce payment of personal property taxes in Ramsey County. Pending supreme court.
1992	State vs. Northern Pacific Ry. Co. In re proceedings to enforce payment of personal property taxes in Ramsey County. Pending supreme court.
1993	In re Condemnation by the Board of Education, City of Minneapolis for addition to lands for the Willard school site.
1994	Re appeal John A. Stees from order of Fire Marshal, enforcing Chap. 564 G. L. 1913. Order complied with.
1995	Re appeal of Peter Anderson from the order of the State Fire Marshal, enforcing Chap. 564, G. L. 1913. Stipulation for repairs prescribed by fire marshal signed.
1996	In re appeal C. H. Prior, et al. from the order of the State Fire Marshal, enforcing Chap. 564, G. L. 1913. Pending.
1997	Maple Lake State Bank vs. J. A. O. Preus as State Auditor, et al. Quiet title. Order filed sustaining demurrer of the state.

Number Attorney General's Docket.	
1998	Re. appeal of Bertha Oentrich from order of the State Fire Marshal, enforcing Chap. 564 G. L. 1913. Building removed.
1999	In re. appeal of Louis F. Rosenstein from order of State Fire Marshal, enforcing Chap. 564 G. L. 1913. Appellant required to erect shed in a manner satisfactory to the building inspector.
2000	State vs. Andrew Myles, et al. To recover $451. Damages. Timber sale. Pending.
2001	In re. appeal Realty Investment Co. from order of the Fire Marshal, enforcing Chap. 564 G. L. 1913. Pending.
2002	Atlas Land Company, vs. State et al. Partition. Mailed complaint to County Attorney St. Louis County for his attention.
2003	In re Bert G. Johnson and John P. Ness. Binding twine note. Claim filed. Received check for $2,227.43.
2004	United States of America vs. W. J. Morrow, county auditor, et al To restrain County officials from taxing lands of Indian alottee. Decree of district court affirmed by the U. S. district court.
2005	In re. appeal Bertha Sauer from order of State Fire Marshal, enforcing Chap 564 G. L. 1913. Judgment entered.
2006	State ex rel Anna Davis, in behalf of Marjorie Lockwood, vs. Fannie French Morse, Habeas Corpus. Appeal pending, supreme court.
2007	Harry Brewster vs. George E. Wood, as State Game Warden. Replevin. Dismissed without prejudice.
2008	Steven Harrington vs. State of Minneapolis; swamp land. Pending.
2009	State vs. Immigration Land Co. Bill of complaint filed U. S. supreme-court.
2010	In re. estate of Samuel Thorn, deceased. Inheritance taxation. G. N. Iron Ore certificates. Appeal from order of the Attorney General determining inheritance taxes. Pending.
2011	State vs. Bartles Oil Co. Oil inspection fees. $272.93. Paid $283.78 under protest.
2012	Commercial Club of St. James vs. Chicago, St. Paul, Minneapolis & Omaha Ry. Co. Appeal from order of Commission in re. depot at St. James. Pending.
2013	Mary Clifford vs. State of Minnesota. In re. estate of Michael Clifford. Dismissed.
2014	R. J. Angus, et al. vs. Superintendent of Banks, et al. To recover interest on claims vs. Chippewa State Bank of White Earth. Dismissed.
2015	L. S. Waller vs. State Superintendent of Banks. To recover interest on claims vs. Chippewa State Bank of White Earth. Dismissed.
2016	W. S. Chase, vs. Minnesota Tax Commission. Certiorari. In re. assessment platted and unplatted land. Order of Tax Commission sustained. 160 N. W. 498.
2017	Re. appeal of Thos. Garrick from the order of the State Fire Marshal, enforcing Chap. 564 G. L. 1913. Pending.
2018	Re. appeal Potter Casey Co. from order of State Fire Marshal, enforcing Chap. 564 G. L. 1913. Pending.
2019	In re. United Flour Mills Co. a bankrupt. Proof of Claim for $95 filed, and allowed as preferred claim.
2020	John A. Thompson et al vs. Minneapolis, St. Paul Suburban Ry. Co. Appeal from order of R. R. & W. H. Com'n. to stop cars 1,500 ft. East of Silver Lake. Pending.
2021	St. Louis County Investment Co. vs. State of Minnesota, et al. Quiet title. Pending.
2022	Re. appeal of John Gazett from order of State Fire Marshal. Enforceing Chap. 564, G. L. 1913. Pending.
2023	In re. appeal Dina Nichols from order of State Fire Marshal. Enforcing Chap. 564 G. L. 1913. Case pending the sale of property.
2024	State ex rel R. R. &Whse. Com'n. vs. M. W. Turner. Injunction. Pending.
2025	State of Minnesota vs. State of Wisconsin. Boundary line location. Bill of complaint filed U. S. supreme court.
2026	Re appeal John Olson from order of the State Fire Marshal, enforcing Chap. 564 G. L. 1913. Dismissed.
2007	State ex rel Era Bond vs. Otto Langum, Sheriff, Habeas Corpus. Writ quashed. 160 N. W. 858.
2028	L. S. Waller vs. B. L. Fairbanks et al. Quiet title. Original complaint mailed to Clerk of Court for filing.
2029	State ex rel Lyndon A. Smith vs. Village of Elrosa, et al Quo Warranto. Pending.
2030	Wm. A. Moore vs. State Board of Control et al. Garnishment. Pending.
2031	State of North Dakota vs. State of Minnesota. Injunction. Bill of Complaint filed U. S. supreme court.
2032	Northwestern Tel. Co. vs. Railroad & Whse. Com'n. In re telephone rates. Order of Commission affirmed.
2033	State ex rel Era Bond vs. Otto S. Langum, sheriff of Hennepin County. Habeas Corpus. Dismissed.

Number Attorney General's Docket.

2034 In re. appeal G. N. Ry. Co. and the St. Paul Union Depot Co. from the order of the State Fire Marshal, enforcing Chap. 564 G. L. 1913. Pending.

2035 State of South Dakota vs. State of Minnesota. Injunction. Bill of Complaint filed U. S. supreme court.

2036 State ex rel Hennepin Holding Company, vs. Minnesota Tax Commission. Certiorari. Writ quashed. 160 N. W. 665.

2037 State vs. John McKenzie and Dominic Rossi. Ejectment. Dismissed.

2038 In re appeal of G. L. Scheid from the order of the State Fire Marshal, enforcing Chap. 564 G. L. 1913. Pending.

CRIMINAL CASES IN SUPREME COURT.

832 State vs. Albert Sailor. Forgery. Affirmed 153 N. W. 271.

834 State vs. T. F. McCauley. Arson. Second degree. Reversed, 156 N. W. 280.

836 State vs. Christ Lucken. Uttering a forged check. Affirmed, 152 N. W. 769.

837 State vs. Julien Provencher. Selling liquor to a drunkard. Affirmed. 152 N. W. 775.

839 State vs. Gentry Smith. Motion to affirm granted.

841 State vs. Theodore H. Lampe. Attempting to commit the crime extortion. Case remanded for further proceedings. 131 Minn. 65.

844 State vs. J. R. Landy. Criminal Libel. Reversed. 153 N. W. 258.

845 State vs. Charles H. Hunter. Manslaughter. Affirmed. 154 N. W. 1083.

846 State vs. Henry Weingarth. Unlicensed drinking place. Affirmed. 159 N. W. 789.

852 State vs. William Edmons. Grand larceny, 2nd degree. Reversed. 156 N. W. 1086.

853 State vs. Ben Lehman. Assault, 2nd degree. Affirmed. 155 N. W. 399.

854 State vs. Daniel LaBar. Swindling. Reversed. 155 N. W. 211.

855 State vs. Hans Strommon and Henry Christianson. Grand larceny, 2nd degree. Affirmed. 154 N. W. 1095.

856 State vs. Arthur Myers, selling intoxicating liquor without a license. Affirmed. 155 N. W. 766.

858 State vs. Geort Shtemme, Carnal knowledge. Affirmed. 158 N. W. 48.

859 State vs. Walter Harris, Grand Larceny 1st degree. Affirmed. 158 N. W. 829.

869 State vs. Ralph F. Macbeth, Rape. Reversed. 158 N. W. 793.

872 State vs. Mary Newell, Manslaughter. Affirmed. 159 N. W. 829.

873 State vs. Fred T. Price, Murder. Affirmed. 160 N. W. 677.

880 State vs. Ole O. Solem, murder first degree. Reversed. 160 N. W. 491.

881 State vs. Lind Damuth, Assault 2nd degree. Affirmed. 160 N. W. 196.

882 State vs. William F. Keehn, Resisting public officer. Affirmed. 160 N. W. 666.

883 State vs. Harold Provencher. Unlawfully selling liquor without license. Reversed. 160 N. W. 673.

885 State vs. Joseph W. Bragdon, Affirmed. 162 N. W. 465.

888 State vs. J. W. Logan, selling liquor without a license. Affirmed. 160 N. W. 1015.

889 State vs. John Thorvildson, Selling liquor without a license. Affirmed. 160 N. W. 247.

891 State vs. Edward Healy, Carnal knowledge certified to the supreme court. Remanded.

CRIMINAL CASES IN DISTRICT COURT.

833 State vs. John McManus, Manslaughter first degree. Yellow Medicine County; found guilty. A. J. Edgerton, assisting.

835 State vs. George Robertson. Embezzling county funds. Mower County. Defendant died before trial.

840 State vs. R. N. Travis. Manslaughter second degree. Carver County. Found guilty. J. C. Nethaway assisting.

842 State vs. Peter Engdahl. Violation of seed law, Chap. 141 G. L. 1913. Isanti County. Plead guilty and paid fine.

843 State vs. P. P. Peterson and M. J. Lee. Grand larency first degree, Swift County. Acquitted. A. J. Edgerton, assisting.

847 State vs. Wolf. Arson third degree. Found guilty. New trial granted. No indictment returned.

848 State vs. Chas. E. Mills. Libel. Jury disagreed first trial, dismissed second. J. C. Nethaway assisting.

849 State vs. Fred Jackson. Misappropriating funds and securities received under Sec. 8806 Stat. 1913. Not guilty. C. L. Weeks assisting.

Number Attorney General's Docket.	
850	State vs. Jackson. Wilfully omitting to pay over public moneys received by him. Cook County. Not guilty. C. L. Weeks assisting.
851	State vs. Fred Jackson. Making false entry in account books. Cook County. Nolled. C. L. Weeks assisting.
857	State vs. L. M. Lesches. Assault in first degree. Winona County found insane. J. C. Nethaway assisting.
860	State vs. Carl Johnson. Selling unlabeled seed. Plead guilty and paid fine. City of Minneapolis.
861	State vs. J. W. Keyes, M. E. Garvey and T. H. Jordan. Arson first degree. Case tried vs. Jordan and jury disagreed. J. C. Nethaway assisting. Retried, found guilty. Garvey acquitted. Redwood County. J. E. Markham assisting. Keyes, plead guilty.
862	State vs. T. B. Jordan and E. T. Johnson. Obscene literature. Swift County, found guilty. C. L. Weeks assisting.
863	State vs. John Stroud. Manslaughter second degree. Fillmore County. Acquitted. J. C. Nethaway, assisting.
864	State vs. Edward Thiel et al. Murder first degree. Nobles County. J. Thiel entered plea guilty murder third degree. Action against Edward Thiel dismissed. J. S. Nethaway assisting.
865	State vs. Albert Deere. Nobles County. Murder third degree. Entered plea guilty. J. C. Nethaway assisting.
866	State vs. Chas. Ballard. Selling milk in barroom without license. City of Minneapolis. Acquitted.
868	State vs. Wm. Brendemuhl. Murder. Clay County. Found guilty. J. C. Nethaway assisting.
870	State vs. J. C. Remi Charest. Arson. Not guilty. Pennington County.
871	State vs. Moriarity et al. Arson. Le Sueur County. Not guilty. C. L. Weeks assisting.
874	State vs. John M. Deglmann, Embezzlement. Blue Earth County. Dismissed by judge. J. E. Markham assisting.
875	State vs. Verreaux. Arson, Polk County. Acquitted, J. E. Markham assisting.
876	State vs. John A. Estlund, Libel. Kittson County. Plead guilty, fined $100. J. E. Markham assisting.
877	State vs. Alfred C. Johnson, Rape. Sibley County. Found guilty, new trial granted. Pending. C. L. Weeks assisting.
887	State vs. T. Rustad, Murder. Lake County. Found guilty of manslaughter first degree. E. S. Oakley assisting.
879	State vs. Fritz Miller, Manslaughter second degree. Rock County. Found guilty. J. E. Markham assisting.

TABLE No. 1.

Tabulated Statement Showing Criminal Cases in Entire State as Reported by County Attorneys for the Years 1915 and 1916

NATURE OF ACCUSATION	In District Court			In Municipal and Justice Courts			Under the Influence of Intoxicating Liquors
	Convictions	Acquittals	Nolle Prosequi	Convictions	Acquittals	Dismissals	
Murder in 1st degree	17	15	5	.....	.....	5	1
Murder in 2d degree	9	2	.....	.....	.....	.....	1
Murder in 3rd degree	3	1	.....	.....	.....	.....	.....
Manslaughter in 1st degree	16	5	2	.....	.....	3	4
Manslaughter in 2d degree	5	6	6	.....	.....	2	1
Assault in 1st degree	30	12	22	1	.....	14	12
Assault in 2nd degree	163	41	48	7	5	42	19
Assault in 3rd degree	79	2	13	1,305	135	234	213
Maiming	1	.....	3	5	1	1	5
Robbery in 1st degree	75	27	47	.....	.....	20	4
Robbery in 2nd degree	27	1	3	2	.....	3	4
Robbery in 3rd degree	21	1	1	.....	.....	2	.....
Arson in 1st degree	2	1	2	.....	.....	1	1
Arson in 2nd degree	2	1	3	1	.....	3	.....
Arson in 3rd degree	11	3	5	8	1	3	3
Burglary in 1st degree	4	1	1	.....	.....	2	1
Burglary in 2nd degree	15	1	3	.....	.....	1	1
Burglary in 3rd degree	231	15	35	9	3	16	8
Grand larceny in 1st degree	89	16	27	3	.....	34	10
Grand larceny in 2nd degree	717	69	106	12	7	137	36
Petit larceny	37	1	10	671	60	160	104
Forgery in 1st degree	10	.....	2	.....	.....	1	1
Forgery in 2d degree	129	12	25	1	.....	21	3
Forgery in 3rd degree	58	1	2	4	2	2	5
Rape	17	7	12	.....	.....	4	2
Indecent assault	35	10	7	6	3	11	3
Perjury	4	9	6	.....	.....	1	.....
Bribery	1	3	1	.....	.....	.....	.....
Abortion	1	1	2	.....	.....	1	.....
Bigamy	12	1	2	.....	.....	1	.....
Adultery	42	5	19	2	1	34	.....
Incest	1	2	.....	.....	.....	1	.....
Seduction	1	.....	5	.....	.....	2	.....
Bastardy	82	6	108	50	16	70	
Keeping House of Ill-Fame	23	3	14	17	.....	8	
Violation of Game and Fish Laws	16	1	1	802	36	67	
Violation of Pure Food Laws	4	1	2	185	7	4	
Violation of Liquor Laws, (Under the Statutes)	381	43	118	752	65	171	131
Illegal Voting	.....	1	.....	.....	1	8	.....
Cutting Timber on State Lands	1	1	1	.....	.....	2	.....
Defrauding Hotel-Keeper	1	.....	.....	73	1	50	3
Defrauding Livery Stable Keeper	.....	.....	.....	11	2	8	4
Language Tending to Provoke Breach of Peace	4	.....	2	447	25	59	65
Non-Support	8	3	4	93	9	40	3
Malicious Mischief	6	.....	5	110	12	20	23
Incorrigibility	4	.....	1	56	2	8	5
Cruelty to Animals	1	.....	.....	23	1	9	3
Gambling	34	2	4	85	1	10	2
Auto Laws	8	2	1	725	15	25	38
Carnal Knowledge	69	12	25	6	.....	15	5
Drunkenness	9	.....	2	4,121	59	36	4,130
Carrying Concealed Weapons	24	7	6	7	.....	12	.....
Miscellaneous	300	56	117	1,138	26	299	213
Total	2,840	410	836	10,738	496	1,683	5,085

TABLE No. II

Offenses Reported by County Attorneys for Years 1915-1916. Showing Counties Separately.

COUNTIES	COUNTY ATTORNEY	In District Court			In Municipal and Justice Courts		
		Convictions	Acquittals	Nolle Prosequi	Convictions	Acquittals	Dismissals
Aitkin	E. H. Krelwitz	2	3	1	61	8	11
Anoka	Will. A. Blanchard	5	.....	.....	68	2	12
Becker	Henry N. Jenson	9	1	2	62	4	9
Beltrami	Graham Torrance	33	3	19	22	5	.....
Benton	E. W. Swenson	17	3	2	74	4	12
Big Stone	A. B. Kaercher	22	1	2	88	.....	1
Blue Earth	J. W. Schmidt	39	1	14	461	1	27
Brown	Adolph Frederickson	18	1	3	179	3	10
Carlton	J. E. Diesen	28	3	13	204	33	5
Carver	W. F. Odell	6	3	1	84	3	1
Cass	E. L. Rogers	10	12	5	32	2	1
Chippewa	A. E. Kief	8	.....	3	38	4	5
Chisago	A. P. Stolberg	11	2	1	41	1	7
Clay	C. G. Dosland	40	2	.....	153	53	137
Clearwater		3	1	.....	9	1	3
Cook	S. C. Murphy	.....	2	1	11	2	4
Cottonwood	O. J. Finstad	13	.....	.....	64	1	7
Crow Wing	S. F. Alderman	19	19	10	89	27	25
Dakota	P. H. O'Keefe	30	4	14	659	3	68
Dodge	H. J. Edison	7	2	2	33	10	15
Douglas	H. E. Leach	24	1	2	70	3	2
Faribault	Henry J. Frundt	19	.....	2	189	5	13
Fillmore	S. C. Pattridge	36	2	.....	69	.....	.....
Freeborn	Norman E. Peterson	27	.....	3	140	3	23
Goodhue	Thos. Mohn	25	1	8	112	3	13
Grant	R. J. Stromme	10	1	.....	8	.....	.....
Hennepin	John M. Rees	747	100	244	13	2	3
Houston	O. K. Dahl	.....	.....	.....	37	.....	2
Hubbard	M. J. Woolley	10	.....	.....	37	3	2
Isanti	Godfrey G. Goodwin	7	.....	.....	16	1	1
Itasca	Ralph A. Stone	41	8	16	195	6	22
Jackson	E. H. Nicholas	23	.....	.....	153	3	8
Kanabec	P. S. Olsen	5	6	3	14	7	12
Kandiyohi	Chas. Johnson	14	3	14	110	9	12
Kittson	R. V. Blethen	9	.....	3	39	.....	4
Koochiching	Franz Jevne	29	2	12	372	5	71
Lac qui Parle	N. F. Soderberg	8	.....	1	43	4	2
Lake	J. Gilbert Jelle	11	4	2	47	1	9
Le Sueur	L. N. Prendergast	19	4	3	134	10	2
Lincoln	Louis P. Johnson	5	1	.....	46	1	3
Lyon	James H. Hall	20	2	2	67	.....	12
Mahnomen	Clayton C. Cooper	9	.....	3	26	.....	24
McLeod	Wm. O. McNelly	10	2	4	98	6	18
Marshall	A. N. Eckstrom	29	1	.....	44	.....	.....
Martin	E. C. Dean	27	1	1	160	7	9
Meeker	R. H. Dart	6	9	5	67	.....	1
Mille Lacs	Olin C. Myron	17	1	11	27	8	9
Morrison	C. Rosenmeier	45	5	7	206	15	61
Mower	Otto Bandler	23	.....	1	140	1	7
Murray	Ole Swanjord	6	4	.....	26	1	1
Nicollet	Geo. T. Olsen	4	1	.....	89	1	2
Nobles	E. J. Jones	14	2	7	101	3	4
Norman	John M. Hetland	6	.....	.....	12	.....	.....
Olmsted	George J. Allen	27	1	1	592	8	100
Otter Tail	Anton Thompson	26	5	9	176	.....	26
Pennington	Hans O. Kjomme	30	3	9	35	1	21
Pine	W. S. Ervin	8	3	3	49	6	13
Pipestone	George P. Gurley	10	.....	1	53	2	16
Polk	G. A. Youngquist	138	17	23	81	9	34
Pope	Julius O. Grove	13	2	1	41	.....	17
Ramsey	Richard D. O'Brien	355	64	65	107	6	177
Red Lake	No Report.						
Redwood	A. H. Enersen	12	1	3	97	5	11

TABLE No. II—Continued

Offenses Reported by County Attorneys for Years 1915-1916. Showing Counties Separately.

COUNTIES	COUNTY ATTORNEY	In District Court			In Municipal and Justice Courts		
		Convictions	Acquittals	Nolle Prosequi	Convictions	Acquittals	Dismissals
Renville	L. D. Barnard	31	.....	9	75	5	8
Rice	Jas. P. Mahon	27	2	1	465	34	50
Rock	C. H. Christopherson	16	1	3	147	1	7
Roseau	M. J. Hegland	12	1	3	42	2	1
St. Louis	Warren E. Greene	212	61	224	74	25	271
Scott	George F. Sullivan	14	2	1	65	4	3
Sherburne	George H. Tyler	6	2	3	26	.....	.....
Sibley	A. L. Young	6	.....	.....	19	1	.....
Stearns	Paul Ahles	53	3	8	160	13	51
Steele	F. A. Alexander	16	.....	3	72	6	13
Stevens	W. H. Cherry	11	.....	2	48	4	10
Swift	J. E. Lee	9	1	1	46	5	1
Todd	Wm. M. Wood	20	1	1	289	2	12
Traverse	Chas. E. Houston	17	.....	3	102	2	11
Wabasha	Michael Marx	7	1	1	46	.....	1
Wadena	J. H. Mark	12	1	1	47	.....	1
Waseca	Frank G. Kiesler	17	4	.....	81	8	23
Washington	Reuben G. Thoreen	20	2	4	140	16	25
Watonwan	Albert Running	24	2	.....	47	.....	5
Wilkin	E. H. Elwin	13	.....	1	72	5	2
Winona	Earl Simpson	42	3	1	2,034	49	52
Wright	Stephen A. Johnson	21	2	3	34	1	8
Yellow Medicine	H. P. Bengston	10	1	1	37	1	1
Total	.....	2,840	410	836	10,738	496	1,683

OPINIONS OF ATTORNEY GENERAL

1

ANIMALS—Administration of Hog Cholera Virus.

M. E. Quigley, Esq.

Dear Sir: I advise you that under provision of Chapter 87, Laws of 1915, hog cholera **serum** may be administered by any person on his own hogs, but no person, except licensed veterinarians, shall administer said **serum** on the hogs of others unless authorized to do so by the State Live Stock Sanitary Board.

Hog cholera **virus** cannot be administered by any person except he be authorized so to do by the State Live Stock Sanitary Board. This means that the owner of hogs cannot administer **virus** to his own hogs.

Your truly,
C. LOUIS WEEKS,
Assistant Attorney General.

July 14, 1915.

2

ANIMALS—Live Stock Sanitary Board not bound to kill diseased.

Dr. S. H. Ward, Secretary, Live Stock Sanitary Board.

Dear Sir: Your letter reads as follows:

"The South St. Paul stock yards ship in a neighborhood of 2,000 head of cattle a month to various states, which states require the animals to be tested for tuberculosis before shipment. Probably 4-5 per cent are found diseased and we have been called upon to appraise and reimburse the owners.

We have reason to believe the state has paid claims for animals which have not been owned in the state for one year, notwithstanding an affidavit has been presented by the claimant that animal originated in Minnesota.

I write to inquire if the board could refuse, under Chapter 114, Laws of 1915, to comdemn and order killed animals intended for shipment to other states and which on inspection at South St. Paul are found or suspected of being diseased?"

I am of the opinion that your question should be answered in the affirmative. The statutes do not **require** that the Live Stock Sanitary Board should order killed any diseased animals; they simply give the board **authority** so to do **when** in the opinion of the board, so doing is necessary or desirable for the protection of the health of the domestic animals of the State. Indeed, the State Live Stock Sanitary Board would not be justified in ordering killed, and paying for a diseased animal, except where the situation is such as failure to order the animal killed would jeoparadize the health of the domestic animals of the State. It follows that if in the judgment of the board, the health of

the domestic animals of the State would not be jeopardized by failure to order the killing of the animals referred to in your letter, the board can very properly refuse so to do.

Yours truly,
C. LOUIS WEEKS,
Assistant Atorney General.

June 3, 1915.

2

ANTI-PASS LAW—Law construed—County officer, and employee of Railroad—Use of Pass by.

S. F. Alderman, Esq.

Dear Sir: You ask if in our opinion a county official who is an employe of a railroad company is prohibited from using a railroad pass under Chapter 92, Laws of 1913.

The only officials that are exempted by that statute from the general prohibition as to using free transportation of railroad companies are employes of the company while occupying—

"office or position other than judicial, under a municipality or public school district, or while acting under appointment as a notary public in this State."

I am reluctant to disagree with you on the conclusion reached, but taking into consideration the entire purpose of the parent statute, as well as that of the amendment of 1913, I think the word "municipality" as there used must be given its most limited meaning. Counties are ordinarily classed as quasi public corporations, and municipalities are ordinarily considered as meaning cities, villages and boroughs. While it is true that the word "municipality" in its broadest sense sometimes includes public or quasi corporations, the principal purpose of whose creation is as an instrumentality of the State and not for the regulation of local and special affairs of a compact community, I think that in this statute it must be given its original and more limited meaning of a subordinate subdivision of the State having powers of local self-government. This is equivalent to saying that it means only cities, villages and boroughs.

If the word "municipality" is taken in its broadest sense, it would leave the statute applicable only to State officials and members of the Legislature, and Judges.

We should avoid, if possible, the construction of a statute which would make the excepted class greater than the included class. I think if the Legislature had intended to except "county officials," it would have used some such term as that.

Furthermore, a regular employe of a railroad would not ordinarily continue as such while holding a county office, but might easily be a Notary Public, school officer, or city or village officer at the same time that he was on the pay-roll of the railroad company in some capacity other than of physician or attorney. We have held that the word "employes" as used in the language added by the statute of 1913 should

not be construed to include surgeons, physicians and attorneys of a railroad company who are mentioned separately from employes throughout the parent statute.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

February 26, 1915.

4

APPROPRIATIONS—When available—Contracting for expenditure of, before available.

C. G. Schulz, Superintendent of Education.

Dear Sir: The auditors of this state, have for many years, and so far as I am advised, since the organization of the state, treated the word "available" in appropriation bills as prescribing the rule governing the expenditure of the actual moneys appropriated. I do not think that the auditors have given to the word "available" the idea that indebtedness could not be incurred prior to the time of the availability of the money set apart for the payment of such indebtedness.

The practical construction given to a statute by the officers who have been obliged to apply it to state affairs is given great weight in this state. The Supreme Court has recently said that a statute must be construed according to the practical construction given to it by those whose duty it has been to administer it. In this state the auditor has been the officer who had had the practical application and construction of appropriation bills.

The law which is deemed by some to prevent the incurring of any obligations which are to be paid out of an appropriation not available at the time of incurring such obligations makes two things criminal. First: The expenditure of money for a purpose other than that for which it was appropriated; and, Second: The incurring of obligations in excess of the amount to which the appropriation is limited.

In order to make this statute applicable the word "purpose" would have to include the idea of time and make the entire incurring of indebtedness, as well as the payment of indebtedness, come during the exact period specified for the availability of the appropriation. In most legislation, specifications of time are treated as directory and unless it appears that the time fixed is very material, such statutes are construed as being directory as to time and not mandatory. Consequently I would think it a strained construction of this statute to say that the expression "made for such purpose" means to limit the time of incurring indebtedness to the time within which the money to pay the indebtedness is available. The State Auditor is forbidden to draw a warrant unless "there be sufficient money in the treasury appropriated to its payment."

Consequently, as the money is not appropriated for the payment of the expenses to which you refer, before August 1, the auditor cannot draw warrants therefor until that time.

It may be that he could refuse to issue a warrant for a debt not contracted within a reasonable time before the date when the money appropriated for such payment becomes available.

Yours truly,
LYNDON A. SMITH,
Attorney General.

May 11, 1915.

5

APPROPRIATIONS—"Maintenance" as a Contingent Fund.

Hon. Fred B. Snyder.

Dear Sir: I have to say that it would be my impression that a fund for maintenance is a contingent fund and not a direct and specific appropriation. It is impossible to draw an exact line between a specific appropriation and the creation of a contingent fund. I think that in the history of appropriation bills in this state, contingent expenses are paid out of funds for "maintenance" and have been so paid for very many years. My own view of the matter is this: That everything of large amount that can be anticipated should be mentioned in an appropriation bill and that the general allowance should only be for things which cannot be certainly predicted or anticipated. The fact that expenses that are sure to occur and must be provided for are covered by appropriations for maintenance would not seem to me to justify claiming that a contingent expense could not be paid out of an appropriation for maintenance, nor that such appropriation did not include a contingent fund.

Our appropriation bills have been elliptical in structure and much can be read into them without offending against the interpretation which has been given to them by practical construction.

Yours truly,
LYNDON A. SMITH,
Attorney General.

March 13, 1915.

6

ARMORIES—Village Bonds to Aid in Construction of.

F. E. Murphy, Village Attorney.

Dear Sir: You inquire whether the village has authority to issue bonds to raise money for the purchase of a site and to assist in the construction of an armory, to be erected in accordance with the provisions of Chapter 302, G. L. 1911, as amended by Chapter 226 G. L. 1913.

The last named chapter amended the 1911 law and gives to villages certain power that they did not previously possess. I am of the opinion that Section 2 of said Chapter 226 authorizes and empowers a village to issue bonds, the proceeds of which bonds are to be placed with the state treasurer to the credit of an armory construction fund. I am of the opinion that the moneys raised by such bond issue cannot be used for the purpose of acquiring a site, but that they are limited to aiding in the construction, repair and improvement of an armory, and, as stated above, must be deposited in the state treasury to the credit of the proper construction fund.

A vote of the electors is necessary before such bond issue can be made. I do not think that the village would have a right to issue village

warrants for the purpose stated, it not having on hand funds to pay such warrants when presented and no levy having been made so that money would be derived therefrom available for that purpose.

The armory, when constructed, is the property of the State of Minnesota, and as to what arrangements, if any, the village might make with the armory board for the use of space therein for municipal or other purposes, is a matter that would have to be determined when the specific proposition is submitted and would depend upon the conditions existing at the time, and among other things, upon whether the proposed use would interfere with the primary purposes for which the building was constructed.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

February 18, 1916.

7

ARMORY BOARD—Certificates Indebtedness—Issuing smaller denominations to substitute for larger denominations.

J. A. O. Preus, State Auditor.

Dear Sir: I do not see any reason why the Armory Board cannot exchange certificates of indebtedness in small denominations for certificates of indebtedness in larger denominations already issued by it for a like amount, for the purpose of enabling the person holding such certificates to negotiate them when he cannot negotiate large certificates but can negotiate small ones.

Yours truly,

LYNDON A. SMITH,
Attorney General.

March 10, 1916.

8

AUCTIONEER—Right of owner to auction own property.

M. J. Daly, Esq.

Dear Sir: You inquire whether you can act as your own auctioneer in selling your stock and machinery or whether the person making such sale must be a licensed auctioneer.

You are advised that a licensed auctioneer is the only one authorized to make the sale of the property referred to at a public sale.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

September 11, 1916.

9

AUCTIONEERS—State license necessary.

J. M. Stewart, Esq.

Dear Sir: You inquire as to whether a U. S. license can be secured that will permit you, a resident of South Dakota, to conduct an auction in the State of Minnesota. Your inquiry is answered in the negative.

No person can be an auctioneer in the State of Minnesota unless he is licensed, and a non-resident cannot secure such a license.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

September 14, 1916.

10

BANKS—Building and loan associations, loans.

A. H. Turrittin, Superintendent of Banks.

Dear Sir: You state that a certain Building and Loan association was incorporated in 1886 under Title 2 of Chapter 34, G. S. 1878, and was therein authorized to "loan money and funds and secure such loans by mortgages or other securities." The articles of incorporation provide that "the general nature of its business shall be * * * the loaning of money to its members only." The by-laws contain the provision that—

"In case funds remain uncalled for on real estate securities for the space of thirty days, the board of directors may, be resolution, authorize the loaning of such funds on other good and ample securities."

It appears that the association has for the past twenty years been making loans to its members on securities other than real estate and shares of stock of the association.

You desire to know whether the association is now limited by Sections 6425 and 6427, G. S. 1913, to the making of loans which are secured by a first mortgage on real estate accompanied by a transfer and pledge of the shares of stock of the borrower and to the making of loans which are secured only by such stock, in which event the loans cannot exceed ninety per cent of the cash or withdrawal value of the stock secured.

This department is of the opinion that your question should be answered in the negative.

Yours truly,

HENRY C. FLANNERY,

February 21, 1916. Assistant Attorney General.

11

BANKS—State may issue certificates of deposit.

A. H. Turrittin, Superintendent of Banks.

Dear Sir: You inquire as to whether a bank organized under the laws of the State of Minnesota has power to issue a time certificate of deposit, by its terms payable in ten years. You also inquire as to whether the interest thereon would be payable annually and whether the certificate would be payable on demand.

The question you ask was passed upon in the case of Francois vs, Lewis, 68 Minn. 409. On page 411 of the opinion it was stated:

"We have no statute prohibiting banks from making time certificates of deposit. Nor is it forbidden by any sound principle of public policy. On the contrary, the financial disturbances of the past few years have demonstrated that, if banks will pay interest on deposits, time certificates maturing within a reasonable date tend directly to conserve, not only the interests of the bank, but the interests of the depositor and the public. There being, then, no limitation, express or implied, on the power of banks to issue such certificates, and the express power having been given to them to receive deposits, pay interest thereon, and to exercise all the usual and incidental powers pertaining to the banking business, it must

necessarily be implied that they have the power to make an agreement as to the terms upon which such deposits will be received, and to issue the usual evidence of such agreement, in the form of a demand or time certificate of deposit."

I am therefore of the opinion that a bank organized under the laws of this state has power to issue such a time certificate of deposit. The certificate would not be payable on demand, but both the principal and interest would be payable in accordance with the terms of the instrument.

Yours truly,
HENRY C. FLANNERY,
Assistant Attorney General.

May 24, 1916.

12

BANKS—Power to issue circulating notes.

A. H. Turrittin, Superintendent of Banks.

Dear Sir: While it is true that since the passage of Chapter 145, G. L. 1905, banks have not possessed the power to issue circulating notes, it is my opinion that the legislature may at any time grant state banks such authority unless in the meantime congress by some act takes away such authority. The inclusion of these words in the articles of incorporation, does not give the bank this authority until the legislature has conferred the same by statute. If the legislature does at some future time confer this right upon banks, then the inclusion of these words in the articles of incorporation will avoid the necessity of an amendment of such articles.

Yours very truly,
ALONZO J. EDGERTON,
Assistant Attorney General.

July 3, 1915.

13

BANKS—Authority of Superintendent of Banks under facts stated, to refuse charter.

A. H. Turrittin, Superintendent of Banks.

Dear Sir: Relative to your authority to refuse a charter for a bank which certain parties are attempting to organize at Appleton, I have to say that the law requires you to certify, as to each and every bank which is being organized and has reached a certain stage in its organization, that it has been organized "under such conditions as to merit and have public confidence," or else the progress of the bank toward organization ceases. (Section 6336 General Statutes 1913).

This requirement is unfortunately worded and if the language was to be literally construed it might be doubted whether the test to be applied by you would be a proper one, but it would seem that the courts would say that if you were satisfied that the bank was being organized under such conditions as would tend to insure the safe conduct of the bank and its fulfillment of its public functions, you should certify as required by law.

The term "merit and have public confidence" means not that hired boosters have created a favorable sentiment toward the new bank or zealous opponents have created an unfavorable sentiment, but that the facts, as known to you, indicate that the bank, if fully organized and engaged in business, would be a safe place for deposit of moneys and a reasonably useful factor in handling the financial transactions of the citizens of the community in matters usually entrusted to banks; then you could say that the bank is organized under such conditions as to merit and have public confidence. It cannot be that the state can maintain a department for the supervision of banks and cannot prevent a bank entering upon business upon conditions which would require its immediate condemnation by such supervising department.

Therefore your first question is answered to the effect that you have the authority and the duty to refrain from certifying to the facts which are pre-requisite to the organization of a bank if you are not satisfed that it is being organized as hereinbefore indicated.

It is not a question of law as to how you shall decide in any particular case, except that a court would not tolerate an abuse of your discretion in the matter of preventing the organization of a bank. Your decision as to whether or not it is being organized under such conditions as to merit and have public confidence must be based upon the facts related to the organization of the bank as found by you upon sufficient evidence.

The questions to be considered are as to whether or not the proposed bank will be a safe place for the deposit of surplus moneys of the community; whether it will be prudent in the loaning out of such moneys as are entrusted to it, and whether it will conduct honestly and efficiently the lines of business ordinarily entrusted to state banks in Minnesota. If it will do these and other similar things in a manner required for the good of the community, and be a worthy agency in the transaction of its business, then the law, taken broadly and according to its general intent, would seem to suggest the propriety of certifying, when the other pre-requistes to its organization had been completed, that it was being organized under such conditions as to merit and have public confidence.

Yours truly,

LYNDON A. SMITH,

February 17, 1915. Attorney General.

14

BANKS—Investments by savings departments of state banks.

G. W. Rodenberg, House of Representatives.

Dear Sir: I understand that the state banks which have savings departments are not required to invest the savings which they receive on deposit in only the kinds of securities which are prescribed for the investments of savings banks.

Yours truly,

LYNDON A. SMITH,

March 5, 1915. Attorney General.

15

BANKS—Limitation in investments in bonds of foreign nation.

A. H. Turrittin, Superintendent of Banks.

Dear Sir: You inquire whether or not there is anything in the statutes of the state placing a limitation upon the amount that a state bank may invest in the bonds of a foreign nation.

In Section 6358, G. S. 1913, the following provision appears:

"The total liabilities to it, as principal, surety, or endorser, of any person, corporation, or co-partnership, including the liabilities of the several members thereof, shall never exceed 15 per cent of its capital actually paid in cash and of its actual surplus fund."

The intention of the legislature as expressed in the above provision seems to have been to minimize the risk of loss to state banks by placing a definite limit on the amount which they can loan or invest in any one place. If a foreign nation can be held to be a corporation or person within the meaning of Section 6358, it would come within the terms of the provision quoted. There is considerable authority for so holding.

Justice Iredell said in the case of Chisholm vs. Georgia, 2 Dallas (U. S.) 119:

"The word 'corporation' in its largest sense, has a more extensive meaning than people generally are aware of. Any body politic (sole or aggregate) whether its power be restricted or transcendent is in this sense a corporation."

In the case of Respublica vs. Sweers, 1 Dallas 40, it was said:

"From the moment of their association the United States necessarily became a body corporate; for, there was no superior from whom that character could be derived. In England, the king, lords and commons are certainly a body corporate, and yet there never was any charter or statute by which they were expressly so created."

In the case of Indiana vs, Woram, 6 Hill (N. Y.) 33, also reported in 40 Am. Dec. 378, is was said:

"That a state is a corporation cannot be doubted; it is a legal being, capable of transacting some kinds of business like a natural person, and such a being is a corporation."

See also Speer vs, School Directors, 50 Pa, (14 Wright) 150, 176.

Section 9412 (11) is as follows:

"The word 'person' may extend and be applied to bodies politic and corporate and to partnerships and other unincorporated associations."

In view of the above descisions and statutory provisions, I am of the opinion that the amount which a state bank may lawfully invest in the bonds of a foreign nation is limited to fifteen per cent of its capital actually paid in cash and of its actual surplus fund.

Yours truly,

HENRY C. FLANNERY,

May 26, 1916. Assistant Attorney General.

16

BANKS—Stockholders' liability—Statute limitations.

H. S. Quiggle, Deputy Superintendent of Banks.

Dear Sir: I have to say that the stockholders' liability becomes fixed at the time when the assessment is determined.

"The amount of these assessments is to be collected, if not voluntarily paid, in actions at law instituted by the receiver."

The liability is one of those against which the statute of limitations does not cut off the remedy until six years after the date of the assessment.

The Supreme Court of the United States has said that this liability is contractual in its nature. See Bernheimer vs. Converse, 206 U. S. 516, 529.

Yours truly,

LYNDON A. SMITH,
Attorney General.

April 18, 1916.

17

BANKS—Trust company—Incorporators—Board of directors need not be chosen from.

H. S. Quiggle, Deputy Superintendent of Banks.

Dear Sir: You ask whether the first board of directors of a trust company must be chosen from the incorporators, I have to say that it need not.

A Pennsylvania case states the law, so far as it exists in harmony with and subject to our statutes, as follows:

"Does not require that the corporators should be subscribers to the stock. They need have no interest whatever in the company to be formed. They are mere instruments of the law for purposes of preliminary organization. The moment that is accomplished, the amount required as capital paid in, the necessary certificate signed, and the charter granted, they are functi officio. The corporation is thenceforth composed of the stockholders."

Densmore Oil Co. vs. Densmore, 64 Pa. St., 43-54.

Yours truly,

LYNDON A. SMITH,
Attorney General.

June 16, 1915.

18

BANKS—Trust companies, under $100,000 capital, no annual fee.

A. H. Turrittin, Superintendent of Banks.

Dear Sir: Regarding the payment of $85 annual fee by trust companies having a capital of less than $100,000, I have to say that I cannot find any statute requiring such companies to pay any fee of the same kind that trust companies having more than $100,000 have to pay.

Yours truly,

LYNDON A. SMITH,
Attorney General.

October 9, 1915.

19

BANKS—Trust companies and savings banks, as to power to accept commercial deposits subject to check and to issue time certificates of deposit.

A. H. Turrittin, Superintendent of Banks.

Dear Sir: You ask—Whether trust companies and savings banks in this state can issue time certificates of deposit and also whether they can accept commercial deposits subject to check.

Trust companies organized under the laws of this state are expressly authorized by Section 6409 G. S. 1913, to take and hold money on deposit. Although there are authorities to the contrary, the weight of authority is in accordance with the holding in the case of Bank of Saginaw vs. Title and Trust company of Western Pennsylvania, 105 Fed. 491, to the effect that in the absence of statutory provision on the subject, a trust company authorized to receive money on deposit has lawful authority to issue certificates of deposit therefor in the usual form. There being no statutory provision on the subject in this state, I am of the opinion that a trust company can issue such certificates.

The taking and holding of commercial deposits subject to check is the distinguishing feature of a bank of deposit. The relationship existing between such a bank and its depositor is that of a debtor and creditor. A trust company differs from a bank of deposit in that its deposits are loans to it or trust funds held in trust. The two positions are somewhat inconsistent, and in view of the provisions of Section 6417 G. S. 1913, that a trust company, "shall not engage in any banking business, except such as is herein expressly authorized," I am of the opinion that trust companies in this state have not the power to take and hold commercial deposits subject to check.

Regarding the issuance of certificates of deposit by a savings bank, I believe the rule to be as stated in Section 225 of Magee on Banks and Banking. It is that,

"A savings bank, unless restricted by its charter, or a statute, is possessed with incidental, and implied power authorizing it to issue certificates of deposit in lieu of pass books."

There is no such statutory restriction in this state, but on the contrary, the use of other evidence of deposit than pass books is recognized in Section 6389 G. S. 1913, which provides that the regulations of the savings bank shall be,

"Printed in full in all pass books, or other evidences of deposit furnished its customers."

The business of a savings bank under the laws of this state, is essentially different from that of a bank of deposit. A savings bank is expressly prohibited, by Section 6395 G. S. 1913, from engaging in any other business not essential to the transaction of its own. In my opinion, a savings bank is therefore prohibited from taking and holding commercial deposits subject to check.

Yours truly,

HENRY C. FLANNERY,

Assistant Attorney General.

May 4, 1916.

20

CIGARETTES—Each place for the sale of, must be licensed.

B. O. Sorum, Esq.

Dear Sir: You inquire if a person has two different places of business may he sell cigarettes in both places when he has only one license for the sale of cigarettes.

Your inquiry is answered in the negative. He must have a license for each place of business in order to legally sell cigarettes in both places. A license for one place of business does not authorize a licensee to sell cigarettes at another place of business.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

June 8, 1916.

21

CIGARETTES—License—Refund of fees.

W. L. Moore, Esq.

Dear Sir: You state that in the month of May, 1915, you took out a cigarette license for a period of two years, paying $25 therefor; that on March 20, 1916, you quit business and ask whether you are entitled to a refund for the unexpired term of the license. Your inquiry is answered in the negative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

April 28, 1916.

22

CIGARETTES—Licenses in rural communities.

A. W. Rehand, Town Clerk.

Dear Sir: You inquire whether in townships having a platted portion on which there resides twelve hundred or more people and so under the provisions of sections 1101 and 1102, G. S. 1913, possess the same power and the same authority possessed by villages of the fourth class in certain particulars, licenses authorizing the sale of cigarettes are to be issued by the authority of the town board or by authority of the board of county commissioners.

You are advised that townships within the class above referred to possess the power and authority of villages only insofar as such powers are enumerated in certain specified subdivisions of sections 1268, 1276 and 1284, G. S. 1913, which subsections do not refer to the granting of licenses. Accordingly your are advised that applications for licenses to carry on the business of dealers in cigarettes within such townships should be made to the county board and the license should be issued by direction of that board.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

August 9, 1916.

23

CITIES—Aldermen removal from ward.

J. V. Williams, Esq.

Dear Sir: You state that your city was organized under title 2, chapter 10, G. S. 1894. You call attention to section 1050, which reads as follows:

"The elective officers of each city shall be a mayor, treasurer, coroner, two justices of the peace **for each ward** and two aldermen in each ward."

As applied to aldermen this section provides there shall be elected "two aldermen in each ward," but you will notice that in regard to justices of the peace, they are "elected **for each ward.**" When an alderman, however, is elected "in each ward" his duties under that law are of a general character, not confined to his ward alone, but to matters which may pertain to the welfare of the whole city. Therefore, he would be an officer of the whole city and his removal from the ward in which he resided when elected to another ward would not, in my opinion, have the effect of creating a vacancy in that office, nor would it be such a case as is mentioned in Section 1058 of Chapter 10 aforesaid, The provision of law that he should be elected in the ward only defines his qualification for election. When elected, he becomes an officer of the whole city as fully as the mayor.

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

August 6, 1915.

24

CITIES—Assessments for improvements may be made in years subsequent to time of improvement.

Geo. D. Smith, City Attorney.

Dear Sir: You ask, if the commissioners fail to make such assessment each year as required, can such assessments for years omitted be legally made during subsequent years?

You are advised that your inquiry should be answered in the affirmative.

The Supreme Court of the United States in the case of Seattle vs, Kelleher, 195 U. S. 351, laid down this rule.

"Special assessment may be levied upon an executed consideration, that is to say, for a public work already done."

This same rule is followed in the following cases:

Bellows vs. Wicks, 41 Vt. 590.
Mills vs. Charleton, 29 Wisconsin, 400.
Hall vs. Street Commissioners, 117 Mass.

Our Supreme Court has held that the power to assess for local improvements is a continuing power.

State vs. Wheeler, 80 Minn. 293-310.

Yours truly,

JOHN C. NETHAWAY,
Assistant Attorney General.

March 20, 1915.

25

CITIES—Boxing matches—Right of city to license after state commission has granted a license.

Michael L. Molan, Member of Boxing Commission.

Dear Sir: The question is before this office, asked by your board, as to whether or not the City of Minneapolis may license clubs and associations to conduct boxing and sparring matches and exhibitions.

The last state legislature saw fit to create a commission in which it vested the **sole** direction, management and control of, and jurisdiction over, all boxing and sparring matches and exhibitions. This act went into considerable detail in prescribing the duties of your commission. Among other statements it says that every application for a license shall be in writing and shall be addressed to the commission. The statute goes on to prescribe certain requirements as to the conduct of the matches and certain rules as to the buildings or structures used for the purpose of conducting in them such exhibitions.

The charter of Minneapolis provides that it may regulate exhibitions, provided the regulations are not repugnant to the laws of the State of Minnesota. The Supreme Court of the State of Minnesota has indicated that the requiring by a municipality, of a license, in a case where the charter of the municipality does not give it power to pass ordinances repugnant to the state laws, cannot require a license for the doing of an act which is to be done, if done at all, under a state license. City of St. Paul vs. Peck, 78 Minn. 497.

In the case of Farwell vs. City of Minneapolis, 105 Minn. 178, the Supreme Court says that where the charters of cities are preserved against the amendment, extension or modification of any of its provisions, such provisions are changed by a general law applicable throughout the state and such law does not come within the purpose of the constitution so protecting special or local laws.

It would seem to be the law of this state that where the state has passed a general act providing that a state commission has the sole direction, management and control of, and jurisdiction over a certain kind of exhibitions, that no municipality can license such exhibitions.

Yours truly,

LYNDON A. SMITH,
Attorney General.

February 23, 1916.

26

CITIES—Charter—Provision for tax levy.

H. J. Merdink, City Attorney.

Dear Sir: You inquire whether a city of * * * may provide in its proposed new home rule charter for a tax levy to exceed twenty-five mills on the assessed valuation, if it sees fit to increase that rate in such charter.

In my opinion your inquiry is to be answered in the affirmative. You call attention to Section 1735, G. S. 1913, which after limiting cities of the fourth class generally to a twenty-five mill levy, provides that in case any such city is operating under a home rule charter, the provisions of this bill shall not apply.

You state that the question is on the construction of the words "is operating" and whether the same refer to the time of the passage of the act or to the time of the levy. In my opinion they have reference to the time of the levy. I call your attention to the case reported in 109 Minn. 328.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

September 27, 1916.

27

CITIES—Home rule charters—Cost of printing.

H. J. Merdink, City Attorney.

Dear Sir: The limitation contained in section 1344 G. S. 1913, to which you refer relates only to the cost of preparation of a proposed charter including legal services rendered to the charter board, the cost of publication and other incidental expenses preparatory to its submission to the vote of the people. The subsequent cost of printing copies of the charter for the use of the city officers and others would not be included in the $500.00 limitation.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

August 8, 1916.

28

CITIES—Expenditures by, for entertainments—Construction of conflicting statutes.

Martin O'Brien, City Attorney.

Dear Sir: You call attention to Section 1745, G. S. 1913, and Chapter 316, G. L. 1915, and inquire whether the former law is repealed by the latter.

Section 1745, General Statutes 1913 was Chapter 329, General Laws 1913, and reads as follows:

"That the governing body of any city of the fourth class in this state, operating under a home rule charter or commission form of govern-

ment, is hereby authorized to annually levy a half mill tax against taxable property in such city for the purpose of providing musical entertainment to the public in public buildings or upon public grounds."

Chapter 316, General Laws, 1915, reads as follows:

"That the governing body of any city of the third or fourth class in this state, is hereby authorized to annually levy a half-mill tax against the taxable property in such city for the purpose of providing musical entertainment to the public in public buildings or upon public grounds; provided, however, that in any such city the total sum that may be levied or expended in any year shall not exceed the sum of five hundred ($500) dollars."

It will be noted that the 1915 law covers in a general way the same subject-matter as does the 1913 law above, being authorization for the annual levy of a half-mill tax against the taxable property of the city, for the purpose of providing musical entertainment to the public in public buildings, or upon public grounds. The 1913 law is applicable to cities of the fourth class, operating under home rule charters or commission form of government. The 1915 law applies not only to such cities, but also to cities of the fourth class, irrespective of whether they are operating under home rule charters, commission form of government, or not.

In addition to the foregoing, the 1915 law limits the amount that may be levied or expended in any one year to $500; no limitation in amount being provided for in the 1913 law.

You are advised that in the opinion of this department, the 1915 law, being the last expression of the legislature on the subject, supersedes and repeals the 1913 law.

Yours truly,

CLIFFORD L. HILTON,

Assistant Attorney General.

May 17, 1915.

29

CITIES—Aggregate indebtedness—How computed.

J. A. O. Preus, State Auditor.

Dear Sir: In regard to computing the aggregate indebtedness of a municipality with a view to determining its loanable valuation, I have to say that nothing whatever is deducted from the aggregate of bonds for which such municipality is liable, even though there may be a revolving fund out of which the law requires the bonds to be paid. Every liability which a municipality has, must be considered in determining its aggregate indebtedness.

Yours truly,

LYNDON A. SMITH,

Attorney General.

May 29, 1915.

30

CITIES—Libraries—Powers of city council—Public library—Election without petition.

F. T. Woolverton, Superintendent.

Dear Sir: It is stated that a public library has been maintained by public subscriptions since January 15, 1915, and that the desire is that the city should take it over; that the council, although they had a right to do so under Section 4916, G. S. 1913, did not feel like doing it until they found out what the majority of the people wanted; that accordingly, **without a petition,** they placed the matter before the people at the regular city election, and that the vote for maintaining said library carried by a majority, or 44 votes.

You call attention to Section 4917, G. S. 1913, which, insofar as here material, reads as follows:

"If such library or reading room be not otherwise established, the governing body of the municipality, upon the petition of fifty freeholders thereof, shall submit the question of such establishment to the voters at the next municipal election. If two thirds of the votes cast on said question be in the affirmative, the governing body shall establish the library or reading room, and levy a yearly tax for its support within the limits fixed by Section 4916. * * *"

You inquire whether the city council has a legal right to vote funds and maintain this library if they see fit to do so.

In my opinion, your inquiry is to be answered in the affirmative.

The power is given the city council under Section 4916, supra, which in part reads as follows:

"The governing body of any city or village may establish and maintain a public library and reading room, or either of them, for the use of its inhabitants, and by ordinance may set apart for the benefit thereof real estate or other property of the municipality."

It appears that the council would have this right, irrespective of a vote of the people, and by the provisions of Section 4917 supra, it becomes the bounden duty of the council to do so, provided a two-thirds vote of the votes cast on the question be in the affirmative, such vote being taken at the next municipal election, upon the petition of fifty freeholders thereof. Assuming that the council did not have the right to call the election without such petition, then the result of the election, even if the two-thirds vote was in favor of the proposition, would not be binding upon the council, and it appears from your statement that the two-thirds vote was not received. Under the conditions as stated by you, it would seem that the council is not in any way bound by the action taken at the election, and is therefore not obligated to establish a library; nor is it precluded from doing so by action under the authority of Section 4916, supra.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

May 12, 1915.

31

CITIES—Library board—Appointments by mayor.

N. F. Soderberg, County Attorney.

Dear Sir: You call attention to Section 4918, G. S. 1913, which vests in a mayor of a city or president of the council the power to appoint members of the library board, with the approval of the council.

You also call attention to Section 2950 G. S. 1913, in which permission is given for an arrangement to be made between a school board and the board of any approved public library, so that a school library may become a branch of the public library. You further state that a rule has been adopted by the state high school board in which it is provided that:

"The superintendent of schools shall be a member of the library board."

You wish to know whether this rule is valid, and whether it is not an unwarranted interference with the appointive power of a mayor of a city.

In my opinion, the state high school board does not have the power to provide that the superintendent of schools shall be a member of the public library board. There would be no objection of course to the superintendent being a member of the board, but it is not within the power of the high school board to appoint him to the office, nor to compel his appointment by the mayor of a city or president of a village council.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

January 25, 1916.

32

CITIES—Library board—Term of members—Control of building—Power of council to review action of board.

Hon. Julius E. Haycraft.

Dear Sir: You submit the following inquiries:

1. "Do members of the board hold until their successors are appointed and qualified, even if this carries their term beyond the three year term? This seems to be covered by Section 4918, General Statutes 1913."

2. "Does such board have executive control of the library building, of its rooms, and power to say how and in what manner and by whom such rooms shall be used, or to whom they they shall be rented, if rented at all?"

3. "Does the council of the city or any other body or persons have any power to reverse, rescind, or modify their action relative to their control of the library building, or the rooms, as specified in question 2?"

In my opinion your first and second inquiries are to be answered in the affirmative and your third inquiry in the negative. I am forced to these conclusions by a consideration of Sections 4918-21, G. S. 1913. In section 4918 it is expressly provided that the three directors shall hold for

the term of three years, "and until their successors quality." Among other things in Section 4920, I find this language with reference to the library board:

"It shall have exclusive control of the expenditure of all moneys collected for and placed to the credit of the library fund, of the construction of library buildings and of the grounds, rooms and buildings provided for library purposes."

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

November 24, 1916.

33

CITIES—Majority of owners construed.

E. L. Thornton, Mayor.

Dear Sir: I state that, in my opinion, the expression "a majority of the owners," found in Section 1798, G. S. 1913, means a majority of the persons owning the property and is not to be construed as if it read "the owners of the majority of the property."

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

January 28, 1916.

34

CITIES—Prosecution for misdemeanors.

Alphonso E. Kief, County Attorney.

Dear Sir: You inquire whether it is the duty of the county attorney in cities in which there is no municipal court, to appear for the state in the prosecution of misdemeanors triable before a justice of the peace, or whether it is not the duty of the city attorney to appear for the state in such prosecutions.

I am of the opinion that the only obligation placed upon the city attorney to appear for the state in any prosecution under a state law, is confined to cases pending before the municipal court of his city, and that it is not his duty to represent the state in the prosecution of misdemeanors made such by the laws of the state.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

September 9, 1916.

35

CITIES—Hiring of attorney to prosecute misdemeanors.

W. F. Anderson, City Clerk.

Dear Sir: You state—"A question has arisen as to the right of the city to pay attorney fees to the county attorney for the prosecution of misdemeanors under the laws of the state before city justices of the peace."

You then ask in substance, if the county attorney undertakes, at the solicitation of some city officer, the prosecution of misdemeanors which you mention and for any reason the city attorney is not available, can the city attorney pay the county attorney for such services?

You must remember that there are certain misdemeanors which the statute requires the county attorney to prosecute, and I would call your attention particularly to the Intoxicating Liquor Laws, and the Game and Fish Laws, and there may perhaps be others. Any prosecution under these laws must be conducted by the county attorney, even though they are before a justice of the peace. Therefore, the word "misdemeanors" has some limitations thereon, insofar as the prosecution of the same is concerned. I have no doubt that the county attorney could be hired by a village or city to prosecute misdemeanors before a Justice of the Peace, when those misdemeanors are of a character which do not require him to prosecute as county attorney, but this general rule seems to have a limitation, and I would call your attention to section 44 of your city charter, which reads as follows:

"In case of sickness or inability of the attorney to act, **he may, at** his **own expense**, appoint by and with the consent of the council, another attorney to act in his stead for the time being."

In view of this express charter provision, it seems to me that this is the sole and exclusive manner in which an attorney may act in place of the city attorney in any matter which he is required to prosecute, and I hardly think the village would be authorized, by reason of this charter provision, to pay the county attorney for services in prosecuting misdemeanors before a justice of the peace, which he is not required under the law to prosecute. This section seems to be exclusive and provides the only manner in which he should be paid.

Yours very truly,

JOHN C. NETHAWAY,
Assistant Attorney General.

February 5, 1915.

36

CITIES—Municipal courts clerk's fees.

W. H. Crowell, City Attorney.

Dear Sir: You ask for a construction of sections 274 to 277, inclusive, G. S. 1913, being a portion of the municipal court act, so-called, relating to the procedure in forcible entry and unlawful detainer cases, and particularly in regard to the right of the clerk to receive a deposit fee in proceedings so instituted.

The act contains the provision that—

"In forcible entry and unlawful detainer the summons shall be issued by the clerk and may be made returnable on any day not less than three days after the issuance of such summons and in other respects such suits shall be governed by similar regulations relating to justices of the peace."

By section 277 it is provided that jurors in criminal cases and witnesses for the prosecution shall be paid by the city or village, that misdemeanors or violations of the orders or by-laws shall be prosecuted by the city or village attorney and all other offenses by the county attorney. Then follows the provision that:

"In civil cases there shall be paid to the clerk of court a fee of $2.00 by the party entering the suit which fee shall be accounted for and paid over to the city or village and shall be in lieu of all fees of the clerk of said court."

While it is true that forcible entry and unlawful detainer is a quasi criminal procedure, in that under certain circumstances a warrant may be issued therein, yet I am inclined to think that as to the legislation here referred to, such proceedings are within the general classification of "suits" (section 274) and within the general definition of civil cases as used in section 277. While the procedure subsequent to the issuance and return of the summons is governed by the law relating to the conduct of such proceedings in a justice court, I think it was intended that where a complaint is filed and the proceeding is instituted in the municipal court, that the complainant is required to pay to the clerk the prescribed deposit fee of $2 and if the complainant succeeds that he is entitled to have this item taxed as a disbursement.

Yours truly,

JAMES E. MARKHAM.
Assistant Attorney General.

September 19, 1916.

37

CITIES—Municipal courts—court of record—practice by private parties.

M. O. Peterson, Esq.

Dear Sir: You inquire whether a municipal court, organized under chapter 229 general laws, 1895, is a court of record. Your inquiry is answered in the affirmative. Section 2 of said chapter, among other things, contains the following:

"Said court shall be a court of record."

You make several inquiries as to the right of an individual, not an attorney, to practice before any municipal court, and I call your attention to section 4947, G. S. 1913, which in part, reads as follows:

"Every person not duly admitted to practice who shall appear as an attorney-at-law, in any action or proceeding in court of record, except in his own behalf when a party thereto, * * * * * * shall be guilty of a gross misdemeanor."

I think that the law last above quoted would preclude anyone not an attorney at law from acting as an agent for his clients, and commencing actions in a municipal court by filing a written complaint, etc., signed by himself as agent for the plaintiff, even though such person did not en-

gage in the trial of the case when the defendant appeared and defended. A person, not an attorney, may bring and conduct an action in his own behalf when he is a party thereto.

Yours truly,
CLIFFORD L, HILTON,
Assistant Attorney General.

May 5, 1916.

38

CITIES—Power Municipal court—Witnesses without the county.

D. M. Cameron, City Attorney.

Dear Sir: You inquire whether a subpoena in a civil action issuing out of the municipal court may be served without the county and whether a witness residing in another county by the service of such subpoena may be compelled to attend and testify before the court.

The statute relating to witnesses and evidence provides that every clerk of a court of record and every justice of the peace may issue subpoenas for witnesses in all civil cases pending before the court and if any person duly subpoenaed fails to attend as a witness as thereby required without reasonable excuse, he is guilty of comtempt of court and may be punished therefor.

The statute further provides for the issuance of an attachment to bring a witness before the court to answer for his contempt and compel him to testify. Clearly under this provision the clerk of the municipal court is authorized to issue a subpoena for the attendance of any witness whose testimony is required before the court and there does not seem to be any exemptions or exception as to witnesses residing outside the county. It is my opinion that a subpoena issued out of a municipal court may be served anywhere in the state and that failure of the witness to attend would constitute contempt of court.

If this is not the correct construction there would be no method by which the attendance of a witness living outside of the county and less than thirty miles from the place where the court is held could be secured. It is only when a witness residing within the state lives more than thirty miles from the place of the trial that his testimony may be taken in the form of a deposition.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

September 21, 1916.

39

CITIES—Public records—Right of examination of.

Andrew E. Fritz, Public Examiner.

Dear Sir: Answering your question as to whether a taxpayer of a municipality has the right of access to the books thereof for the purpose of examining such records to ascertain whether public moneys have been legally expended, I state that a taxpayer always has such right, provided

the books or records which he desires to examine are public records. The books which are required by law to be kept by the financial and auditing or clerical departments of a municipality are almost invariably public records. Of course the examination which might be so made by a taxpayer would not have the same legal effect as an examination conducted by your department, but could be used by such taxpayer in any manner he might see fit to cause the laws to be enforced or penalties to be inflicted for a violation thereof.

Yours truly,
WILLIAM J. STEVENSON
Assistant Attorney General.

January 2, 1915.

40

CITIES—Limit of tax levy.

J. O. Peterson, City Attorney.

Dear Sir: You refer to Section 8, Chapter 5, of your city charter, which provides as follows:

"The city council shall annually levy taxes as hereinbefore provided, not to exceed twelve mills on the dollar of the taxable valuation of the city for current expenses, and in addition thereto, not to exceed one mill upon the taxable valuation of the city for the library fund; and, in case the city becomes the recipient of a donation for a library building an additional levy of one-half of one mill may be made."

You inquire whether a city council has a right to make the levy of twelve mills on the dollar and a levy in addition thereto of sufficient amount to pay interest on outstanding bonds.

In my opinion, your inquiry must be answered in the negative.

In other words, I am of the opinion that the words, "current expenses," as used in said Section 8, include the item of interest on bonded indebtedness. The phrase, "current expenses," means "ordinary expenses" or the expenses which ordinarily under existing conditions must, from year to year be paid by the municipality. Interest on bonded indebtedness is none the less a current expense because entailed on account of the action of the boards in providing for a bond issue.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

July 19, 1915.

41

CITIES—Visiting nurses—Power to pay expenses of.

Andrew E. Fritz, Public Examiner.

Dear Sir: You state:

"A number of municipalities in this state, including cities and villages, are paying compensation and expenses of 'visiting nurses.' I do not find any specific law authorizing this. In your opinion would they have the right to make such expenditures under the general provisions for the preservation of health?"

I am of the opinion that when in the judgment of the board of health of a municipality it is necessary that visiting nurses be employed, such employment may be made, and the compensation and expenses of such nurses paid, provided of course that there are moneys available for the payment thereof.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

November 18, 1916.

42

COMMISSION MERCHANTS—Law construed.

Railroad and Warehouse Commission.

Gentlemen: You inquire whether a broker who handles agricultural products or farm produce comes within the provisions of Section 4598, General Statutes 1913, which defines a commission merchant as a person "who may receive for sale for account of consignor any agricultural products or farm produce."

It is my opinion that your inquiry is to be answered in the affirmative

Yours truly,
ALONZO J. EDGERTON,
Assistant Attorney General.

May 18, 1915.

43

COUNTY ATTORNEYS—Preparation complaints—Obtaining witnesses—Duty as to.

John M. Rees, Esq., County Attorney.

Dear Sir: Your inquiry relates first to the duty of the county attorney in the preparation of complaints and warrants in criminal cases, and also to the duty of the county attorney in securing the attendance of witnesses who live outside the state.

In reply to your first inquiry, you are advised that it has long been the custom in this state for county attorneys to draw complaints and cause warrants to be issued, but no legal duty rests upon such officer to perform such services. He may be required to attend preliminary examinations upon the condition that he is furnished with a copy of the criminal complaint. When the Grand Jury has acted upon a criminal charge, the county attorney may be required to draw all indictments and presentments.

In this connection your attention is directed to Sections 9072-9073 General Statutes, 1913 which provide, among other things, as follows:

9072—"Judges of the several courts of record in vacation, as well as in term time, court commissioners and all justices of the peace, are authorized to issue process to carry into effect the provisions of law for the apprehension of persons charged with offenses."

9073—"Upon complaint made to any such magistrate that a criminal offense has been committed * * * and it shall appear that such offense has been committed, he shall issue a warrant * * *."

It is to be seen that the statutes in this state contemplate that criminal prosecution shall be instituted by making proper complaint to the judges of the several courts of record and justices of the peace; and also complainants may appear before the grand jury of the proper county.

It is my conclusion that it is not the duty of county attorneys to prepare criminal complaints, or cause warrants to be issued. There is, however, an implied duty to amend or correct defective criminal complaints drafted by magistrates, and the expressed duty of drawing all indictments and presentments.

In answer to your second inquiry, it is my opinion that where a grand jury returns an indictment and the material witness is absent, or resides out of the state, it is his duty to exercise diligence in securing the attendance of such witness at the trial of such case.

Yours truly,
ALONZO J. EDGERTON,
Assistant Attorney General.

February 6, 1915.

44

COUNTY ATTORNEY—Contingent fund.

Olin C. Myron, County Attorney,

Dear Sir: You inquire in effect whether the county attorney's contingent fund can be used for necessary expenses (including detective services when necessary) in the securing of evidence against persons selling or disposing of intoxicating liquor illegally.

The ruling of the Attorney General upon this question is to the effect that your inquiry may be answered in the affirmative. Of course you understand that before money for the payment of such expenses can be received from the county treasurer, the expenditure must have the approval of the District Judge, for the law provides that the Auditor's warrant must be countersigned by such District Judge.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

March 9, 1916.

45

COUNTY ATTORNEY—Contingent fund—Rewards and detectives.

J. A. Lee, County Attorney.

Dear Sir: I have to say that the general holding has been that the county attorney's contingent fund is not given for the purpose of offering rewards. This principle was laid down in the district court of Hennepin county some time ago.

It has been held that detectives can be employed by the county attorney and their services paid for out of the contingent fund. It might be well though in such case to consult the district judge as he has the approval of the warrants by means of which the contingent fund is expended.

Yours truly,

LYNDON A. SMITH,
Attorney General.

April 3, 1916.

46

COUNTY ATTORNEY—Legal ethics—Right to appear for private parties in certain cases.

O. J. Finstad, County Attorney.

Dear Sir: My own judgment is that the county is a specific, distinct party in all ditch cases, and the county attorney is specially paid to take the care of the county's interests which an attorney would take of the interests of, say a bank, when he was paid, in addition to its general retainer, for attending to a particular line of business. I am inclined to think that no county attorney can legitimately be the attorney for an estate in which there is likely to be an inheritance tax.

Note—See Dosland vs. Clay Co. 161 N. W. 382.

Yours truly,

LYNDON A. SMITH,
Attorney General.

March 22, 1915.

47

COUNTY ATTORNEY—Services rendered school district—Compensation for.

M. J. Olson, Clerk, District 31.

Dear Sir: You inquire on behalf of your board of education as to whether the county attorney has the right to charge a school district for services rendered by him. Your inquiry is answered in the affirmative. It is not a part of the county attorney's duties to advise or do legal work for the school district. He may perform that service, but is entitled to charge the same therefor as would any other attorney.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

November 15, 1916.

48

COUNTY ATTORNEY—Writing bond for contracting company—Doing county work.

J. A. Lee, County Attorney.

Dear Sir: This office has heretofore held that the county auditor could not write a bond for the contracting company that had a contract with the county for ditch or road work when such county auditor was

agent for the bonding company. I have therefore to advise you that in the opinion of this department the county attorney should not write a bond for a drainage engineer. It may be that the strict construction of Section 1089, G. S. 1913, might not make such act unlawful, but that chances are that the courts would hold the same to be unlawful. Be that as it may, however, it occurs to us that the county attorney by writing such a bond would place himself in a position that would be embarrassing, to say the least, if it became necessary to have recourse of the surety company, for it would be the duty of the county attorney to bring action against the company of which he was an agent and in whose behalf he issued the bond in question.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

June 15, 1916.

49

COUNTY AUDITORS AND TREASURERS—Clerk hire—How determined.

A. E. Fritz, Public Examiner.

Dear Sir: You call attention to Sections 823 and 873 G. S. 1913. I have to inform you that it has heretofore been and is now the holding of this office that the salaries and clerk hire of county auditors and county treasurers are to be regulated by the assessed valuations as fixed by the Minnesota Tax Commission for the preceding year. In other words, such salaries and clerk hire for the year 1917 will be based upon and regulated by the assessed valuation as fixed by the Minnesota Tax Commission for the year 1916.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

November 24, 1916.

50

COUNTY AUDITOR—Deputy may not take acknowledgment of auditor,

J. F. Mushel, Register of Deeds.

Dear Sir: After conferring with the Attorney General, I am directed to advise you that a deputy county auditor cannot take the acknowledgment of the county auditor himself in the execution of any instrument which is required to be acknowledged by the auditor.

Yours truly,

JOHN C. NETHAWAY,
Assitsant Attorney General.

October 26, 1915.

51

COUNTY AUDITORS—Endorsements as to back taxes on deeds.

Edward Solberg, Register of Deeds.

Dear Sir: I state that while it is customary for the county auditors in the various counties, even in the largest counties in the state, to make the endorsements on deeds as to back taxes as soon as the instruments are handed to them, thus allowing the parties to place them upon record within a few minutes after reaching the court house, I know of no statute that requires such immediate action by the auditor. The making of such endorsement is a matter of some responsibility and each auditor must determine for himself how much time he requires to examine his records and how expeditiously he may desire to serve the public. Ordinarily it is a matter in which he and the grantee in the deed are primarily interested.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

September 9, 1915.

52

COUNTY COMMISSIONERS—Chairman of.

Simon Simonson, Esq.

Dear Sir: I can see no legal objection to the person who has been elected as chairman of the county board, resigning from his position as such chairman. The county board may accept his resignation and elect another man to the position of chairman. I do not think that the vice-chairman can act as a member of the Board of Audit.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

March 1, 1916.

53

COUNTY COMMISSIONERS—Use of contingent fund in gubernatorial investigations.

N. B. Arnold, Esq.

Dear Sir: I am of the opinion that under the principle laid down in Hillman vs. Board of County Commissioners (84 Minn. 130) the county board is not authorized to establish a contingent fund for the purpose of assisting in the production of evidence against the county officers who are now suspended by the Governor and being investigated by him upon charges filed. The county board may provide a fund for the investigation of the possibility of recovering misappropriated county money, and if inci-

dentally this investigation should reveal evidence which ought to be produced in the matter of the removal of county officers, then such evidence could be obtained by subpoenacing the witnesses before the commissioner that they might testify.

The above really answers the doubtful parts of your letter except that the answer to the third question was agreed upon to be that the attendance of the witnesses without fees would be secured if possible, and if not, the question of whether they can be so compelled would be referred, through contempt proceedings, to the district court.

The removal of a county officer is determined upon by a very simple proceeding which is the filing of charges with the Governor and the taking of testimony by a commissioner sitting for the Governor. Those who know of misconduct of public officials must by implication know the witnesses who can prove such misconduct. While this proceeding is simple in outline it has its intricacies and necessities. These it would seem must be looked after by the private citizens interested in an endeavor to secure more faithful or capable officials.

Yours truly,

LYNDON A. SMITH,

Attorney General.

September 29, 1916.

54

COUNTY COMMISSIONERS—On annual salary not entitled to fees in drainage proceedings.

J. W. Schmitt, County Attorney, Mankato, Minn.

Dear Sir: You direct attention to the statute fixing the compensation of the county commissioners in certain counties at $800 per year. This is declared to be in lieu of all other fees and charges, except actual and necessary traveling expenses incurred and paid in the discharge of the official duties, not to exceed $1,200 per year, and you inquire whether this includes services rendered by the county commissioners in ditch proceedings notwithstanding the provisions contained in Section 5571, G. S. 1913, providing for the payment of $3.00 per day to each commissioner during the time occupied in proceedings for the establishment, repair or inspection of drainage ditches.

Following a previous ruling of this department you are advised that the statute fixing the salary for the county commissioners in counties of the class referred to, excludes the right of the county commissioners to receive fees or other compensation for services rendered in connection with ditch proceedings and you are further advised that the expenses incurred by the county commissioners in ditch proceedings must be included within the $1,200 limitation upon the amount of expense which may be incurred by and paid to a county commissioner in any one year of his service.

Yours truly,

JAMES E. MARKHAM.

Assistant Attorney General.

July 13, 1916.

55

COUNTY COMMISSIONERS—Without power to engage counsel to assist in litigation to which county is not a party.

Henry N. Jensen, County Attorney.

Dear Sir: You state that an application has been made by your county board to appropriate money toward a fund which is being collected for the purpose of carrying on litigation.

You inquire whether the county board would have the right to appropriate the county funds for this purpose, the county not being a direct party to the suit, and only interested in the action to the extent that if the "Clapp Act" is found to be unconstitutional no further taxes can be collected on the lands in question. You are advised that, in the opinion of this office, such appropriation cannot be made by your county board.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

January 13, 1916.

56

COUNTY COMMISSIONER—Removal from district—vacates office.

Axel Fresk, Esq.

Dear Sir: I have to say that I am of the opinion that if a County Commissioner moves out of his commissioner district, but still remains in the county, of which he is an officer, he is not eligible to retain his office after having changed his residence from that district to another.

This is a disputed matter and has never been judicially decided so far as I know.

Yours truly,

LYNDON A. SMITH,
Attorney General.

August 19, 1915.

57

COUNTY COMMISSIONERS—Expiration of term of—

P. S. Olsen, County Attorney.

Dear Sir: In regard to a further meeting of the present board of county commissioners on January 17, before the expiration of the terms of its members, it was held in State ex rel Forrer vs. McIntosh, 109 Minn. 18, that the out-going officers do not not pass out of office until the close of the first day of the official year, unless their successors qualify at some time during that day, but where the old board holds over and transacts any business on this last day of their term, it is limited to the closing up of old business and matters of necessity.

The constitution provides that the official year for state officers shall commence on the first Monday in January and that all terms of office shall terminate at that time and reading the constitutional provision, and the statute as construed by the supreme court in the case referred to, I am of the opinion that it is proper for the new board to convene on Monday the first day of January. The members of the board having qualified by filing the prescribed oath of office, may properly convene as a board, and elect a chairman and vice chairman, and the board being thus organized may properly receive and approve the bonds of the clerk of the district court and the judge of probate.

In view of the constitutional provision referred to, and the imperative public necessity, I am of the opinion that the meeting of the board of county commissioners for the purpose of organization, and the approval of the bonds of in-coming public county officers, whose terms begin on that day, is not within the inhibition of the statute creating the holiday. The board having met and organized and approved the bonds of the incoming county officers, the orderly procedure would be to adjourn to the annual meeting on the following day, without the transaction of any other business. In the indicated situation I am of the opinion that if the public business requires a further meeting of the old board, a special meeting should be called before the close of the year.

Yours truly,

JAMES E. MARKHAM,
Assistant Attorney General.

December 4, 1916.

58

COUNTY COMMISSIONERS—May employ a road superintendent.

John Boss, County Auditor.

Dear Sir: You ask whether the county board has a right to employ a road superintendent to superintend the construction of county roads. I call your attention to the case of Armstrong vs. Board of County Commissioners 103 Minn., Page 1, in which the court held that,

"County commissioners have the power to enter into a contract for the employment of such agents as may be necessary to oversee, superintend and inspect work on the highways of the county, for which they have appropriated county money."

It appears to me that this fully answers your inquiry.

Yours truly,

JOHN C. NETHAWAY,
Assistant Attorney General.

August 3, 1915.

59

COUNTY COMMISSIONERS—Compensation of—services in connection with ditch proceedings.

G. A. Youngquist, County Attorney.

Dear Sir: You call attention to the fact that the County Commissioners of your county are controlled by the subdivision of section 684, General Statutes 1913, in which a salary of $800 is provided for each county commissioner in counties having more than $20,000,000 and not exceeding $100,000,000 of assessed valuation. You call attention to sections 5571 and 5614, general statutes 1913, and inquire as to whether the compensation provided for county commisisoners in ditch matters shall be in addition to any other salary which may be paid to members of the board who perform such services. You are advised that County Commissioners drawing a salary under the subdivision of section 684 supra, cannot receive extra compensation for services rendered in ditch proceedings.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

March 26, 1915.

60

COUNTY COMMISSIONERS—Compensation of fractional congressional townships.

M. J. Hegland, County Attorney.

Dear Sir: I advise you that in my opinion a fractional congressional township is not to be considered or counted as a congressional township for the purpose of determining the compensation of the County Commissioners under the provisions of Chapter 88, Laws 1915. Section 1 of that act provides that—

"In all counties having not less than fifty-five congressional townships and an assessed valuation of not less than five million dollars * * * the several members of the county boards shall receive a salary of $480 per year."

Obviously the classification with reference to the area is based on the idea that the extent of the area has some relation to the burden of administration. It is equally obvious that counting a fractional township, as a township, would not be a compliance with the standard prescribed by the legislature.

Yours truly,

C. LOUIS WEEKS,
Assistant Attorney General.

June 15, 1915.

61

COUNTY COMMISSIONERS—Cannot furnish transcript of proceedings.

Andrew E. Fritz, Public Examiner.

Dear Sir: In reply to your letter inquiring whether or not the county board may agree to furnish a transcript of the proceeding in a ditch matter to a company proposing to buy the bonds issued in the matter, I have to say that the county board has no such right.

Yours truly,
LYNDON A. SMITH,
Attorney General.

February 27, 1915.

62

COUNTY COMMISSIONERS—Traveling expenses of—reimbursement for—

E. H. Krelwitz, County Attorney.

Dear Sir: You inquire whether Chapter 88, Laws of 1915, authorizes members of the county board in counties within the class there affected to charge the county for board and lodging while attending meetings of the board at the county seat.

Since the statutes do not require such officials to reside or maintain an office at the county seat, but on the contrary they are presumed to maintain their residence in the commissioner's district in which they are elected, it is my opinion that their necessary expense of traveling to and from the county seat on official business is a proper charge against the county. Traveling expenses are deemed by most authorities to include hotel bills, and this has been the general construction put upon this term throughout this state in both county and state matters.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

May 18, 1915.

63

COUNTY COMMISSIONERS—Not entitled to mileage under facts stated.

Olin C. Myron, County Attorney.

Dear Sir: I am of the opinion that the members of the county board would not be entitled to mileage for attending a special meeting of the county board called to fill a vacancy in the office of county superintendent, provided that such allowance of mileage would be in excess of the allowance of mileage for twelve meetings during the year. In other words, the limitation of mileage for twelve meetings during the year includes both general and special meetings of the board.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

November 28, 1916.

64

COUNTIES—Clerk of court—term of office.

Henry A. Larson, Clerk of Court.

Dear Sir: Relative to the time that an appointed clerk of court holds office, I have to say that the principle stated in the case of Prenevost vs. Delorme, 129 Minnesota 359, leads me to think that a clerk of the district court of any county would only hold his office, by virtue of his appointment until the next election, under ordinary circumstances.

The situation is rendered uncertain by the terms of Chapter 168, Laws of 1915, which attempts to extend the term of office of any person appointed to fill a vacancy to the balance of the entire term. This would tend to prolong the term of office of your successor until the first Monday in January, 1919, and do away with the necessity of electing his successor next November. My own judgment is that his term expires the first Monday in January, 1917, and that his successor would have to be appointed in the usual way provided for the appointment of clerks of court when there is a vacancy. The question is a very difficult one, and has not yet been settled in my mind or in the minds of my assistants.

A resignation should be made to the judge of the district court who has the power to appoint a clerk to fill a vacancy.

Yours truly,

LYNDON A. SMITH,
Attorney General.

March 25, 1916.

See case of State vs. Berg, 132 Minn. 426.

65

COUNTIES—Limitation of actions for services—power board to pay barred claims.

Graham M. Torrence, County Attorney.

Dear Sir: You submit the following inquiries:

1. "Within what period of time does a claim for services rendered to a county become outlawed under our statute of limitations?"

2. "Has the board of county commissioners of a county the power to pay a claim against a county which is barred by the statute?"

Answering your first inquiry, I have to say that I think the statute of limitations of six years, begins to run after a reasonable time has elapsed from the date of the rendering of the service. In other words a claimant against the county should file his claim within a reasonable time after the rendering of the services.

Section 1094, G. S. 1913, provides as follows:

"No action shall be maintained against a county upon any claim except county orders, when the only relief demanded is a judgment for money, until such claim shall have been duly presented to the board and it shall have failed to act upon the same within the time fixed by law, or unless such board shall consent to the institution of such action. No ac-

tion shall be brought upon any county order until the expiration of thirty days after a demand for the payment thereof has been made, and any judgment against the county entered in an action brought on any such order without such demand shall be void."

I do not believe that the county board has the power to pay a claim against the county which is barred by the statute of limitations.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

May 12, 1916.

66

COUNTIES—Dwelling cannot be built for Janitor.

C. G. Dosland, County Attorney,

Dear Sir: You inquire whether the county board would have the right to build and construct a dwelling house to be the property of the county and to be the residence of the janitor, such janitor being one hired by the county to take care of the court house.

In my opinion your inquiry is to be answered in the negative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

June 21, 1916.

67

COUNTIES—Net indebtedness of state rural highway bonds.

Andrew E. Fritz, Public Examiner.

Dear Sir: Relative to the inclusion of State Rural Highway Bonds in the net indebtedness of a county, as defined in Section 1848, G. S. 1913, I have to say that in my judgment the indebtedness represented by state rural highway bonds should be divided into gross indebtedness and net indebtedness, according to the following rule:

One-half of the estimated cost of the Rural Highway as fixed at the time of the approval of the plan of such highway by the State Highway Commission, should be deducted from the gross indebtedness.

Next, there should be also deducted from said gross indebtedness the amounts assessed to the persons living along the line of the highway, which of course should be one-half of the amount deducted because of the state paying one-half of the expense. The difference between the one-half to be paid by the state, plus the one-fourth to be paid by the persons whose land is assessed to aid in the construction of the road, and the total bonded indebtedness incurred because of the construction of such road, would be the amount which should be included in the net indebtedness of the county.

Yours truly,
LYNDON A. SMITH,
Attorney General

September 18, 1916.

69

COUNTIES—Liability for injury to engineer on ditch.

O. J. Finstad, County Attorney.

Dear Sir: We are of the opinion that an engineer although appointed by a judge of the district court, is an employe of the counties interested in the construction of the judicial ditch and the counties would be jointly liable, in case the engineer or his assistants are injured while engaged upon the work. See Subdivision 1, Section 17, Chapter 209, G. L. 1915.

Yours truly,

W. J. STEVENSON,
Assistant Attorney General.

January 19, 1916.

70

COUNTIES—Fishing in drainage ditches—offering rewards—

J. A. Lee, County Attorney.

Dear Sir: You submit the following inquiries:

1. "Do the fish laws of the State of Minnesota apply to drainage ditches; the same as to lakes and streams?"

2. "Is it illegal or beyond the authority of the board of county commissioners to offer a reward in murder cases; for the arrest and conviction of the murderer?"

3. "Is it illegal for the county board to offer a reasonable reward for the arrest and conviction of illegal sales of intoxicating liquors in the county?"

In my opinion, your three inquiries are each to be answered in the affirmative.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

April 18, 1916.

71

COUNTIES—Premiums received at State Fair.

Andrew E. Fritz, Public Examiner.

Dear Sir: You submit the following inquiry:

"When a county which has an exhibit at the state fair is awarded a premium, should this premium be turned into the county revenue fund or may it be expended upon the exhibit in addition to the appropriation made by the county board pursuant to Sections 739-741, G. S. 1913?"

In my opinion the money received as a premium should be turned into the county revenue fund.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

October 21, 1916.

72

COUNTIES—County Officials—serving in National guard—do not vacate Offices.

N. F. Soderberg, County Attorney.

Dear Sir: You state that your county treasurer is a member of the Minnesota National Guard, and is now "somewhere" in Texas, that when he left he employed a competent man to look after the county treasurer's office. You do not state, but I assume, that the man in question was appointed as deputy county treasurer. At the request of the county auditor you desire to know if the county treasurer can draw the salary of the office while he is thus serving in the National Guard.

I am inclined to the opinion that the inquiry is properly to be answered in the affirmative, at least insofar as a reasonable length of time is concerned. Had the county treasurer, on account of the condition of his health or for other reasons, left your county and taken a trip even of two or three months duration, he would not have vacated his office by such an act.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

August 1, 1916.

73

OFFICIAL BONDS—Two witnesses as to corporate surety—

A. M. Anderson, Register of Deeds.

Dear Sir: It is the opinion of this department that powers of attorney to execute bonds in behalf of a surety company should have two witnesses thereto.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

January 15, 1916.

74

COUNTIES—Redistricting of commissioner's districts.

Ole Swanjord, County Attorney.

Dear Sir: You call attention to Section 679, G. S. 1913, in which provision is made for the redistricting of commissioner districts. Among other things this section provides:

"Counties may be redistricted by the county board after each state or federal census."

You inquire whether or not the county board may redistrict at any time following a federal or state census, or whether such redistricting

must be done within a reasonable time after the taking of such census. In my opinion redistricting may be done at any time after a state or federal census, but one redistricting is all that can be made after the taking of any such census and before the taking of another census.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

November 9, 1915.

75

COUNTIES—Register of Deeds—Not to file assignments of wages.

Charles Calligan, Esq., Register of Deeds.

Dear Sir: You are advised, that in my opinion Chapter 364, Laws of 1915, relating to the filing with the Register of Deeds of all instruments evidencing a lien on or reserving title to personalty does not cover the ordinary instrument assigning wages to be earned in the future. Such assignment is usually an actual transfer of the title to the money which is to become due and does not give the holder a mere lien thereon. Neither can it be said to be an instrument reserving title to personalty. It is the opposite of that.

Yours truly,

WILLIAM J. STEVENSON,
Assistant Attorney General.

June 15, 1915.

76

COUNTIES—Register of Deeds—Conditional sale contracts—where filed—Chapter 364, Session Laws, 1915, construed.

Peter F. Fay, Register of Deeds.

Dear Sir: Chapter 364, Laws of 1915, relating to the transferring and hereafter filing with the Register of Deeds of certain instruments heretofore filed with the Town Clerks is not a repeal nor does it in any way modify the previous law relating to filing chattel mortgages, bills of sale and conditional sale contracts with Registers of Deeds, viz: Chapter 143, Laws of 1913. Our construction of the 1915 Law is, that it is entirely independent of the previous one and therefore affects only such instruments as are defined in Section 1 thereof. You will observe that this Section does not assume to relate to any instrument except those which by statute at that time (April, 1915) may be filed with the clerk or recorder of any municipality. Conditional sale contracts, chattel mortgages and bills of sale have not been filed with such clerks or recorders since July 1, 1913. Therefore the Law of 1915 does not relate to any instruments of the three kinds last mentioned.

Prior to the passage of the 1915 Law, this office held that it was the original conditional sale contract and not the copy that should be filed with the Register of Deeds. Therefore the 1915 Law does not change this ruling.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

September 13, 1915.

77

COUNTIES—Register of Deeds—Correcting of record.

Ralph A. Stone, County Attorney.

Dear Sir: Concerning the error made by your previous Register of Deeds in recording a deed in 1899, I state that if your present Register of Deeds is satisfied from an inspection of the records and of the original instrument, and from any other evidence now obtainable, that an error has been made by the Register of Deeds in recording such instrument, such mistake may now be corrected to the end that the record may be true and complete. Of course, when a recording officer corrects a record so as to make it conform to the original instrument, the corrected words take effect only from the date of the correction.

Before a recording officer is justified in making a correction, it must clearly appear to him that the discrepancy between the instrument, and the record thereof is one caused by the recording officer, or his predecessor, and that the original instrument now presented to him is in exactly the same condition that it was when first recorded.

The application of these rules must be in the furtherance of justice, and if carefully and impartially applied cannot prejudice the rights of all parties nor can they deprive innocent parties of the benefit of the record as originally made.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

March 9, 1915.

78

COUNTIES—Register of Deeds—In re deed entitled to record, when certificate of acknowledgment is in a foreign language.

J. E. Diesen, County Attorney.

Dear Sir: You inquire: (a). If a deed written in the English language, except as to the certificate of acknowledgment, which certificate is in a foreign language, is entitled to record.

(b). If a power of attorney to convey real estate, written in a foreign language, is recordable.

* * * *

In Missouri it is provided by statute that a certificate of acknowledgment may be in a foreign language accompanied by a sworn translation; and in Indiana by statute it is provided that if in a foreign language, the certificate must be accompanied by a further certificate of the United States Consul, or other designated officer, stating the meaning of the certificate of acknowledgment. We have no statute similar to those of Missouri and Indiana.

Section 5771, G. S. 1913, provides for fees of Registers of Deeds, and subdivision 4 thereof reads as follows:

"Recording any deed or other papers in other than the English language, 25 cents per folio."

The above quoted language has been on our statute books since 1858, and I am free to admit that the same furnishes ground for an argument to the effect that deeds in a foreign language may be recorded. But said provision has always appeared in the law prescribing the fees of Registers of Deeds. Nowhere does our statute law provide, or has it provided for translations of deeds, etc., written in a foreign language.

Generally speaking, no instrument is entitled to record unless it gives constructive notice. What constructive notice would a record written in Chinese or Sanskrit render? How could an abtsractor acquire any information therefrom?

Certainly a deed written in whole or in part in a foreign language is good as between the parties, and in some instances the requiring of a deed to be written in the English language might work a hardship; but such isolated cases do not to my mind present a valid reason for saying that our records may be encumbered with instruments written in foreign languages which are not understood by an English speaking people. Further, how could a Register of Deeds determine if a deed written in the Egyptian language was entitled to record?

My conclusion is that instruments to be entitled to record, in the absence of a statute providing for translations, must be in the language of our country, to-wit: English.

Yours truly,

EGBERT S. OAKLEY,
Assistant Attorney General.

December 27, 1916.

79

COUNTIES—Register of Deeds—Fees of.

W. C. Lee, Register of Deeds.

Dear Sir: You inquire whether Chapter 364, Laws of 1915, is authority for the Register of Deeds charging a fee of twenty-five cents after July of this year for the filing of chattel mortgages, conditional sale contracts and bills of sale of chattels.

Chapter 143, Laws of 1913, changed the place of filing of such instruments from the office of Town Clerk, Village Recorder and City Clerk, except in cities of the first class, to the office of the Register of Deeds of the county. That law went into effect July 1, 1913, and provided that the fee of the Register of Deeds for such filing of such instruments should be ten cents per instrument. From that date these instruments could be filed only with the Register of Deeds.

They could not be filed with the town or city clerk, or village recorder. They could not be deemed to be within the meaning of Section 1 of the 1915 Law, which says:

"Any instrument evidencing a lien on or reserving title to personal property, which instrument by statute may be filed with the Clerk or Recorder of any municipality, or true copy thereof, shall be filed with the Register of Deeds in the county in which the said personal property is situate."

At the time this law was enacted, there were several classes of instruments, such as seed grain notes, horseshoers' liens, threshers' liens and other statutory liens on personal property which were to be filed with such municipal Clerks or Recorders, and which could not be filed by the Register of Deeds. This law, therefore, affects only such class of instruments and does not purport to affect or relate to bills of sale of chattels, chattel mortgages or conditional sale contracts, all of which are governed solely by the 1913 law.

Therefore, in my opinion, the Register of Deeds must continue to charge only ten cents per instrument for the filing of those instruments mentioned in the 1913 law, but as to all other instruments which may be filed with him under the 1915 law, he can charge twenty-five cents per instrument.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

June 14, 1915.

80

COUNTIES—Register of Deeds—Fee for Marginal Release.

P. J. Hill, Register of Deeds.

Dear Sir: The only charge that the Register can make in connection with the entering upon his records of a marginal release of a real estate mortgage is the fee of ten cents. This is supposed to cover his services in connection with the entering of that form of release.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

December 18, 1915.

81

COUNTIES—Register of Deeds—Recordable instruments—Duty to record instrument combining features of farm lease with those of chattel mortgage.

L. S. Orwoll, Register of Deeds.

Dear Sir: As to the recording of farm leases containing a chattel mortgage clause, or the filing thereof as a chattel mortgage, I state that in my opinion the chattel mortgage feature does not become a matter of public notice unless the instrument is treated as a chattel mortgage, and filed in your office. The lease features, however, do not become a matter of public record or constructing notice by merely filing the instrument as a chattel mortgage. As an instrument affecting the land, it would have to be recorded. Whether it is filed or recorded, or both, is a matter for the person presenting it to determine. I do not think the Register of Deeds would have any authority to refuse to take either course that the interested party may direct and tender appropriate fees therefor.

Yours truly,

WILLIAM J. STEVENSON,
Assistant Attorney General.

December 18, 1915.

82

COUNTIES—Register of Deeds—Recordable instruments—Deeds to mineral rights when taxes not paid on surface rights.

Edward L. Rogers, County Attorney.

Dear Sir: You ask if a deed conveying mineral rights can be recorded without the payment of the taxes against the surface owner.

The subject of taxing mineral reservations and the effect of tax liens against government descriptions of land where the owners of such lands have separated the surface rights from the mineral rights has long been a subject of much doubt and confusion among the property owners and lawyers in this state. The decision of the recent case of Washburn vs. Gregory Company, 125 Minn. 491, has had the effect of clarifying the situation. It now seems plain that where the mineral and surface interests are separated, such interests become separate pieces of real estate and must be treated separately in all matters pertaining to taxation and tax liens.

We conclude, after a careful consideration of this case, that deeds conveying mineral rights may be recorded without the payment of taxes against the surface owner, and that deeds conveying surface rights may likewise be recorded without the payment of taxes against the mineral reservation. This rule is true, of course, only where the surface rights and the mineral rights have been separated and held by different persons prior to the assessing of the taxes in question.

Yours truly,

WILLIAM J. STEVENSON,
Assistant Attorney General.

March 20, 1915.

83

COUNTIES—Register of Deeds—Recordable instruments—Declaration of interest.

Messrs. Thwing & Rossman.

Gentlemen: I cannot see how any declaration or assertion that a person might make in writing to the effect that he has certain interests in the real estate or even that he owns the real estate can be considered an instrument in any manner affecting the title to realty. Public records should not be encumbered with such papers.

While the Register of Deeds has no jurisdiction to pass upon the validity of instruments presented to him for record, he is not wholly without discretion to determine whether an instrument should be admitted to record. He is not required and cannot be compelled to place in the public records of his county any sort of document that may be presented to him merely because it is acknowledged before a Notary Public and signed in the presence of two witnesses. See Dancy vs. Clark, 24 Appealed Cases, District of Columbia, 487, 499, and People ex rel vs. Fromme (App. Div.) 54 N. Y. Supp. 833.

We have no difficulty in reaching the conclusion that the only instruments which a Register of Deeds is authorized to record are those which the statute specifically mentions.

Yours truly,

WILLIAM J. STEVENSON,

Assistant Attorney General.

April 19, 1915.

84

COUNTY—Register of Deeds—Recordable instruments—Notary's public seal—Expiration commission.

Victor E. Erickson, Register of Deeds.

Dear Sir: I state that in my opinion an instrument is properly recordable in your office even though the acknowledgment taken in another state does not indicate the date of expiration of the notary's commission nor have attached thereto a certificate of the notary's official capacity. I do not think that any courts have even held that an acknowledgment taken in this state is not a good acknowledgment even if the notary does not attach the date of expiration of his commission.

Yours truly,

WILLIAM J. STEVENSON,

Assistant Attorney General.

October 7, 1915.

85

COUNTY SANATORIA—County attorney may be on board of.

Andrew E. Fritz, Public Examiner.

Dear Sir: You inquire whether there is any legal objection to a county attorney serving as a member of the county sanatorium board.

In my opinion your inquiry is to be answered in the negative.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

August 11, 1915.

86

COUNTY SANATORIA—County Commissioner cannot be member of Sanatorium Board.

O. J. Finstad, County Attorney.

Dear Sir: At the request of the county commissioners of your county, you are asking relative to the validity of the organization and acts of the sanatorium commission for the counties of Cottonwood, Nobles, Rock, Pipestone, Murray, Lincoln and Lyon. It appears that two members of the sanatorium commission from your county are county commissioners, and you state that of the entire membership of the sanatorium commission there are only three or four who are not county commissioners. Information, however, received later is to the effect that only seven of the seventeen members are county commissioners. It does not appear from your communication as to what action the joint county sanatorium commission has taken. Section 7722, G. S. 1913, insofar as here applicable, reads as follows:

"No commissioner (county) shall be appointed or elected by the board of which he is a member to any office or position of trust or emolument, and no commissioner shall receive any money or other valuable thing as a condition of voting or inducement to vote for any contract or other thing under consideration by the board, or become a party to or directly or indirectly interested in any contract made by the board; and every appointment or election made and every contract or payment voted for or made contrary to the provisions of this section shall be void. Any violation of the provisions of this section shall be a malfeasance in office."

A member of the county sanatorium commission receives no compensation whatever and is only entitled to reimbursement for his actual necessary expenses incurred in the performance of the duties of the position which he holds. It is therefore manifest that the position of a member of the county sanatorium commission is not one of "emolument." The next question that arises is whether it can be considered as a "position of trust." I am of the opinion that it is, and that a county commissioner should not be appointed by the board of which he is a member to the position of a member of the sanatorium board. If I am correct in the views above indicated, then the places attempted to be occupied by them

should be filled by the appointment of persons who may lawfully hold the positions. Although the statute makes the appointments void, still I am of the opinion that those members (who are county commissioners) having been, so far as the records show, duly appointed and having, as I assume, qualified in the manner provided by law, would be considered as de facto officers, and their acts as such upon the sanatorium commission would be binding.

Inquiry made brings the information that the sanatorium board above referred to has organized, held various meetings and entered into contracts for the purchase of land for a sanatorium site and done other acts of a like nature. A tax levy has been made in the various counties for the raising of money for carrying on the sanatorium project, but of course the levies in question were not made by the sanatorium commission, but by the various county boards.

As above indicated, I am of the opinion that the positions on the sanatorium commission that are attempted to be held by the county commissioners should be filled by other appointments and the orderly course of procedure, and one that I assume the county commissioners who have heretofore been appointed on the sanatorium commission would be in accord with, would be for such members to forthwith resign. I am further of the opinion that, as above indicated, the actions of the sanatorium board are not invalid because of the fact that certain county commissioners are members thereof.

I have received information from the Executive Secretary of the Advisory Commission that Jackson County is also in the group of counties above referred to, but that at no time in the past has there been to exceed eight members of the commission who were county commissioners. If a majority of the members of the sanatorium commission are competent to serve as such, and to be considered de jure members thereof, the action taken by such majority would be valid and binding irrespective of whether the minority of the board who were not qualified to act as de jure members, voted with or in opposition to the action of said majority.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

June 12, 1915.

87

COUNTY SANATORIA—County board not to allow bills.

Andrew E. Fritz, Public Examiner.

Dear Sir: You refer to Section 720, G. S. 1913, and inquire whether it is necessary for the county board to pass upon claims for maintenance of a county tuberculosis sanatorium or whether the county board has authority to disallow or reduce a claim which has been allowed by the sanatorium commission. Your two inquiries are answered in the negative.

In the section referred to, I find the following language:

"All moneys collected or received for such sanatorium purposes, except cost of site, erection and equipment, shall be deposited in the treasury of said county or counties, to the credit of the tuberculosis sanatorium

funds, and shall not be used for any other purpose, and shall be paid out in a manner provided by law for other county expenses by the proper officers of said county or counties, upon the properly authenticated vouchers of the county sanatorium commission, signed by the president and secretary thereof * * * * * *."

The words, "proper officers of said county or counties" above used, have reference to the county auditor, county treasurer, and the words, "in a manner provided by law for other county expenses" have reference to the drawing of warrants upon the county treasurer.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

July 13, 1916.

88

COUNTY SANATORIA—"Free Patients" defined.

Frank G. Kiesler, County Attorney.

Dear Sir: You refer to Chapter 500, G. L. 1913, and call attention to the provisions thereof in which reference is made to "free patients" and the payment by the state of $5.00 per week for their care in a sanatorium. You state that in the City of Waseca, there are several tubercular patients that must be sent to a sanatorium outside of the county, and you inquire whether the state will pay $5.00 per week for the care of such patients, they being indigent, and having no one responsible from whom the expense can be collected.

Under the law as it now stands, I am of the opinion that these patients are not "free patients" within the meaning of the law, and it would therefore follow that the state will not pay $5.00 per week toward their care. Assuming that this expense is a necessary one, and is thus incurred by the local board of health of Waseca, the City of Waseca can recover from the county one-half thereof, or $5.00 per week. The result will be that the City of Waseca and the County of Waseca will each pay $5.00 per week.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

March 19, 1915.

89

COUNTY SANATORIA—After vote in favor of—Duty to erect mandatory.

R. J. Stromme, County Attorney.

Dear Sir: Referring to the provisions found in paragraph (c) of Section 1 of Chapter 500, General Laws, 1913, I wish to call your attention to the language therein contained, which after providing for the submission of the question to the voters by the voluntary action of the county board, or after a petition therefor has been filed, provides as follows:

"If a majority of voters of such county or a majority of the voters of each county of such group of counties voting thereon vote in favor thereof, then such sanatorium shall be erected hereunder and a tax levied if necessary to pay the cost which such county or counties are required to pay, etc."

I know of no reason why the word "shall" as therein contained, should not be given its usual, ordinary construction, and be considered as mandatory rather than to be construed as though the word were "may" and hence permissible only.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

February 20, 1915.

90

COUNTY SANATORIA—Duty of cities to take care of patients under facts stated.

Ora J. Parker, City Attorney.

Dear Sir: You make reference to Sections 4646-4648, G. S. 1913, and Chapters 434 and 500, G. S. 1913, and inquire whether it is compulsory upon a city to take care of tuberculous patients as may be directed by the State Board of Health.

It is conceded that pulmonary tuberculosis is a communicable disease and being such the prevention and suppression thereof comes within the provisions of the general statutes above referred to. It is clear that the statutory provisions make it the duty of the local board of health to incur the necessary expense for such prevention and suppression, and the municipality must pay therefor in the first instance. The municipality can then recover the amount from a private person as mentioned in said Section 4646, if there be any liable and able to pay; if not, then the city may recover from the county one-half of such reasonable expense. There would seem to be no escape from the conclusion that these provisions of law are mandatory, and place an absolute duty upon the municipality and the county. The local authorities can dispose of the cases by sending them to a proper sanatorium, or can handle the matter locally, providing it can thus be done.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

March 19, 1915.

91

COUNTY SANATORIA—Law construed.

Dr. Robinson Bosworth, Executive Secretary.

Dear Sir: You submit the following inquiry:

"A county board at the 1914 July meeting makes a one-mill levy to raise funds for the construction of a tuberculosis sanatorium. In June, 1915, it is discovered that this fund is not sufficient by $5,000 to complete

the building. The County Sanatorium Commission presents the county board at its July 1915 meeting with a request for maintenance funds for the ensuing year. This amount requested being $5,000 in excess of the amount actually required for maintenance, it being the intention of the County Sanatorium Commission that this $5,000 should represent a surplus, and therefore be available for 'building, purchasing, equipments, etc.' as provided for by the amendments to the County Sanatorium Law. In the presence of the estimate or intention of the County Sanatorium Commission that the funds requested for maintenance are in excess by $5,000 of the amount actually required, is it not permissible for the County Sanatorium Commission to use this surplus for construction purposes prior to the expiration of the term for which said maintenance fund is provided?"

The County Sanatorium Law as amended at the 1915 session of the legislature, among other things contains the following provision:

"Said county sanatorium commission of a county or group of counties is hereby authorized, with the approval of the advisory commission of the Minnesota Sanatorium for Consumptives, to use any **surplus** of the tax levy made for the maintenance of a sanatorium, for building, purchasing, equipments, building additions, building cottages, making improvements and repairs."

The question above submitted resolves itself into the proposition as to whether or not there can be a "surplus" in the maintenance fund of a sanatorium before any money whatever is collected from a tax levy for maintenance and before the time has arrived at which it can be definitely determined that there is a "surplus" in such fund.

"Surplus" has been defined as an "overplus;" "that which remains when use is satisfied;" "that which is left from a fund which has been appropriated for a particular purpose," "remainder of a thing;" "residue."

The foregoing definitions to my mind indicate that a surplus in funds cannot be said to exist until after the expenditure of the necessary portion of the funds for the purpose for which the funds were raised or appropriated, or at least until such time shortly before the termination of the period for which the funds were raised or appropriated, so that it can be definitely determined what amount will remain after such necessary expenditures. The words "overplus," "remainder" and "residue," "that which is left," all seem to indicate that there must first be an expenditure from a fund, or at least an absolute and definite determination as to what such expenditure will be before there can be said to be a surplus in the fund.

It is true your statement is to the effect that the amount requested for the levy is $5,000 in excess of the amount actually required for maintenance. This may be and doubtless was the honest view of the members of the Sanatorium Commission. The question might suggest itself as to why the levy of the $5,000 was not made specifically for the year in question for expenditure for building, etc., instead of including an unnecessary amount in the levy for maintenance.

The question also arises as to whether it can be said that there is a maintenance fund much less a surplus in such fund prior to the time that one cent of the money has come into the treasury from a collection under said levy.

I am of the opinion that your inquiry must be answered in the negative and that it is not permissible for the County Sanatorium Commission to have warrants drawn for building purposes, to be paid out of a supposed surplus that may exist in the funds to be raised from the levy for maintenance purposes.

It will be noted that in the law "said County Sanatorium Commission"—

"Shall determine by resolution, each year prior to July first, the amount of money necessary for the maintenance of such sanatorium during the following year, and a certified copy of such resolution shall be forthwith forwarded to the board or boards of county commissioners and such board or boards shall at the regular meeting in July include the property approved and apportioned amount in the annual levy of the county taxes."

You make further inquiry as follows:

"Such being permissible, would it not also be proper to anticipate collection of a tax, levied to raise such funds by the issuing of warrants? After a tax levy has been made by the county board to provide for such funds and prior to its collection, in case the County Sanatorium Commission issues orders against such fund, is it the duty of the county auditor to issue warrants or to otherwise provide funds to meet such orders?"

Your attention is called to the following language found in Section 4 of Chapter 270, General Laws 1915:

"All moneys collected or received for such sanatorium purposes * * * shall be deposited in the treasury of said county to the credit of tuberculosis sanatorium funds, and shall not be used for any other purpose and shall be paid out in a manner provided by law for other county expenses by the proper officers of said county, upon the properly authenticated vouchers of the county sanatorium commission, signed by the president and secretary thereof."

It is true that practically all claims against a county must be allowed by the county commissioners, but the language of this law has particular reference to how moneys from this fund "shall be paid out," and it is stated that such moneys shall be paid out "in a manner provided by law for other county expenses by the proper officers of said county." Money is paid out of the county treasury by the county treasurer upon warrants issued by the county auditor, and I am of the opinion that the county auditor would be authorized to draw his warrant upon the county treasury for such amounts as are evidenced by duly authenticated vouchers of the county sanatorium commission, signed by the president and secretary thereof, without having the bills allowed by the county board.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

August 3, 1915.

92

COUNTY SANATORIA—Limit on State aid to.

Dr. H. M. Bracken, Secretary State Board of Health.

Dear Sir: You are advised that in the opinion of this department $50,000 is the maximum amount that can be paid by the state toward the cost of the erection and equipment of any one sanatorium project, and the law does not mean that the state will give an equal amount to that contributed by the several counties in excess of the $50,000 referred to.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

January 6, 1915.

93

COUNTY SANATORIA—Title to site runs to the county.

John H. Mark, County Attorney.

Dear Sir: You state that Wadena and Todd counties have purchased a site for a tuberculosis hospital, and you inquire generally whether the title to the sanatorium site should run to the state. Your inquiry is answered in the negative. Although the state pays money towards sanatorium projects, the title to the property does not vest in the state, but in the county or counties that establish the sanatoriums.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

May 9, 1916.

94

COUNTIES—Sheriff—Fees of—Collecting personal property tax warrants.

O. J. Finstad, County Attorney.

Dear Sir: You are advised that in my opinion where a sheriff collects personal property tax warrants, he should collect his fees accruing on such warrants. If the sheriff is acting under the provisions of Sections 948 and 955, G. S. 1913, he retains these fees in addition to his salary. You will observe that said Sections provide that his salary is for all official services for the county other than those required of the sheriff by the tax laws.

Yours truly,

WILLIAM J. STEVENSON,
Assistant Attorney General.

May 18, 1915.

COUNTIES—Sheriffs—No reimbursement for expenses incurred in making investigations.

C. G. Dosland, County Attorney.

Dear Sir: It appears that the sheriff of your county has filed a bill against the county for expenses incurred by him in investigating the commission of a certain crime, but no complaint had been filed or warrant had been issued. The sheriff was called by the complainant and responded to his call. You ask whether the bill for expenses is a legal claim against the county.

I am inclined to think that your inquiry should be answered in the negative, at least in the absence of any further information as to the facts. I do not think the sheriff is justified in incurring expenses to be charged against the county where he simply investigates a matter for the purpose of finding evidence that might possibly show the commission of a crime. The duty devolves upon the sheriff to preserve the peace of his county and circumstances might arise where, in the preservation of the peace, it would be necessary for him to incur expenses that would be chargeable against the county.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

April 20, 1916.

96

COUNTIES—Sheriffs—Reimbursement for expenses in serving tax citations.

R. J. Stromme, County Attorney.

Dear Sir: You are advised, that in my opinion a sheriff being paid a salary and actual traveling expenses under the General Sheriff's Salary Law is entitled to his actual expenses in serving and attempting to serve tax citations even though he does not collect the tax. While the salary paid the sheriff does not cover his compensation for services rendered under the tax laws, he is nevertheless entitled to his actual traveling expenses.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

October 14, 1915.

97

COUNTIES—Sheriff—Duties as to unlawful assemblies.

Charles M. Andrist, Secretary to the Governor.

Dear Sir: Relative to the prevention of unlawful assemblies, I have to say that there is no doubt of the sheriff's right and duty to suppress such unlawful assembly.

Just what constitutes an unlawful assembly is to be ascertained from a definition of an "unlawful assembly" found in Section 8795 G. S. 1913. It is not every gathering of people who are inclined to discuss things injurious to the peace of the community that constitutes an unlawful assembly. A time honored definition is:

"An assembly of three or more persons * * * with intent to carry out a common purpose lawful or unlawful in such a manner as to give firm and courageous persons in the neighborhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it."

Every assembly suspected of being unlawful must be treated according to its own characteristics. The sheriff of a county should act coolly, judiciously and firmly in his treatment of such gathering. Should he deem it necessary to have legal advice at hand as to whether the facts before him constituted an unlawful gathering of people, I would think that it might become the duty of the county attorney to keep himself in touch with the sheriff.

It has been held by this office that it is not only the duty of the sheriffs of this state "to apprehend and jail those who have committed crime * * * but that it is likewise the duty of the sheriff to prevent the violation of law * * * when complaint is made to him that a law is about to be violated or when it is brought to his knowledge or he has reason to believe that the peace of his county is about to be broken, and duty rests upon the sheriff to conserve the peace and enforce the law."

Yours truly,

LYNDON A. SMITH,
Attorney General.

August 17, 1916.

98

COUNTIES—Sheriffs—Duties—Unlawful assemblies.

Ralph A. Stone, County Attorney.

Dear Sir: The sheriff cannot act until an unlawful assembly takes place within the county. Then the sheriff should warn the assembly to disperse if anything occurs which convinces him that it has reached the point of being an unlawful assembly.

In determining this question he can take into consideration the facts which are known to him with regard to the general purpose and intention of the class of persons represented at such assembly, as the same have been exhibited by the same people, generally speaking, at other recent times and nearby places. The sheriff should have witnesses in mind who know of what has been done in localities treated by persons of the kind who assemble in some illegal manner.

The presumption of law is that assemblies are unlawful but this presumption, is seems to me, can be met by the fact that similar gatherings have done unlawful acts, if such be the case. It would be very desirable to have men in the assembly who can understand the language and who are unbiased and of good memory. One of the best things possible in such emergency, and also one of the most difficult, is to have a stenographer present to take the exact language used.

I would suggest that you read with considerable care the case of People vs. Most, 26 Am. State Rep. 458. Another case that has some things in it that are instructive and suggestive is Spies vs. People, 3 Am. State Rep. 320, 417-418.

I am a little inclined to think that the Spies case states the law rather strongly against the conspirators therein mentioned. When an unlawful assembly is so held as to have a possible connection with murder afterward committed, there is a natural tendency to state the law strongly against the persons whose activities and declarations have been in line with the final commission of murder. The culmination of plans discussed at gatherings in the murder of several people, gives to each of those steps a meaning and force which might not be given if the final outcome of an assembly were merely the destruction of a property. The law is probably the same but it gets some coloring from the seriousness of results.

Yours truly,
LYNDON A. SMITH,
Attorney General.

August 18, 1916.

99

COUNTY SUPERINTENDENT—Certain expenses not allowable.

Hon. Andrew E. Fritz, Public Examiner, Capitol.

Dear Sir: You submit the following inquiry:

"Can a county superintendent, who does not reside at the county seat, draw expenses at the county seat when he is there on official business?"

In my opinion your inquiry is to be answered in the negative. Section 692, General Statutes 1913, among other things states that the county board shall provide offices at the county seat for the superintendent of schools. For this reason the ruling as to the expenses of a county attorney for whom no office is provided by the county board at the county seat, would not apply to a county superintendent.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

August 2, 1915.

100

COUNTIES—Surveyors—Making of plats by.

C. Rosenmeier, County Attorney.

Dear Sir: I have to say that the surveyor who makes the plat to which Section 6857, General Statutes 1913, relates should be the one who makes the certificate, whether he be county surveyor or a private surveyor employed for the purpose of doing the surveying and making the plat.

Yours truly,
LYNDON A. SMITH,
Attorney General.

June 29, 1915.

101

COUNTIES—Surveyors—Fees of, platting lands.

J. A. Stanton, County Surveyor.

Dear Sir: You ask if county surveyors are entitled to the same fees for platting and recording in county record books when the lands surveyed are village lots, streets, etc., when he is called upon to do the work officially as county surveyor.

I think, in view of what has been said by our Supreme Court, your question must be answered in the affirmative. (See State vs. Patton, 62 Minnesota 388).

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

January 6, 1915.

102

COUNTIES—Surveyor—surveyed by.

E. W. Swenson, County Attorney.

You submit the following inquiry:

"Does a survey in any county as made by the county surveyor have any preference over a survey made by any other competent surveyor?"

In my opinion, your inquiry is to be answered in the negative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

November 26, 1915.

103

COUNTY TREASURER—Permitting banks to collect taxes.

Hon. Andrew E. Fritz, Public Examiner.

Dear Sir: I state that in my opinion the county treasurer has no right to allow a bank or any person to collect and handle taxes unless such person is a clerk or deputy in his office. No one but a deputy treasurer would have a right to sign the treasurer's name to an official tax receipt. The practice of instructing banks throughout the county to collect taxes and issue the county treasurer's official receipt, signing the treasurer's name thereto, is illegal, as the treasurer has no right to consider such banks as his agents. The effect of the arrangement would be to make the bank the agent of the taxpayer and the purported receipt would be a nullity.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

January 20, 1916.

104

COUNTY TREASURER—Not entitled to compensation in drainage proceedings.

J. P. Boyer, County Treasurer.

Dear Sir: You refer us to Sections 5571 and 5614 General Statutes 1913 and ask if the county board, if it deem proper, could grant you compensation for collection of ditch taxes in certain cases.

If you will examine the original legislative act, from which Section 5614 referred to was taken, you will see that the provisions thereof have no application to proceedings such as you mention; and construing Section 5571, we are of the opinion and so advise, in view of the former opinions of this department, that the county treasurer is not within its provisions, and the county board would have no right to grant you compensation for the collection of ditch taxes.

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

December 30, 1915.

105

COUNTY TREASURER—Without authority to accept second payment of taxes.

Ralph A. Stone, County Attorney.

Dear Sir: I state that in my opinion the county treasurer has no right to accept the payment of taxes a second time on any tract of land in his county. The acceptance of the full amount of the tax and the issuing of an official receipt therefor exhausts the county treasurer's authority as to such tax, and at the same time cancels the tax so that it no longer exists on the books of the county.

In the absence of a statute allowing a second payment, I have no hesitancy in reaching the conclusion that it cannot be countenanced.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

January 14, 1916.

106

COUNTIES—Wolf bounties—Appropriation for—Weight of attorney general's opinions.

Hon. J. A. O. Preus, State Auditor.

Dear Sir: Relative to the payment of wolf bounties, I have to say that Assistant Attorney General Hilton, with my approval, decided that such payment could not legally be made out of appropriations available after August 1, 1915, when a deficiency appropriation had been made for

the specific purpose of paying bounties for the killing of wolves. A bounty does not stand on the same footing as contracts, express or implied. See State vs. Iverson, 120 Minn. 247, 253, where it is held that equitable principles cannot be applied in questions involving the payment of bounties.

I do not think that my opinion of September 13 held that "it is discretionary with the state auditor to determine the intent of the legislature in things of this character." The state auditor must always determine the intent of the legislature in his action in reference to statutory matters, and it is in determining this intent that he must use his discretion. There are many definitions of "discretion." The early one that "the discretion of a judge is the law of tyrants" has been wholly repudiated and in its place have been put definitions like the following:

"Deliberate judgment."

"Acting according to what appears just and proper under the circumstances."

"Giving effect to the will of the legislature."

"A discretion controlled and limited by sound principles of law applied to the facts in each case."

"It must be governed by rule, not by humor; it must not be arbitrary, vague, or fanciful, but legal and regular."

In this state a large discretion has been given to administrative officers in their action upon questions that come before them. The power of judgment or discretion which is vested in a state auditor is like that described in O'Connor vs. Gertgens, 85 Minn. 481, 496, in which the action of the administrative officers of the land office was characterized in the following language:

"It is well settled that authority to hear and determine all questions of fact arising in the land department of the general government is exclusively vested in the appropriate officers thereof. The jurisdiction thus conferred is judicial in its nature, and the decisions of the department officers, when acting within their jurisdiction, are final and conclusive, and cannot be reviewed by any other branch of the government, when unaffected by fraud or mistake."

This is said to be true even when the question is one of mixed law and fact.

Another case illustrating directly the power of the state auditor in acting upon questions before him is State vs. Red River Lumber company, 109 Minn. 185. In this case the state auditor decided that certain land was agricultural in character. It was treated as such but finally appeared to have been not agricultural land but timber land. The court held that the decision of the auditor, though erroneous, was final, and said:

"The auditor so determined in this case, which determination, within the authorities cited, is conclusive against collateral attack. * * *

"Though there was manifest error in the determination, the fact furnishes no reason for departing from the well established rule against collateral attack."

A further question is involved in your inquiry and that is the relation of a state official to an opinion rendered, at his request, by an assistant attorney general.

The law permits the Attorney General to have assistants, and their work is deemed to be, within certain limitations, that of the Attorney General himself. The law of this state would seem to indicate that such opinions should be followed by those to whom they are given. The Supreme Court seems to have suggested the rule in such matters in State vs. Germania Bank, 106 Minn. 164. Paraphrasing its statement on a matter similar to this, the rule would read as follows:

"When the administration of an office, whose head is entitled to the advice of the Attorney General, makes it necessary or expedient to take legal advice and such person obtains such advice from the Attorney General and follows it in good faith, he is exonerated if erroneous action results because of his reliance on such advice."

Personally I have seen no statement of the attitude which should be taken toward an opinion of an Attorney General than that which was given by Attorney General Black years ago, as follows:

"The duty of the Attorney General is to advise, not to decide. A thing is not to be considered as done by the head of a department merely because the Attorney General has advised him to do it. You may disregard his opinion if you are sure it is wrong. He aids you in forming a judgment on questions of law; but still the judgment is yours, not his. You are not bound to see with his eyes, but only to use the light which he furnishes, in order to see the better with your own.

"But though opinions from this office have technically no binding effect, it is generally safer and better to adopt them. Uniformity of decision in the different departments, on similar subjects, is necessary, and cannot be secured otherwise. For the same reason, one attorney general ought to be cautious how he differs from another who has gone before him. For myself, I shall never depart from the precedents when I find it possible to follow them without being unfaithful to my own convictions."

Yours truly,

LYNDON A. SMITH,

Attorney General.

September 28, 1915.

107

COUNTIES—Wolf bounties—County auditor to draw warrant.

C. D. Bacon, Auditor, Cass County.

Dear Sir: Relative to wolf bounties, I have to say that the failure of the state to appropriate sufficient money for the payment of the bounties does not affect the duty of the county to pay the claims for wolf bounties which are duly presented. The county authorities should proceed in the same manner as though there were an appropriation in the state treasury for the full reimbursement of the counties that paid wolf bounties, instead of an implied pledge on the part of the state to reimburse such counties.

I regret to be obliged to come to this conclusion but the legislature has full authority over counties in the matter of prescribing what they shall do, and it would seem that the legislature has said that the auditor shall

issue his warrant upon the treasurer for the amount of bounties properly claimed for the killing of wolves, and it would seem that the counties must assume that the state will reimburse them for the amount of moneys paid out for such bounties at some time, although is has not done so now. The county auditor's warrant is drawn upon the county treasury and the county is to be reimbursed by the state for what it pays out for this purpose.

On the question of the power of a legislature over municipal corporations see Merchants National Bank vs East Grand Forks, 94 Minn. 246, 250-251, and cases cited. See also Hunter vs. Pittsburgh, 207 U. S. 161.

Yours truly,
LYNDON A. SMITH,
Attorney General.

November 26, 1915.

108

COUNTIES—Wolf bounties—Duty of auditor to draw warrant.

C. Rosenmeier, County Attorney.

Dear Sir: You ask whether or not a county auditor is required to draw and issue to the person duly claiming a wolf bounty, the amount of such bounty, when there is no money in the state treasury with which to reimburse the county for money paid out on account of wolf bounties.

In reply to your question I have to say that the auditor, in my judgment, must issue such warrant and must transmit to the state auditor copies of the certificate and warrant, as required by statute, whether there be money in the state treasury applicable to the payment of wolf bounties or not.

You do not ask whether or not the treasurer should pay such warrant until the time comes when there is money in the state treasury with which to reimburse his county for money paid out for wolf bounties. This is the serious question, but as you have not asked it I do not speculate upon how this inquiry should be answered. It will be met when the inquiry comes from any county attorney.

Yours truly,
LYNDON A. SMITH,
Attorney General.

November 24, 1915.

109

COUNTIES—Wolf bounties—Full grown wolf—What is.

C. W. Mahlum, County Auditor.

Dear Sir: You ask what is the difference between a full grown and a cub wolf. You state that you are undecided whether an animal grown to that size and age where it is able to take care of itself, yet not really full grown, should pass for a cub or for a full grown wolf.

As the wolf bounty statute indicates, the legislature divided wolves into two classes, cubs and full grown wolves. It would follow that a wolf that was not full grown should be considered as a cub. The logical conclusion would be that a wolf is full grown when it has reached such a stage of growth that is will have no appreciable growth thereafter. This would not necessarily mean that the weight of the wolf would not increase, but that it had reached a condition of stature, anatomical structure and skeleton development that would not be thereafter appreciably changed.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

May 25, 1916.

110

COURTS—Contempt of by affidavits.

E. H. Bahe.

Dear Sir: You enclose copy of an affidavit filed in your court in a civil action therein pending and inquire whether the same constitutes contempt of court.

I call your attention to Sections 7615-7616 General Statutes and also to the cases found in the following reports: 9 Cyc. 20; 3 Minn. 274; 9 L. R. A. 566; 66 N. W. Rep. 1017.

I quote the following:

"Contempt may be committed by inserting in pleadings, motions, affidavits briefs, arguments, applications for rehearing, or other papers filed in court or in memoranda on the court docket, impertinent, scandalous, insulting or contemptuous language reflecting on the integrity of the court."

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

September 26, 1916.

111

COURTS——District judges reimbursed for expenses incident to assembling at Capitol to revise rules practice.

Hon. L. S. Nelson, District Judge.

Dear Sir: You call attention to Section 167, G. S. 1913, in which provision is made that the judges of the district court shall annually assemble at the Capitol on the first Wednesday after July 4, to revise the rules and practice in such courts. Reference is also made to Chapter 466, G. L. 1913, in which provision is made for the payment to the judges of the district courts, in addition to the amounts provided by law, all sums they shall hereafter pay out as necessary railway, traveling and hotel expenses, while absent from their places of residence in the discharge of their official duties.

It appears that this year some of the judges met at the Capitol on Wednesday, July 5, and there not being a quorum, an adjournment of the meeting was taken to Duluth for July 10, that being the date fixed for the State Bar Association meeting.

You inform us that the state auditor is in doubt as to whether the expenses incident to the attending of such meeting at Duluth can be properly charged to the state.

A communication from the state auditor was received by this department on November 18, and there is now before us your expense account bearing date October 31.

I am of the opinion that the attendance upon the meeting referred to in Section 167, G. S. 1913 comes within the discharge of the official duties of such judges and that for attendance at that meeting, whether a quorum was present or not, the judges should be reimbursed for the expense referred to. However, I do not think that the expenses incident to an adjourned, or any other, meeting held by the judges at a place other than the capitol of the state would constitute a proper charge against the state.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

November 21, 1816.

112

CRIMINAL LAW—Abandonment of illegitimate child by father.

H. J. Edison, County Attorney.

Dear Sir: In re the making of a requisition upon the Governor of the State of Indiana for the surrender of one———— you stated that said ————is the father of a child now about nine months old; that said child was not born in wedlock; that said————has never had the custody of said child, nor has he at any time exercised any supervision over the child or contributed in any way to its support; that he has left the State of Minnesota ostensibly for the purpose of avoiding legal proceedings to charge him with civil and criminal responsibility arising out of his paternity.

You ask whether under these circumstances the said————is criminally liable under the provisions of Section 4933, Revised Laws 1905, as amended by Chapter 144, Laws 1911.

I am of the opinion that your question is to be answered in the negative.

The section above referred to, so far as material, reads as follows:

"Every parent or other person having the care or custody for nurture or education, of a child under the age of ten years, who shall desert such child in any place with intent wholly to abandon it shall be punished by imprisonment, etc."

In my opinion the said————has never had the "care and custody for nurture or education" of the child, of which he is alleged to be the father. In other words, in my opinion the word "care" as used in said

section must be construed in connection with the other words used in the section and implies, if not actual custody, at least supervision or dominion over the child.

It is quite insistently urged that the word "care" was to be construed as the equivalent of legal obligation to support. If such were the case the words "who shall desert such child" would have to be construed as meaning or as being the equivalent of "who shall fail to perform his legal duty to support."

But assuming that the contention as to the meaning of the word "care" is well founded, I beg to point out that in the case stated by you there is no legal obligation resting upon the father of an illegitimate child to support it.

"The father of a bastard child is not legally liable for its support, except as provided in this chapter." (The bastardy act) (State vs. Hausewedell, 94 Minn. 179).

So too, the Supreme Court of Alabama in the case of Simmons vs. Bull, 21 Ala. 501; 56 Am. Dec. 257, said with reference to a bastard child:

"In the absence of a statute, the father is under no legal obligation to support him and the statute prescribes the mode, and the only mode, by which this support can be obtained."

See also State vs. Tieman, 32 Wash. 294; 73 Pac. 375; 98 Am. St. Rep. 857

It follows that if the word "care" is to be construed as meaning, the legal obligation to support, that it is not applicable to the father of a bastard child for the reason that there is no legal obligation on the part of such a father to support such a child.

Of course it could not be contended that————————ever had the custody of the child for nurture or education.

Yours truly,

C. LOUIS WEEKS,

Assistant Attorney General.

March 4, 1915.

113

CRIMINAL LAW—Carrying concealed weapons—Police officer exception.

H. T. Donaldson, Justice of the Peace.

Dear Sir: The statute, Section 8770 G. S. 1913 provides that,

"Every person who shall carry, conceal or possess * * * any knife, pistol or other dangerous weapon, shall be guilty of a gross misdemeanor, and the possession by any person other than a public officer of any such weapon, concealed or furtively carried on the person shall be presumptive evidence of carrying, concealing or possessing with intent to use the same."

While the language employed is not as clear and direct as it might be, I think it is the fair intent and purpose of the statute to expect a police

officer from the provisions thereof. The common sense of the situation would seem to require such a construction, and I have no doubt that such was the legislative intent.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

December 6, 1916.

114

CRIMINAL PROCEDURE—Costs taxed against defendant.

Ottocar Sobotka, Esq.

Dear Sir: I beg leave to advise you that no costs can be taxed or collected from a defendant in a criminal case except where a fine is imposed including the costs and the defendant pays the fine and costs.

Clerk's fees, in a case such as you mention, are collected by the clerk from the county as other fees. If he is on a salary basis, then no costs will be collected in such a case as you mention.

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

September 25, 1915.

115

CRIMINAL LAW—Dance hall—What is.

P. S. Olsen, County Attorney.

Dear Sir: Section 8685 G. S. 1913, defines a dance hall as follows:

"A public dance hall, as the term is used in this act shall be taken to mean any room, place or space open to public patronage in which dancing, wherein the public may participate, is carried on and to which admission may be had by the public by payment either directly or indirectly of an admission fee or price for dancing."

In my judgment, it is not necessary that the room, place or space, etc., be used for dancing exclusively in order that it shall be a dance hall.

Yours very truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

November 26, 1915.

116

CRIMINAL LAW—Indians—Jurisdiction of state in criminal matters.

Graham M. Torrance, County Attorney.

Dear Sir: You ask for our opinion on the hereinafter stated question:

"Should the corner of this (Beltrami) County hold an inquest upon the Red Lake Indian Reservation, over the body of a tribal Indian, a member of the Chippewa Red Lake Tribe, who has been shot by another tribal Indian of the same tribe, on the reservation; both Indians being wards of the government and receiving annuities from the government?"

I am of the opinion that your question should be answered in the negative. Section 994 Statutes of 1913 provides:

"Coroners shall hold inquests upon the dead bodies of such persons only as are supposed to have come to their death by violence and not when death is believed to have been and was evidently occasioned by casualty."

The provisions of our statutes calling for an inquest are auxiliary to the administration of the criminal laws of this state.

"Tribal Indians, for acts committed within the limits of their reservation are not subject to the laws of the state."

Bem-way-bin-ness vs. Eshelby, 87 Minnesota 113.
State vs. Campbell, 53 Minnesota 354.
U. S. vs. Kagama, 118 U. S. 375.
U. S. vs. Thomas, 151 U. S. 585.

Yours truly,
C. LOUIS WEEKS.
Assistant Attorney General.

August 25, 1915.

117

CRIMINAL LAW—Lewdness defined.

Frank G. Kiesler, County Attorney.

Dear Sir: You call attention to Section 8718-8726, G. S. 1913, and make particular reference to the word "lewdness" contained therein. You inquire in effect as to whether this word can be so construed as to cover the running of an unlicensed drinking place in which intoxicating liquors are sold, and where persons become intoxicated and indulge in brawling, fighting and the use of obscene language and where persons are at times assaulted, and the peace of the neighborhood disturbed.

In my opinion your inquiry is to be answered in the negative. The authorities that I have examined would seem to indicate that the word "lewdness," as used in the statute referred to, has reference only to unlawful acts of a sexual character.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

February 14, 1916.

118

CRIMINAL LAW—Instituting prosecutions.

Richard E. Goldner, Esq.

Dear Sir: In this state the criminal laws are enforced by local officers and citizens are expected to begin prosecutions as a matter of good citizenship. These prosecutions may be begun before justices of the peace, court commissioners, municipal judges and district judges when in the county. You can also complain to the grand jury of your county, and

if any one interferes with your going before the grand jury with evidence you should submit the matter to the judge sitting and in charge of the court.

Yours truly,
LYNDON A. SMITH,
Attorney General.

April 3, 1916.

119

CRIMINAL LAW—Procedure—Pleading ordinance.

J. J. Hadler, Village Attorney.

Dear Sir: The state constitution provides that all indictments shall conclude "against the peace and dignity of the State of Minnesota."

I am not aware of any statute imposing this requirement in the case of a criminal complaint as distinguished from an indictment and my understanding is that it is not usual to use those words in a complaint for the violation of a municipal ordinance.

It is ordinarily sufficient in a complaint for the violation of a city or village ordinance to set up the facts constituting the violation and ending with the words "contrary to the provisions of the ordinance" (describing it by number if it has one, or by its date and title). It would do no harm to follow after these words "and against the peace and dignity of the State of Minnesota."

The constitutional right to a trial by jury upon accusation of a criminal offense does not apply to proceedings for the punishment of offenders against municipal ordinances.

City of Mankato vs. Arnold, 36 Minn. 62.

Your truly,
JAMES E. MARKHAM,
Assistant Attorney General.

December 13, 1916.

120

CRIMINAL LAW—Prisoners—Earnings—Payment to dependent relatives.

State Board of Control, Capitol.

In my opinion, the Board of Control may lawfully pay the "earnings" of a prisoner in the state prison or state reformatory to, or for the use of, the wife and children of such prisoner, or his dependent relatives, without his consent to the making of such payment, provided the rules and regulations of the board relating to such matter so provide. Section 5459, R. L. 1905, relates solely to the earnings of prisoners in the reformatory and is superseded and repealed by Chapter 304, Laws 1909.

Section 1 of Chapter 304, Laws 1909, provides:

"That the State Board of Control be and it is hereby authorized and empowered to provide for the payment to the prisoners confined in the state prison or in the state reformatory of such pecuniary earnings, and for the rendering of such assistance as it may deem proper under such rules and regulations as it may prescribe."

Section 2 of Chapter 304 provides:

"Any money arising under section 1 of this act shall be and remain under the control of the state board of control to be used for the benefit of the prisoner, his family or dependent relatives, under such regulations as to time, manner and amount of disbursements, as the board may prescribe."

It is obvious from these two sections that the word "payment" as used in Section 1, is to be construed as though it read "crediting," since the two sections read together contemplate that such earnings shall remain under the control of the State Board of Control until actually paid out and Section 2 provides, that the same may be disbursed for the benefit of the prisoner, his family or dependent relatives.

The construction above set forth is further fortified by the language found in the last part of Section 2 which provides for the forfeiture of the earnings credited where the prisoner is guilty of a breach of prison discipline or escapes. In other words, the earnings credited are not the absolute property of the prisoner; if they were, the legislature could not thus provide for their summary confiscation.

Yours truly,

C. LOUIS WEEKS,

Assistant Attorney General.

May 17, 1916.

121

DETECTIVE AGENCY—Branch must act under a separate license.

Hon. W. S. Hammond, Governor.

Dear Sir: I have to say that I am of the opinion that each branch of a detective agency must act under a separate license. I have held in relation to the licensing of employment bureaus as follows:

"There shall be one central principal place of business at which the principal business of the employment bureau shall be carried on, and where its books shall be kept and the inspection of its methods of conducting business made if necessary."

The statutes are similar enough so that I think the same principle of law governs each in the matter of license.

Yours truly,

LYNDON A. SMITH,

Attorney General.

November 22, 1915.

122

DRAINAGE—Abandonment of enterprise after contract let.

Charles E. Houston, County Attorney.

Dear Sir: It appears from your letter that there is a drainage proceeding pending before the county board of your county, for the construction of a drainage ditch. This ditch was established by order of the county board and a contract was let for the necessary construction. * * *

You then ask in substance if the county board with the consent of the contractor has the power to abandon this ditch proceeding and cancel the contract.

The general rule is well declared by a learned text writer.

"At any time before the rights of third persons have vested, the council or other corporate body may, if consistent with its charter or rules of action, rescind votes and orders."

Dillon on Municipal Corporations, 290.

A very instructive case in point, is State ex rel Sullivan vs. Ross, 118 N. W. Repts. 85, a Nebraska case where the question was whether a board could abandon its proceedings in the matter of laying out a ditch, and in that case the court says:

"In the present case, if the ditch had been opened and damages assessed, the case would fall within the rule of the McNair case; however, where rights of others are vested there can be no reconsideration, and this was the essence of the holding in that case."

I would suggest that you examine this case, as it offers considerable information upon the question involved in your letter, and one which I think furnishes a complete solution of the matter. Following the reasoning of that case and in fact, in the absence of any statutory authority, I am of the opinion that when bonds are issued, assessments levied, and a contract made for the construction of a county ditch, the power vested in the board has been once exercised, and is beyond recall, and the board would have no right to abandon the proceedings.

Yours truly,

JOHN C. NETHAWAY,

Assistant Attorney General.

December 22, 1915.

123

DRAINAGE—Appeal certiorari—Final order.

W. H. Cherry, County Attorney.

Dear Sir: It is my view of the statute that a party desiring to question the validity of the proceedings leading up to the final orders establishing the ditch and assessing the damages, and benefits therefor must proceed by certiorari, and that this is the exclusive remedy for errors and irregularities in the proceedings. The court has held that no appeal lies from a judgment establishing a county ditch.

Aspelin vs. Murray County, 115 Minn. 440.

The procedure is for the protection of the rights of the property owner as indicated by the court in an earlier case, from which I quote,

"An owner against whose lands a drainage assessment is levied under the statute referred to may; (1) appeal upon the statutory grounds and be heard as to the amount of benefits assessed against his land, or damages awarded to him; (2) by certiorari bring to the district court for review any order in such proceedings from which no appeal is allowed and which affects his substantial rights; (3) reserve for and urge upon the application for judgment those defences allowed by Section 919, R. L. 1905."

State vs. Johnson, 111 Minn. 255.

It is not contemplated that the proceednigs for the establishment of the ditch shall be subject to review by appeal, except as to the amount of benefits or damages to the particular tract involved, the single exception being that an appeal will lie from an order refusing to establish the ditch.

State vs. Nelson, 116 Minn. 424.

Webb vs. Lucas, 125 Minn. 403.

It may be that in the case to which you refer, the right to question the irregularity of the proceedings leading up to the final order was not pressed upon the appeal or was decided in favor of your contention, but I take it that a reference to these authorities will be useful to you in the further prosecution of the litigation.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

May 10, 1916.

124

DRAINAGE—Assessment of road benefits against county main ditch and branches.

Albert H. Enersen, County Attorney.

Dear Sir: You ask—1. In case of the construction of a county ditch and resulting benefits to a state road, should the assessment therefor be entered against the township or against the county?

By Section 5551, G. S. 1913, it is provided that the benefits accruing to any public road or street may be assessed against the city, village or town which is by law "chargeable with the duty of keeping such road or street in repair."

Prior to the legislation of 1913, the duty of maintaining all public highways was imposed upon the town through which the highway was laid out and used, but the legislation of that year imposed the duty of maintaining state roads and rural highways upon the counties through which they are laid out and operating, thus relieving the township of this obligation. The town being relieved of the obligation to maintain the highway, it would seem to follow that it is also relieved of the obligation to pay the assessment for the construction of a drainage ditch, the construction of which benefits a state highway.

It is provided by Section 5529, G. S. 1913, that:

"All lands benefited by a public ditch, drain or water course, and all public or corporate roads or railroads, so benefited in whole or in part, shall be assessed in proportion to the benefits for the construction thereof, whether said ditches pass through said lands or along or near the line of such roads or railroads or not."

This section authorizes an assessment against a public road benefited by the construction of a drainage ditch, and as the county is charged with the obligation of keeping the road in repair, it would seem to follow that the proper course would be to levy the assessment in general against the county, and pay it out of the road repair fund.

2. I am not sure that I understand your second question. As I read your inquiry the situation instanced is one where the main drainage ditch is carried on for some distance, but is subsequently divided into two or more branches or outlets, presumably for the reason that the natural outlet into which the water would be drained would not take care of the entire quantity of water if discharged through a single drainage outlet. In this situation, if my understanding of it is correct, I think the enterprise should be considered as one system and that the aggregate cost of the entire improvement, including all of the outlets, should be assessed upon all of the lands benefited by the improvement in proportion to the benefits accruing to each particular tract.

Yours truly,

JAMES E. MARKHAM,
Assistant Attorney General.

July 20, 1916.

125

DRAINAGE—Road benefits assessed against county.

S. A. Brown, County Auditor.

Dear Sir: You state that the question has been raised in your county several times as to whether it is legal to assess road benefits against the county for their county or state roads in connection with the construction of county or judicial ditches.

I call your attention to Section 5528, G. S. 1913, where it is provided:

When any ditch established under this act drains either in whole or in part any public or corporate road or railroad or benefits any of such road so that the roadbed or traveled track of such road will be made better by the construction of such ditch, and viewers shall estimate the benefit arising therefrom to such roads."

I think that this statute would be legal to assess road benefits against the county.

Yours very truly,

JOHN C. NETHAWAY,
Assistant Attorney General.

December 22, 1915.

126

DRAINAGE—Assessment—Town ditch—How payable.

Arthur Ellis, Town clerk.

Dear Sir: Your inquiry is as to the time within which assessments for the construction of township ditches are required to be paid, and you quote the suggestion contained in a letter received by you from the state drainage engineer to the effect.

"That the law on this point seems to leave the question as to the length of time in which to pay ditch taxes on township ditches to the town board and the petitioners."

The statutory provisions relating to the construction of town ditches are not very clear, but I do not find any provision authorizing the distribution of the assessments over a period of years. The statute seems to contemplate that where the amount of damages and benefits is not arrived at by agreement between the parties whose land is affected and the town board, that the board shall assess and apportion the damages, and that the town clerk shall then make a statement, showing the total cost of the ditch and the amount of estimated benefit to each public street or road, and to each tract of land benefited by the improvement. This statement is required to be recorded in the office of the register of deeds, and the amount entered against each tract of land benefited becomes a first lien thereon until paid, taking precedence of mortgages or other incumbrances on the land. It is provided that the amount charged against each tract of land shall bear interest from the time that the town clerk's statement is filed in the office of the Register of Deeds at 6 per cent per annum until paid.

The statute also provides that any property owner may pay his assessment to the county treasurer at any time after the recording of this statement, and when such payment is made, including interest to the time of payment, the town clerk is required to issue his certificate and this certificate may be recorded in the office of the register of deeds, and when so recorded the register is required to discharge the lien. The statute contains this provision:

"On or before November 15 next following such filing, the town clerk shall notify the auditor of each county in which said statement is filed, of the time of such filing and of the book page in the office of said register of deeds of said county in which said statement is filed and of the certificates of payment in full that he has issued; and said auditor shall thereupon, forthwith, enter upon the tax lists of said county, the amount of such lien then remaining unpaid against each respective tract of land subject thereto, as a tax upon said tract, which shall be subject to be collected with light penalties as are other taxes for said year, until all is paid."

This seems to be the only provision upon the subject. The meaning of the words, "until all is paid," at the end of this section, is not clear, but I am satisfied that, standing alone, it does not create the inference that the payment may be divided into installments extending over a period of years. I think the law contemplates that as the benefits resulting to

each tract of land shall be payable as soon as the town clerk's statement is filed in the office of the register of deeds, and that if not paid before the 15th of the following November, it goes upon the tax roll for the succeeding year, and must then be paid in full at the same time that the other taxes upon the land are payable.

Yours truly,

JAMES E. MARKHAM,

Assistant Attorney General.

June 17, 1916.

127

DRAINAGE—Bridges over ditches.

O. E. Anderson, Esq.

Dear Sir: This department some time ago held that towns were compelled to construct bridges across public ditches to intersect on each side of the bridge with the public highway. The expense of constructing such a bridge is an element of damages that must be taken into consideration by the ditch viewers when awarding damages to the property along the ditch and if no damages are awarded for building a bridge, and the towns do not appeal from the award, they are bound by the same, and must build the bridge at their own expense.

I would call your attention, however, to Chapter 252, General Laws 1915, which provided that where a public drainage ditch has been or shall hereafter be constructed wholly or partly along a boundary line between towns and the excavated material has been deposited on said boundary line or within two rods on either side thereof, the cost of the construction and maintenance of all bridges heretofore or hereafter constructed across such ditch along said boundary line shall be paid for and borne equally between the town within which such bridges are constructed and situated and the town adjoining said boundary line.

Again, Chapter 100, General Laws, 1915, provides that whenever the State Drainage Commission shall have heretofore constructed or partly constructed an outlet for a state ditch, under the provisions of Chapter 138, General Laws 1911, and which state ditch was constructed under the provisions of Chapter 221, General Laws, 1893, and which outlet has been constructed across the town road at a point other than where the channel of the stream or river crosses such town road, the county board is authorized, empowered and directed to construct a substantial bridge across such outlet ditch on such town road.

Yours truly,

JOHN C. NETHAWAY,

Assistant Attorney General.

June 1, 1915.

128

DRAINAGE—Proceeds of Bonds not to be used for other purposes.

Franz Jevne, County Attorney.

Dear Sir: The County Treasurer states that your county has issued and sold its bonds in specified amounts for the construction of several judicial ditches. In a case where the aggregate of warrants issued against a certain ditch exceeds the proceeds of the bonds for that ditch, he then asks if the moneys received from the payments of liens or installments thereof, or the moneys received from the state for interest on the liens against state lands, may be used to pay such excess, or must that money be reserved as a fund to meet the bonds issued.

You are advised that it has been the holding of this department that when bonds are issued to defray the expense of constructing a ditch, the proceeds of such bonds cannot be diverted to any other purpose, the installments of assessments as they fall due, and the interests thereon cannot be diverted from the use to which they should apply; that is, the payment of the bonds; any deficiency that might arise in the fund to pay for any ditch must be borne by the county from its revenue fund, or collected by a supplementary statement to be filed with the register of deeds. Money collected on one ditch cannot be used on another. The funds must be kept separate.

See opinions, Attorney General, 1912-1913.

Yours very truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

December 13, 1915.

129

DRAINAGE—Sale bonds—No publication notice required.

Charles Johnson, County Attorney.

Dear Sir: You ask—"Has the board of county commissioners the right to enter into a contract with a loan company whereby they agree to sell to said company all ditch bonds to be issued during a certain period of time, said loan company to take such bonds at par at a fixed rate of interest stipulated in the agreement; or must the board advertise for bids?"

If you will refer to Section 4 of Chapter 300, General Laws of 1915, you will find therein this provision:

"Said county board shall have power to negotiate said bonds as they shall deem for the best interests of said county, but not for less than their par value."

By reason of such statutory provision you are advised that the board need not advertise for bids. The balance of your inquiry should be answered in the affirmative.

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

December 30, 1915.

130

DRAINAGE—Separate accounts for each improvement—Funds not to be transferred.

Andrew E. Fritz, Public Examiner.

Dear Sir: The drainage law, before the amendment of 1915, to which you direct attention, provided that the proceeds from all drainage bonds should be placed in a general ditch fund, and that into this fund all moneys received from the payment of ditch liens should be paid and it seems to have been contemplated that this fund should be available for the payment of drainage bonds and other obligations arising out of drainage operations, without reference to the particular ditch system from which the money was received, or for which it was expended. The amendment of 1915, to which you direct attention, reads:

"The auditor shall keep a separate account for each drainage ditch system, which account shall be credited with all moneys arising from the sale of bonds, all moneys received as interest or penalties or upon liens, charges, assessments and from all other sources on account of such drainage system, and which account shall be debited with every item of expenditure made on account of such drainage system."

There is no express provision to the effect that the county treasurer shall keep upon his records a separate account of the funds received, and disbursed for each drainage system or district in the county, but I think this is the plain implication from the provision in question. The legislative intention, although not clearly expressed, is reasonably manifest from the language implied, and the treasurer should be required to establish and keep a separate account with each drainage ditch system, to correspond with the distinct and separate accounts which the auditor is required to establish and maintain under the amendment in question.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

May 6, 1916.

131

DRAINAGE—New ditch passing over or through ditch previously constructed.

J. E. Kasner, County Auditor.

Dear Sir: I have no doubt that a separate and independent proceeding can be maintained for the construction of a main ditch and branches, although a portion thereof may pass over or through an old ditch by which the old ditch would be widened and deepened, but there might some complication arise in regard to the assessments against property benefited by the old ditch when originally constructed and it would not be fair to assess such property for the construction of another ditch when in fact the ditch along the property had already been constructed, and it only needed repairing, which might be less expensive than the original

cost of the ditch. These are matters which I think should be taken into consideration when the viewers appraise the benefits and I cannot see why they may not be adjusted in a new and original proceeding.

Yours truly,

JOHN C. NETHAWAY,
Assistant Attorney General.

October 26, 1915.

132

DRAINAGE—Meandered lake—Action county board.

George Frerd, Esq.

Dear Sir: You ask to be informed as to the right of property owners bordering upon a meandered lake to drain the same into a river about one-half mile away, through the land of one of the riparian owners bordering on the lake. You indicate that the property owners themselves desire to construct the drain, the expense thereof to be apportioned among them by agreement.

I have to advise you that the plan you suggest cannot be carried out.

Section 8949, G. S. 1913, provides:

"Every person who shall drain or cause to be drained, or shall attempt to drain in any manner any lake, pond or body of water which shall have been meandered, and its metes and bounds established by the government of the United States in its survey of public lands, shall be guilty of a gross misdemeanor."

By section 5523, G. S. 1913, authority is conferred upon the county board of the several counties of the State to cause to be constructed drainage ditches for the draining of wet or submerged land, and thereby may lower or drain the channel of any lake whether navigable and whether meandered or not; provided that—

"No meandered lake shall be drained under the authority of this act, except in case such lake is normally shallow and grassy and of a marshy character, or in case such meandered lake is no longer of sufficient depth and volume to be capable of any beneficial public use of substantial character for fishing, boating or public water supply."

I take it that the lake to which you refer is of such character that the county board would have the right to proceedings instituted for that purpose, to have it drained under the provisions above referred to. Your county board on petition of the owners of the land bordering on the lake would in all probability institute the necessary proceedings. The board would be obliged to do the work by contract and assess the cost upon the lands benefited by the drainage of the lake.

Yours truly,

JAMES E. MARKHAM,
Assistant Attorney General.

133

DRAINAGE—Petition—Describes improvement fully including laterals.

E. L. Thornton, Esq.

Dear Sir: I would say that in my opinion it is not necessary to describe in the petition for the establishment of a drainage ditch whether it is to be a tile or an open ditch, but I do believe that it is necessary to describe the lateral or branch ditches that are to be constructed.

You will notice by referring to that part of section 5526, General Statutes, 1913, found on page 1206, that the engineer is required to make a correct survey of the line of the ditch, drain, creek or water course "and of the branches thereof." Throughout that part of the section branch ditches are spoken of and mentioned in connection with the original ditches. Defining the duties of the engineer there is the provision that,

"When he finds it necessary, to provide for running said ditch underground, through drain tiles, or other materials, as he deems best, by specifying the size and kind of tile or other material to be used in such underground work and shall estimate the cost of the same as a part of the total cost of the work."

It would seem to me that when a petition is made for the construction of a ditch that the law then leaves it for the engineer to determine whether it should be an open or a tile ditch. If that be so, then you can very readily understand that it is not necessary to mention in the petition which is desired to be constructed. I am, however, clearly of the opinion that the petition should describe all branch or lateral ditches that the petitioners wish to have constructed in connection with the main ditch.

Yours truly,

JOHN C. NETHAWAY,
Assistant Attorney General.

September 30, 1915.

134

DRAINAGE—Petitioners—Withdrawals.

James H. Hall, County Attorney.

Dear Sir: You are advised that under the conditions stated I hardly see how part of the petitioners for a county ditch and laterals thereto can withdraw that part of the petition which affects one of the laterals. The statute pertaining to ditches provides that under certain circumstances the principal and sureties on a drainage bond may by paying the costs which have been incurred, have the proceedings for the establishment of a ditch dismissed. I am of the opinion that this can be done in only the prescribed way, by petition, and the proper time to consider such petition would be when the matter comes up for hearing upon the making of the final order establishing the ditch. Under the law, a ditch which is constructed by private parties cannot be connected with a ditch already constructed without proper proceedings and application to the county board, when an opportunity would be afforded for establishing the price which

should be paid for affording that outlet. As I understand the law, it was never contemplated that after a ditch was constructed, that others could construct a ditch to empty into the main ditch without paying their share of the benefits which they derived by reason of such outlet.

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

October 26, 1916.

135

DRAINAGE—Construction of laterals—Petition bond.

A. Frederickson, County Attorney.

Dear Sir: Where a petition is filed for the construction of a lateral ditch, which is to empty into a ditch already constructed, that the proceedings should be the same as provided for the construction of the original ditch, and a bond must be furnished to the county, as provided by statute in the case of the construction of an original ditch.

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

October 8, 1915.

136

DRAINAGE—Petition by town board—Bond.

Axel H. Olson, Esq.

Dear Sir: The statute requires that before any ditch proceeding is instituted a petition shall be filed with the county auditor, signed by one or more of the land owners whose lands will be affected or assessed for the expense of the construction, or by the supervisors of any township liable to be affected by or assessed for the proposed construction; and one or more of the petitioners is required to give a bond with good and sufficient sureties conditioned to pay the expenses in case the county board shall fail to establish the proposed ditch.

This language would seem to authorize the supervisors of the township in their official capacity, to petition for a county ditch, but I find no express provision authorizing the township to execute the necessary bond and it is at least doubtful whether it has that authority.

I think the safe course to pursue, in case the town board is in favor of the construction of the proposed county ditch, is to have a petition signed by at least one property owner whose lands would be affected by the procedure. The county board may very well sign the petition also as indicating its wish that the ditch be constructed and its willingness that a part of the expense be assessed against the public roads within the township benefited by the improvement; but I think that this is as far as the town board ought to go, and that the proceeding ought not to be

instituted upon the petition of the town board alone, and that the town board ought not to assume to give a bond for the payment of the expense of the proceeding in case the ditch is not ordered, inasmuch as there is no express provision of statute authorizing the board to give such bond.

Yours truly,

JAMES E. MARKHAM,
Assistant Attorney General.

May 6, 1916.

137

DRAINAGE—Petition—Insufficient bond—Petitioners not generally liable for expense.

Burt I. Weld, Esq.

Dear Sir: The statute provides that at the time of filing such petition, one or more of the petitioners shall give bonds with good and sufficient freehold security, payable to the county or counties, as the case may be, to be approved, including the amount and sureties, by the clerk of the district court of the county where such proceedings are instituted, said bond to be conditioned to pay the expenses and costs in case the court or the judge thereof shall fail to establish proposed ditch, drain or water course. The statute contains no provision imposing upon the petitioners the general obligation to pay the cost of the proceedings for the establishment of a judicial ditch, and I take it that, independent of the statute, such obligation does not exist.

I am of the opinion therefore that the only claim that can be made against the petitioners for reimbursement on account of the expenses incurred in the conduct of the proceedings where the court denies the petition for the establishment of a ditch must be based upon the bond given by the petitioners under the provision of statute above referred to, and as that obligation in the instant case has been fully paid and discharged, the petitioners have met the requirements of the law and fully discharged their obligation and are not liable for the payment of any further costs or expenses incurred in the proceeding.

Yours truly,

JAMES E. MARKHAM,
Assistant Attorney General.

July 12, 1916.

138

DRAINAGE—Petitioners' bond—Expenses in excess of bond—Obligation of County.

E. V. O'Brien, County Auditor.

Dear Sir: You in substance state that parties petitioned for a judicial ditch and accompanied the petition by a one-thousand dollar bond. You then ask:

"If the expense exceeds the bond and the ditch is not established, who pays for the debts above the bond?"

Section 5525 provides, after setting forth the requirements of the petition, that one or more of the petitioners should give a bond with good and sufficient freehold sureties payable to the county, to be approved, including amount and sureties, by the auditor, conditioned to pay all expenses in case the county board or the court shall fail to establish the ditch.

Section 5553 General Statutes 1913 has the same provision in regard to judicial ditches except that the bond is to be approved, and the amount fixed by the clerk of the court in which the proceedings are pending.

In Meinert vs. Bottcher, 60 Minn. 204, the court, in speaking of the bond in that case, which is unlike the one in the instant case, said:

"If this was a mere bond in a penal sum, on a condition to be void upon the doing of some collateral act by the obligor or by a third party, the penalty of the bond would doubtless be the limit of liability on the instrument itself."

Again in Nelson vs. Armstrong, 93 Minn. 449, an action upon a bond given to secure the safe keeping of deposits in a bank, the court in rendering its opinion says in ordering an amendment of the findings of the court below which had given plantiff judgment for $120 more than the penalty of the bond:

"While the difference between the penalty and amount for which judgment was ordered was technically within the errors assigned, no discussion of this feature was made at the argument or considered in the opinion, and, it being our view that the appellant surety was only liable to the extent of the amount of the penalty in the bond and interest thereon."

In view of these rulings which seems to declare a universal rule, the liability on this bond is limited to the penalty, and it would appear that in case the expense exceeds the penalty of the bond it is a loss which must be borne by the county itself.

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

December 30, 1915.

139

DRAINAGE—Petition for ditch repairs.

C. A. Youngquist, County Attorney.

Dear Sir: The statute in express terms does not require a petition for the repair, widening, deepening, or extending of a drainage ditch, but I take it that orderly procedure for such improvement requires that the proceedings be initiated by a petition, and it would seem that the original petition and the supplemental petition, to which you make reference, may be considered by the board as the basis of its order appointing an engineer to perform the duty of reporting upon the entire project and submitting the necessary plans and specifications therefor.

If this communication does not clear up the situation which you have in hand, I hope you will feel free to make such further inquiries as you deem necessary.

With kind regards,

Yours very truly,
JAMES E. MARKHAM,
Assistant Attorney General.

July 25, 1916.

140

DRAINAGE—No petition required in repair proceedings.

Hon. Charles H. Warner.

Dear Sir: In answering your inquiry, I think the better course to pursue is to refer you to section 5552, General Statutes of 1913, and Section 6, Chapter 300, General Laws of 1915. By examining those laws, you will find a complete and thorough course of proceeding for the repairing of ditches, and this law applies to state ditches as well as county and judicial ditches.

We have held that if the county board has sufficient funds in the treasury to defray the expenses, and they do not desire to make an assessment, they may pay the cost out of the revenue fund, as provided for in the laws referred to; however, if they expect to reimburse the revenue fund by an assessment upon the property, then viewers must be appointed to assess such benefits. It is not necessary that a petition should be presented to the board, they may act upon their own motion the same as repairing highways; nor is it necessary that an engineer be appointed if the cost of the improvement and other necessary information can be obtained without the service of an engineer.

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

September 24, 1915.

141

DRAINAGE—Procedure to establish county ditch.

Charles Klein, Esq.

Dear Sir: Ordinarily the procedure looking to the establishment of a county ditch is as follows:

1. A petition signed by one or more of the land owners whose land will be liable to be affected by the ditch is filed with the county auditor together with a bond.

2. Notice of filing of petition and of time and place of hearing is published three weeks in some county newspaper.

3. An engineer is appointed who surveys the line of the proposed ditch.

4. Said engineer submits a detailed report which is filed with the clerk of court or auditor.

5. Three viewers are appointed by board to assess the benefits or damage to each tract of land affected.

6. Said viewers file with county auditor their findings and report.

7. Auditor calls special meeting county board and gives notice thereof to all interested parties.

8. County board holds a hearing, takes testimony and makes its order in the premises.

Sections 5525-5533 G. S. Minnesota 1913.

In establishing judicial ditches the matter is heard by the judge of the district.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

October 12, 1916.

142

DRAINAGE—Publication of order establishing.

J. A. Lee, County Attorney.

Dear Sir: You inquire whether the final order establishing a county ditch in accordance with the provisions of Section 5532, G. S. 1913, must be published at length as a part of the proceedings of the Board of County Commissioners.

I do not find any provision in the drainage law requiring the publication of the final order and I think the general provision for the publication of the minutes of the Board of County Commissioners, as contained in Section 690, G. S. 1913, would be satisfied by the publication of a general statement with the report of the viewers so presented and so confirmed, perhaps adding the words, "by the adoption of the following resolution;" and then publishing the resolution omitting the descriptions and other matter.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

September 18, 1916.

143

DRAINAGE—Repair of ditches—Duty of county board.

Paul Ahles, County Attorney.

Dear Sir: You state that a petition was presented to the commissioners for the cleaning and repairing of a county ditch which was constructed over twenty years ago; that as you understand the law the party or parties making the petition should file a bond, the same as if the petition were made for the construction of a ditch, that the viewers should

be appointed to assess the benefits, and that an engineer be engaged to make specifications for the cleaning out of the ditch. You then ask if you are correct in this construction of the law.

By reason of the peculiar language of Section 5552, General Statutes 1913, you will see that it is made the absolute duty of the county board to keep the ditch in repair and this must be done, as we have held, whether a petition is presented or not. In making such repairs, if the cost is expected to be assessed against the property benefited, then viewers must be appointed and observe the same proceedings as if it was the construction of a ditch and an engineer may be appointed if the board deem it necessary.

I do not think that Chapter 300, G. L. 1915, has amended the law found in Section 5552 so as to abrogate the ruling heretofore made by this department and the law followed in this case.

Yours truly,

JOHN C. NETHAWAY,
Assistant Attorney General.

May 25, 1915.

144

DRAINAGE—Substitution of tile for open ditch—Assessment proceedings.

A. E. Kief, County Attorney.

Dear Sir: In regard to the proposed repairs on the ditch referred to including the substitution of tile for open ditch, I have reached the following conclusions:

1. While there is no express provision upon the subject, I am of the opinion that the language employed in the amendatory act (Chapter 300 L. 1915) is broad enough to include any kind of repairs, widening, deepening or extending which may be necessary to provide a ditch of sufficient capacity to furnish adequate drainage for the land affected, and that this may include, where necessary, the substitution of tiling for an open ditch. This I take to be the fair intendment of the closing paragraph, which provides that the repairs may include, "such other changes or alteration therein as will enhance its usefulness for the purpose of drainage."

2. The cost of the repairs, deepening, widening and extending is to be paid from the funds to the credit of the ditch so improved, in case there are sufficient funds to the credit of such ditch account.

3. In case there are not sufficient funds to the credit of the drainage ditch to be improved, then the expense of such improvement is to be paid out of the general revenue fund of the county, and the revenue fund is to be reimbursed by an assessment upon the property benefited.

4. The character of the assessment depends, to some extent at least, upon the conditions which bring about the necessity for the improvement. If it is an ordinary repair, or one for the removal of sediment, weeds, or other obstructions, then the cost of the improvement is to be assessed

upon the lands originally assessed for benefits by reason of the construction of the ditch and in the same proportion as the original assessment for benefits.

5. When the improvement of a drainage ditch is rendered necessary in consequence of the subsequent construction of other ditches connecting with or emptying into the same, or into lakes drained thereby, which subsequent ditches increase the volume of water to be taken care of by the original ditch, or which, by the deposit of sediment therein contribute to the necessity of repair, widening, deepening, or extending the same, and in all cases in which the improvement is rendered necessary because of the insufficiency or incapacity of the original ditch to furnish adequate drainage of the entire area of land affected and requiring drainage, then the cost of the improvement must be equitably apportioned between the lands benefited by the original ditch and those benefited by the ditches subsequently constructed in proportion to the benefits received by the lands originally assessed and those drained by the laterals and other ditches, subsequently constructed, the same as if the original ditch and the subsequent ones were originally one ditch system in proportion to the benefits of these respective classes of land, and viewers must be appointed and the same course taken as in original proceedings.

6. When the total cost of the improvement is equal to or in excess of 25 per cent of the original cost, the necessary funds may be obtained by the sale of bonds as provided by section 5542, G. S. 1913, and the assessment lien is to be collected in the same manner as those arising out of the original construction.

Applying these rules we think you will have no difficulty in making a proper and equitable assessment.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

May 10, 1916.

145

EDUCATION—Apportionment money.

C. G. Schultz, Superintendent of Education.

Dear Sir: The question involved is as to whether children who are in regular attendance at parochial or private schools and are permitted to receive instruction in the public schools in manual training only, can be counted by the school district for apportionment. It appears that the time consumed in the manual training instruction referred to amounts to one hour and one-half or two hours in each of two days in every school week. The children in question do not receive any other or further instruction from the public schools and are only enrolled in the public schools for the one study of manual training

The constitution provides for the so-called apportionment of the school funds to the various districts in proportion "to the number of scholars." The legislature has seen fit to provide that apportionment shall only be paid to a school district for pupils who attend at least forty

days within the school year, thereby defining the word "scholar" and limiting that word to pupils who do so attend for forty days within a school year. The legislature has defined a school month to mean four weeks and has provided that five days of a week—from Monday to Friday inclusive—shall be school days. I am of the opinion that apportionment money cannot be allowed to the district for the children referred to in the communication of Superintendent Hess. I am not unfamiliar with the opinion of former Attorney General Hahn, found on page 491 of the Attorney General's Opinions for 1858-1884, in which he holds that—

"The enrollment of evening schools conducted by the regular corps of teachers can be reported for apportionment the same as day pupils for the reason that there is nothing in the law requiring the apportionment to be made to day scholars only."

I think the situation covered by General Hahn's opinion can clearly be distinguished from the one here being considered.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

August 5, 1915.

146

EDUCATION—Associated Rural Schools—Termination of relations.

H. P. Bacon, Secretary.

Dear Sir: Relative to the termination of the relationship existing between associated rural schools and the central school:

The law is now changed and a two-thirds vote of the associated rural school district in question is sufficient to terminate the relationship, provided prior notice, etc., has been given.

You, as clerk of the central school, are not required to take any steps in the matter.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

January 13, 1915.

147

EDUCATION—Ballots at annual school meeting.

Dewitt Adkins, Esq.

Dear Sir: You inquire as to whether there would be any objection to your board of education providing for the Australian Ballot System at the coming annual election in your school district. Your inquiry is answered in the negative.

The Australian Ballot System, as adopted for general elections, does not apply to school district elections, but there would be no objection to using this system in the election of school district officers in your

district. There should be, of course, upon the ballot a blank space, so that the voter could write in a name and vote for some one other than the persons whose names appear upon the ballot. I may, however, say to you that it would probably be competent for any voter in the school district to prepare a ballot of his own in the ordinary form and cast the same, and be entitled to have it counted. The preparation of a ballot for use at a school election is not a part of the duties of the school board, and I do not think it would be competent for the school board to spend school district money for this purpose, nor to require any fee from a person who desires to file for one of the offices to be filled.

My answer to your inquiry has reference particularly to a ballot prepared in the Australian form, upon which will appear names of persons for various offices (together with a blank space for each office) and upon which ballot will be placed squares where in a cross mark can be placed and also directions to the voter as to how to indicate his choice.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

May 3, 1915.
See Chapter 384, Sess. Laws 1917.

148

EDUCATION—Ballot voting on separate propositions.

Andrew Lindgren, Clerk, School Board.

Dear Sir: I have to say that the uniform ruling of this office, founded on my judgment of the meaning of Chapter 122, General Laws 1907, has been that where different structures are to be built or remodeled, the vote must be a separate one on each of the propositions. The law says: "Each proposition contained in such resolution or petition shall be stated separately on the notice and on the ballot, and shall be voted on separately."

The form of notice of election and the form of the bond ballot is such as to indicate that the construction of any single building is a single proposition, independent of any other.

Yours truly,
LYNDON A. SMITH,
Attorney General.

March 15, 1916.

149

EDUCATION—Consolidation of districts—Meeting to vote on.

Harry L. Moody, Esq.

Dear Sir: You state that two districts, are considering the matter of consolidation; the law requires that there must be twenty-five voters present to select officers to preside at the meeting where the consolidation question is to be voted upon, and in this you are correct.

I am of the opinion that the terms of this law are mandatory, and that twenty-five voters should be present in order to properly organize the meeting, and select election officers. The legislature could not have used language any plainer than was used to indicate that it was the intention to have twenty-five voters present at the organization of the meeting. As far as I am advised, no court has passed upon the specific question.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

January 26, 1915.

150

EDUCATION—Consolidation of districts—Notices for voting on.

Jennie Holm, County Superintendent of Schools.

Dear Madam: You ask whether the law will have been sufficiently complied with if a notice calling for a vote upon the consolidation question is simply posted in one place instead of being posted in three places.

The law relative to the giving of notice for a vote upon the question of consolidation of school districts provides that—

"The County Superintendent shall within ten days cause ten days' posted notice to be given in each district affected. * * *."

Paragraph 14 of Section 9412, General Statutes 1913, provides that—

"The term 'posted notice' when similarly used shall mean the posting at the beginning of the prescribed period of notice, a copy of the notice or document referred to, in a manner likely to attract attention, in each of three of the most public places in the town, city, district or county to which the subject-matter of the notice relates, or in which the thing of which notice is given is to occur or be performed."

You are advised that in my opinion the posting of the notice in but one place, where the law requires the posting in three places would not be sufficient. However, if at the election held there was cast in favor of the proposition of consolidation such a vote that the result would not have been changed if every voter in the district in question who did not vote at the election had voted against the proposition, and it would therefore appear that the result would not have been changed if proper notice had been given, I am of the opinion that the election would not be invalidated.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

May 4, 1915.

151

EDUCATION—Consolidation of districts.—Successive elections.

John H. Mark, County Attorney.

Dear Sir: You state that school district No. 8 of your county voted on April 24 on the proposition to consolidate with District No. 5 and that the proposition to consolidate was lost.

You inquire whether a new election can be had to vote upon the same proposition, or whether the election already held is determinative of the question for all time. In my opinion, the question, provided the proper preliminaries are carried out, can be voted upon again, irrespective of the result of the first election.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

May 21, 1915.

152

EDUCATION—Consolidation—Petition for election on—Effect of withdrawal of signers.

N. A. Thorson, Esq., Superintendent of Schools.

Dear Sir: It appears that a petition signed by the requisite number of resident freeholder voters of districts 6, 16 and 238, asking for an election on the consolidation question under Chapter 207, G. L. 1911, was received by you on April 7. You received on April 13, six days after receiving the petition in question, a remonstrance signed by six of the freeholders out of the twelve who originally signed the petition from District No. 6.

You inquire as to what effect the remonstrance would have if received after notices had been published for a consolidation election, and as to what effect it would have if it were received before the notices of election had been posted.

It does not appear from your communication whether the six remaining names on the petition, not attempted to be withdrawn by the remonstrance, constitutes 25 per cent of the resident freeholder voters of the district.

As a general proposition, a signer of a petition may withdraw his name from such petition and such withdrawal operates to take his name from the petition, provided withdrawal is made in time. If the withdrawal is made prior to the time that action is taken, the names are not to be considered as on the petition. If, however, the attempted withdrawal is made after action is taken on the petition, as by for instance publishing or posting a notice, then it is too late for such withdrawal to be effective.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

April 20, 1915.

153

EDUCATION—Consolidated district—Disintegrating same.

C. Rosenmeier, County Attorney.

Dear Sir: Voters of a consolidated common school district have not the right by vote to disorganize a consolidated district, and return the districts included therein back into their component parts. Upon proper procedure new districts can be formed out of a consolidated district or lands detached therefrom the same as is the case with ordinary school districts.

You call attention to the following provision of Paragraph 5, Section 2673, G. S. 1913, referring to a petition for the formation of a school district:

"Such petition shall be acknowledged by the petitioners and submitted to the county superintendent, and if he shall approve of the same he shall endorse such approval in writing upon said petition, stating his reasons therefor; and if he shall disapprove of the same he shall endorse thereon in writing his reasons for such disapproval."

You inquire in effect as to whether the action above referred to of the county superintendent of schools is a condition precedent of any action being taken by the county board.

In my opinion such a petition should be presented to the county superintendent and he should within a reasonable time after such presentation, endorse thereon his approval or disapproval, with his reasons therefor. He can be compelled to do so by mandamus. I do not, however, think that it was the intention of the legislature to permit the county superintendent, by failure to do his duty in the premises, to hold up and prevent action by the county board on the petition. The county board is not bound to follow the recommendation of the county superintendent. If he should approve of the petition the board may, nevertheless reject it; if he disapproves of the petition, the county board may, nevertheless establish the new district. It will be noted that if this action by the county superintendent is a condition precedent to action by the county board, then the county superintendent, if opposed to the formation of the new district, could effectually prevent its formation by refusing to act, while on the other hand, if he did act and disapprove the petition, the county board could notwithstanding such action of his establish the district. In my opinion it was never the intention of the legislature to place this power in the hands of the county superintendent, and that the action of the county superintendent provided for in the section quoted was primarily for the purpose of aiding and assisting the county board in determining the petition upon its merits.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

December 20, 1916.

154

EDUCATION—Consolidation of districts—Sale of school house.

E. A. Mostue, County Superintendent.

Dear Sir: You state that there is a proposition on foot for the consolidation of three school districts in your county; each of the school districts have school houses of considerable value and two of the school districts have bonded indebtedness. You call attention to the fact that the consolidation, if effected, will pass over to the newly consolidated district, as an asset, the school houses in question, each district retaining, however, its own bonded indebtedness.

You inquire whether the respective districts could legally sell the school houses and use the money toward the payment of the bonds. I think that if the action so authorizing was taken at a properly called school meeting, it would be competent for the school board to sell the school houses, and I do not see any objection to such sale being made, the sale, however, to be conditioned, and the title to the property to pass only in case the consolidation carries and becomes effective.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

February 8, 1915.

155

EDUCATION—Expense graduation exercises.

C. G. Schulz, Superintendent of Education.

Dear Sir: You state—"There seems to be some question, as to the legality of the county commissioners' allowing bills for certain expenses connected with county common school gradaution exercises, such as are held every year in most of the Minnesota counties. The question has now been raised by a county superintendent, and you would appreciate a ruling from this department on the question."

In other words, the substance of your inquiry is whether the county commissioners can allow the bills which you mention.

I am unable to find any statutory authority conferred upon the board of county commissioners to pay expenses incurred in holding county common school graduation exercises, and guided by the universal rule adopted by the courts, that in the absence of any authority conferred upon it, the county can only disburse the public moneys for such purposes as are mentioned in the statute, those that are not mentioned are not to be included by implication, no matter how meritorious the claim may be, nor the benefits which may be derived by the expenditure of that money.

I therefore beg leave to advise you that the county commissioners have no authority to allow bills for expenses incurred in connection with the county common school graduation exercises.

Yours truly,

JOHN C. NETHAWAY,
Assistant Attorney General.

August 28, 1915.

156

EDUCATION—High school—Pupil attending school in district other than his own.

H. I. Harter, County Superintendent of Schools.

Dear Sir: I am of the opinion that a student residing in a district that maintains a high school is not entitled to free admission in a high school of another district furnishing the same courses of instruction as are furnished in the high school of the district in which the student is a resident. If the high school of the district of the student's residence does not furnish instruction in the industrial studies, then such student may be admitted to a high school of another district that does furnish such instruction, for the purpose of receiving the same, and the rate of tuition to be charged shall be such as is fixed by the State Board of Education, but not to exceed $2.50 per month, for not more than nine months in any school year.

The rate of tuition that is to be charged a high school student who attends a high school in a district other than his own, and in which school of his attendance the courses of instruction are the same as in his own, by permission of the school board of such school, may be fixed by the board having charge of such school.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

October 1, 1915.

157

EDUCATION—Schools—Indians entitled to attend.

C. L. Freer, Clerk, School District No. 17.

Dear Sir. You ask—"Have Indian children whose parents have taken allotments the same right to attend the public school as white children?"

Your question is rather indefinite, but I might say that the courts have held:

"Every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of the Dawes act of congress, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate from any tribe of Indians therein and has adopted the habits of civilization, is by said act declared to be a citizen of the United States, and is entitled to all the rights, privileges and emoluments of such citizens."

This is the language found in the decision of a North Dakota case: State vs. Desnoyer, 72 N. W. 1014, cited as authority by our own supreme court in the Hankee vs. Bowman, 82 Minn. 332.

I am therefore of the opinion that if these children are not wards of the United States they would be entitled to all the school privileges equally with white children, but if they are, upon the other hand, subject

to the control of the federal government, they would be wards of that government, and not entitled to school privileges, so you can see that the answer to your inquiry depends upon the true facts connected with the children.

Yours truly,

JOHN C. NETHAWAY,
Assistant Attorney General.

August 23, 1915.

158

EDUCATION—Contract—Cash in lieu of certified check.

W. A. Robertson, Esq.

Dear Sir: It appears from your communication that the school board have asked for a certified check of 5 per cent of the amount of the bid to accompany each bid. One party, instead of sending a certified check sent cash to cover the required amount. His bid was considered as the lowest and was acepted. You in effect inquire whether a contract awarded under the facts stated would be lawful. I am of the opinion that it would.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

October 9, 1915.

159

EDUCATION—Pupils—Power to exclude under facts stated.

D. C. Rockwood, Esq.

Dear Sir: You state that three families in your community send their children to school in such a filthy condition that they cause the whole room in which they are seated to smell. I infer from your statement that the condition in which these children come to school is such that it seriously interferes with the proper conduct of the school, and the comfort of the other children in the room. You ask whether these children can be excluded from attending school, and whether such exclusion would relieve the parents from liability under the compulsory education act.

Your first inquiry is answered in the affirmative and the latter in the negative. The compulsory education act has been construed to mean that parents are required to send their children of the prescribed age, to school in a proper and fit condition to associate with other children.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

October 26, 1916.

160

EDUCATION—School board—Authority to purchase site subject to mortgage.

W. H. A. Koehler, Esq.

Dear Sir: It appears that there is now owned by the consolidated school district a schoolhouse site of about one and two-thirds acres; that the present board desires to buy about four acres adjoining such site and build a large new building thereon, near the old building, and heat both buildings from the same heating plant.

You state that the proposed tract will cost $3,750 and that there is in the treasury $2,000 voted as a general fund. You ask whether the board may buy the tract, subject to a mortgage, and pay the balance out of money on hand.

The school board cannot buy the site subject to the mortgage, but must, when it acquires the site, be prepared to secure the same free from all incumbrances. The school board cannot incur an indebtedness in excess of moneys on hand available to pay for the same, or in anticipation of the collection of a tax levy already made.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

December 17, 1915.

161

EDUCATION—School board—Authority to sell and purchase site without vote.

Frank Durmette, Esq.

Dear Sir: You inquire in effect as to whether a school board of a school district can sell the various school house sites of the district, and with the proceeds purchase grounds suitable for a new school building, without an election called for the purpose of voting upon the question of such sale.

In my opinion, your inquiry is to be answered in the negative.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

April, 18, 1916.

162

EDUCATION—School board—Authority to prevent pupils from carrying offensive drugs on their persons.

C. A. Patchin, Esq.

Dear Sir: You ask whether a school board has authority to prevent a pupil of such school from wearing a sack of asafetida, suspended by a cord about the neck of the child in question, such asafetida being offensive.

In my opinion the board has such authority. The school board is given by statute the general care and control of the public schools, and has power to adopt reasonable rules and regulations for the management of such schools. The school board has authority under the compulsory education act, to require children between the ages of eight and sixteen years to attend school, such children to be in a reasonable clean and inoffensive condition. If a parent sends his child to school in an offensive condition so as to detract from the efficiency of the school, and such child is sent home for that reason, it does not relieve the parent from prosecution for failure to comply with the compulsory education act.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

April 20, 1916.

163

EDUCATION—School board cannot purchase land from a member thereof.

V. E. Anderson, Secretary, Board of Education.

Dear Sir: The inquiry submitted by you some time ago had reference to the purchase of additional property adjacent to the present site, and you were advised as to the law in that regard, and were told that the school board could, without a vote of the people, acquire additional land adjacent to or near the present site, so that the school house site, (with such additional grant) would not exceed one block, provided there were funds on hand available for the purpose.

It now appears from your communication that pursuant to such ininstructions the board made arrangements for the purchase of a tract of land lying immediately south of and adjoining the one-half block which your school district uses as its school house site at present.

You state further that a member of your board of education owns the additional land proposed to be acquired, and you ask whether it would be legal for the board of education to purchase this land from one of its members such member not participating in action of the board, and the price to be paid for such land being concededly much less than the value of the property.

In my opinion, your inquiry must be answered in the negative. The law expressly prohibits a member of a board from being interested directly or indirectly in any contract made by the board.

If the member in question, the owner of the land, resigns from the board and thus ceases to be a member thereof, there would be no objection to the board, as then constituted, purchasing the land in question from the owner. You suggest that the owner of the land might convey it to the third person, and then the third person convey it to the board. I do not think this would be permissible. It would in fact be accomplishing indirectly what the law prohibits being done directly.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

May 12, 1915.

164

EDUCATION—School Board—Christmas tree.

Thomas S. Silliman, Attorney.

Dear Sir: You inquire whether it would be lawful for your school district to extend district funds towards the expense of a municipal Christmas tree to be erected in the school yard for the benefit of the school children, and also for the benefit of the public at large.

In my opinion your inquiry is to be answered in the negative. I can find no provision of law that would authorize the expenditure of school money for that purpose.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

December 21, 1916.

165

EDUCATION—School Board—Compelling study of foreign language.

Conrad M. Molstad, Esq.

Dear Sir: You inquire whether a school board would have the authority to excuse pupils from taking instruction in a foreign language.

Your inquiry is answered in the affirmative.

You also ask whether the school board can compel all of the pupils in a school to take such foreign language.

This inquiry in answered in the negative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

October 30, 1915.

166

EDUCATION—School Board—Employing Visiting Nurse.

B. M. Cosgrove, Superintendent Public Schools.

Dear Sir: You state that you employ a school nurse in your city who devotes her time to work in the parochial schools as well as the public schools. That her compensation has heretofore been raised by subscriptions and entertainments. You ask whether it will be possible for the local school board to pay the salary of the nurse if she works in the parochial schools as well as the public schools.

Your inquiry is answered in the negative provided her entire compensation is paid from public school money, because there is a constitutional prohibition against the expenditure of money in that way. I cannot, however, see any objection to a school nurse being employed by the public schools for part time. I think the school authorities might hire a visiting nurse, and pay her a reasonable compensation, for instance, half of her

time, the other portion of her time being devoted to other than public school work, and to be compensated for by the parochial schools or private parties. You will understand, of course, that by the adoption of this means there must not be, directly or indirectly, any public money paid for services that she may render to any one other than the public.

Yours truly,

CLIFFORD L. HILTON,

Assistant Attorney General.

May 2, 1916.

167

EDUCATION—School Board—Filling Vacancies.

H. B. Plummer, District Clerk.

Dear Sir: Your attention is called to Sections 2742 and 2744, General Statutes 1913.

When a vacancy exists a school board can fill the vacancy, and the person appointed will hold his office until the next annual school meeting, at which time a person should be elected to fill out the balance of the unexpired term of the person whose resignation or failure to qualify created the vacancy. The appointment so made by the board, and the election at the annual school meeting, both taken together will cover the period of time for which the man who resigned or failed to qualify was originally elected.

Yours truly,

CLIFFORD L. HILTON,

Assistant Attorney General.

August 2, 1915.

168

EDUCATION—School Board—Vacancy—Term of appointee.

Dewitt Adkins, Superintendent of Schools.

Dear Sir: You submit the following inquiry:

"In filling a vacancy made by a resignation on the board of education in an independent district, does the appointment hold good until the annual election, or until the unexpired term of the resigned member?"

The appointment holds good until the next election at which time a new member should be elected who will hold for the unexpired term for which he was appointed, provided that such unexpired term does not terminate at such annual election.

Yours truly,

CLIFFORD L. HILTON,

Assistant Attorney General.

March 23, 1915.

169

EDUCATION—Filling of vacancy in school board.

C. G. Schulz, Superintendent of Education.

Dear Sir: An appointment to fill a vacancy in a school board or board of education, is until the next annual school meeting, at which time there should be elected an officer to fill the balance of the unexpired term of the officer whose resignation created the vacancy. The appointment so made, together with the election so held at such annual meeting will make up the unexpired term.

In case an appointment is not made by the board, but instead a special school meeting is called for the purpose of filling vacancy, then under the provisions of Section 52, compiled school laws 1913, the officer elected at such special meeting will hold office for the unexpired term.

Yours truly,

CLIFFORD L. HILTON,

Assistant Attorney General.

August 11, 1915.

170

EDUCATION——Filling of vacancy in consolidated school board.

James Arrowood, Esq.

Dear Sir: You inquire if one member of a consolidated school district board resigns and his resignation is accepted, whether the other members may fill the vacancy. Your inquiry is answered in the affirmative. When one member resigns it is competent for a majority of the remaining five members of the board to fill the vacancy at a properly called meeting of the board. At such meeting, a quorum of the board being present, a majority of such quorum can fill the vacancy. The person who has resigned, and whose resignation is accepted, is no longer a member of the board, and has no choice in the election of his successor.

Yours truly,

CLIFFORD L. HILTON,

Assistant Attorney General.

August 13, 1915.

171

EDUCATION—School Board meeting—Tie vote.

Lewis Lohn, Esq.

Dear Sir: You state that a Board of Education of an independent school district consists of six members, and you ask what can be done to settle a tie vote; there being three members on the board voting on each

side of the proposition. There is no provision made for the settlement of such tie vote and as long as that condition maintains, the proposition fails to carry.

Yours very truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

April 19, 1916.

172

EDUCATION—School Board—Members receive no compensation.

F. G. Schrader, Esq.

Dear Sir: You are advised that it is now and has heretofore been the holding of this Department that it is not competent for any member of the board of an independent school district to receive compensation for any services rendered by him for the district, excepting the secretary and treasurer.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

September 6, 1916.

173

EDUCATION—Powers of Board under facts stated.

C. G. Schulz, Superintendent of Education.

Dear Sir: You ask for an opinion of the attorney general on the following questions:

1. "Has the Board of Education of the Independent School District of the City of Duluth a right to maintain, and conduct supervised playgrounds on the school premises, and appropriate money for the maintenance thereof?"

2. "If they have such right, may they conduct such supervised play on Saturdays and during the vacations, and appropriate money for the maintenance thereof?"

3. "If they have a right to conduct such playgrounds, may they permit adults, not of school age, to use such playgrounds during any part of the day?"

4. "Has the Board of Education of the Independent School District of the City of Duluth a right to permit the use of school buildings for social center purposes; if so, have they a right to incur any expense in connection therewith?"

5. "Has the Board of Education of the Independent School District of the City of Duluth any right to permit the use of school buildings for religious purposes, except upon a petition of a majority of the legal voters of the entire independent School District of the City of Duluth?"

The first and second questions are answered in the affirmative.

A strict construction would require that the third, fourth and fifth questions should be answered in the negative.

1. In discussing the conclusions reached by me as above indicated, I may say that when there is money in the school district treasury, available for general school district purposes, I am clearly of the opinion that the Board of Education of the Independent School District of Duluth (the general law governing independent school districts generally being applicable to the Duluth district in so far as the questions here involved are concerned) has a right to make expenditures for the maintenance and conduct of playgrounds on the school district premises.

2. Although the law prescribes that schools shall be held not less than five (5) nor more than ten months in any year, and that a month shall be considered as four weeks, and that five days shall constitute a school week, still I am of the opinion that supervised playgrounds on school premises may be maintained during the entire time, including not only Saturdays during the school terms, but also during vacation periods. The maintenance of such playgrounds would not constitute the keeping of such schools in excess of the maximum period of ten months in any one year. The School Board is given general charge and control of all school district property and under that authority would have the power to take care of the playgrounds in question all the time, and in my opinion, the expenditure of the small amount of money necessary for the conduct of such playgrounds on Saturdays and during vacation periods, would be permissible, particularly as such playgrounds would of necessity require watching, supervision and protection at all times.

3. I answered your third inquiry in the negative for the reason that the question, and the broad way in which it was put requires such an answer in order that the expenditure of school district moneys may be confined to the benefit of children of school age. Strictly speaking, I think the conclusion reached is correct, although I would not care to hold that permission could not be given to a limited number of adults to use the playgrounds at a time and in a manner that would in no way interfere with the use of such grounds by school children, and the use of which by said adults would in no way cause any material extra expenditure of school district moneys.

4. It does not appear from the fourth inquiry what is meant by "social center purposes." If we take it for granted that such purposes are purposes distinct from the furnishing of education along scholastic and kindred lines to the school children of the district, then school districts moneys cannot be expended therefor. If the so-called "social center purposes" are, however, such as do not interfere with the use of school property for school purposes; are not within the purview of the paragraph hereinafter quoted; are carried on at a time and are of such a nature as not to occasion an expenditure of school district money to any extent; and the school board in the exercise of sound judgment and discretion decide that such use of the school property will not be at all detrimental to the primary purposes for which said property is held, then such board may grant permission for such use.

5. Paragraph 3 of Section 2747, G. S. 1913, reads as follows:

"The school board may also * * * * * (3) Upon a petition of a majority of the legal voters, authorize the use of any school house in the district for divine worship, Sunday schools, public meetings, elections and such other similar purposes as, in their judgment will not interfere with its use for school purposes; but before permitting such use, the board may require the bond of some responsible party in the penal sum of one hundred dollars, conditioned for the proper use of such school house, the payment of all rent, and the repair of all damage occasioned by such use, and they shall charge and collect for the use of the district from the persons using such school house, such reasonable compensation as they may fix."

In the absence of statutory authority I do not think the School Board would be authorized to allow the use of the schoolhouse property for other than school district purposes, and as the statute has provided for such other use, the granting of the same must be confined to the manner prescribed in said quoted paragraph.

I am aware of the impracticability of attempting to secure the signing of a petition by a majority of the legal voters in the Duluth district, but the remedy is legislative. We must construe the law as we find it.

I most heartily concur in the conclusions reached by Messrs. Baldwin, Baldwin & Holmes, to the effect that it would be unlawful for the Board of Education of the City of Duluth to enter into an arrangement with the City of Duluth whereby there should be a joint conduct by the school district and the city of the playgrounds at the joint expense, the control of said grounds and the conduct thereof to be exercised by a joint board representing the governing bodies of the school district and the city. I also concur in the conclusion reached that "there is no power express or implied, that authorizes the Board of Education to maintain playgrounds and recreation facilities for the general public of the city."

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

November 29, 1915.

174

EDUCATION—School Board—Power to execute promissory notes.

John H. Mark, Esq., County Attorney.

Dear Sir: It appears that the school board of a certain district in your county at a legal meeting of the board passed a resolution authorizing the said board to give a note of the district for one thousand dollars to take up existing indebtedness, and such note of the district was given, bearing interest at the rate of 10 per cent per annum. It appears that no

action was taken by the district itself in this regard. You inquire whether the school board had the right under the facts stated to execute the note in question.

In my opinion your inquiry is answered in the negative.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

March 5, 1915.

175

EDUCATION—School Boards—Proxies.

J. L. Dahl, Superintendent of Schools.

Dear Sir: I have to say that no one can vote on a school board except those who have been elected as members and are such at the time of voting. There is no such a thing as a proxy for a member of a school board.

Yours truly,

LYNDON A. SMITH,
Attorney General.

April 13, 1916.

176

EDUCATION—Publication of proceedings of board in independent districts.

J. Solberg, Clerk, Board of Education.

Dear Sir: You refer to Chapter 360, G. L. 1915, in which provision is made for the publication of proceedings of the school board in independent districts. You inquire whether such publication has reference to the proceedings of regular as well as special board meetings.

You inquiry is answered in the affirmative. I am of the opinion that these publications should be made seasonably after the board meetings are held, and that the board should not wait until a number of meetings had been held before such publication.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

November 17, 1916.

177

EDUCATION—School Board—When orders may be issued.

Raymond Doyle, Clerk of School Board.

Dear Sir: I have to say that it is not competent for a school board to issue school orders in excess of the amount of money on hand available to pay the same; nor to issue orders for any money to be raised

in the future, except such as is to be raised by a tax levy already made and then only such an amount of orders as will not exceed the difference between that tax levy, and the amount of current expenses and moneys heretofore appropriated that must be paid out of such tax levy.

Yours truly,

LYNDON A. SMITH,
Attorney General.

May 23, 1916.

178

EDUCATION—School district property—Assessments for local improvements.

H. J. Snyder, Esq.

Dear Sir: I may state to you that taxes cannot be imposed or local assessments cannot be made against school house and other school district property used for school purposes. It is, however, within the power of the school board to arrange for the payment of its proper share of the cost of street or other local improvements which are or will be of benefit to the school property. Among such improvements will be sidewalks, curbing, paving of streets and sewers.

The question as to the necessity or the desirability of paying for such improvements, and the amount of such payments rests in the sound discretion of the school board. I assume of course that your school district had, and has ample funds either on hand or that will be collected from a tax levy made to meet such expenditure.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

November 17, 1916.

179

EDUCATION—School districts—Issuing bonds —Who entitled to vote on.

P. J. Fitzpatrick, Esq.

Dear Sir: Both men and women are entitled to vote for or against the issuing of bonds by a school district to build a school house, providing they come within the qualifications of the constitution of this state as to who are legal voters. These constitutional requirements are that the persons voting must have resided in this state six months next preceding any election, and have been thirty days a resident in the election district, and have been citizens of the United States three months, and are over 21 years of age.

A few persons are not entitled to vote because of having lost their civil rights by the commission of crime or who are insane or under guardianship. A person does not have to own land in order to be a legal voter at school meetings.

Yours truly,
LYNDON A. SMITH,
Attorney General.

April 3, 1916.

180

EDUCATION—School district—Bonds—Majority vote.

Mr. Alex McNeil.

Dear Sir: You are advised that the question of issuing bonds of a school district of the State of Minnesota, requires but a majority vote and a two-thirds vote is not necessary in order to carry the bonding proposition.

Very truly,
EGBERT S. OAKLEY,
Assistant Attorney General.

August 31, 1916.

181

EDUCATION—School district—Issuance of bonds to private parties.

Charles V. McCoy, Esq.

Dear Sir: You inquire whether a consolidated school district that has issued bonds to the State of Minnesota for 15 per cent of its valuation may issue additional bonds, the same to be disposed of to private parties.

Your inquiry is answered in the affirmative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

July 15, 1916.

182

EDUCATION—School districts—Change of Boundaries as affecting bonded indebtedness.

A. M. Marks, District Clerk.

Dear Sir: I may state to you that, under the law, a change of school district boundaries does not affect the lien or liability of bonded indebtedness. The lands included in a school district at the time the bonds are issued still will continue to remain until the bonds are paid, subject to the bonded indebtedness. The law so provides.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

June 24, 1915.

183

EDUCATION—Division of Indebtedness on division of districts.

C. Rosenmeier, County Attorney.

Dear Sir: You state that a certain consolidated school district in your county has voted to bond itself to the State of Minnesota for a certain sum. Such bonds have not yet been issued and of course the money has not been received from the state. You ask if prior to the issuance of the bonds, and the payment of the money by the state thereon, the county board detaches upon proper petition certain territory from the consolidated school district in question, the territory so detached would be relieved from the bonded indebtedness.

In my opinion your inquiry is to be answered in the affirmative. The bonded liability attaches to the territory of the school district as it exists at the time the money is paid by the state on the bonds, which may or may not be the same territory which was included in the school district at the time the bonds were voted. If by a detachment of certain territory the assessed valuation of the school district fell below the constitutional limit, then the Board of Investment would not make the loan to the full amount voted.

Yours truly,

CLIFFORD L. HILTON,

Assistant Attorney General.

September 5, 1916.

184

EDUCATION—School district depository—Member of board a director of bank.

C. G. Schulz, Superintendent of Education.

Dear Sir: I do not think that after a school board has designated a bank as a depository it is precluded from designating another bank, also as a depository during the time covered by the first designation. I may, however, call your attention to Opinion No. 210, of the Attorney General's opinions for the years 1911-1912, in which, following previous holdings of the office, it was held to be illegal for a bank to be designated as a depository when an officer, director or stockholder of the bank held the office of school district treasurer.

Yours truly,

CLIFFORD L. HILTON,

Assistant Attorney General.

February 11, 1916.

185

EDUCATION—School districts—Forming two common districts out of a consolidated district.

Anton Thompson, County Attorney.

Dear Sir: You inquire whether, in the opinion of this department, the county commissioners have the power and jurisdiction to form two common school districts out of the territory now comprising a recently formed school district.

In my opinion, if the petitions are in proper shape, and all legal prerequisites are compiled with, the county board has such power and authority.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

January 15, 1916.

186

EDUCATION—School District—Limit indebtedness.

H. J. Dower, President Board of Education.

Dear Sir: In reply to your letter of March 31, I have to say that there is no limit fixed for the indebtedness of an ordinary common school district in the matter of borrowing money for the building of a new school house.

Yours truly,
LYNDON A. SMITH,
Attorney General.

April 3, 1916.

187

EDUCATION—School District—Officer of depository as surety on bond.

Peter Anderson, President Board of Education.

Dear Sir: Where a bank is designated as a depository for school district funds, an officer of the bank, and his wife may be accepted as sureties on the bond, providing the school board is of the opinion that they are financially responsible.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

September 6, 1916.

188

EDUCATION—School District Orders—Payment—Interest.

H. P. Bacon, District Clerk.

Dear Sir: I may say to you that school district orders properly issued for lawful claims against the district, and presented to the treasurer and not paid for want of funds and so stamped, draw interest at the rate

of 6 per cent per annum after such presentation and stamping. A school district order should not be issued unless there is money in the treasury to pay the same, or unless a tax levy has been made so that the money received from such levy will be available for the payment of the order in question. In other words, a district may issue orders in anticipation of the collection of money from a tax levy lawfully made.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

August 2, 1915.

189

EDUCATION—School Districts—Petition to attach territory—Insufficient when.

H. A. Arneson, Esq.

Dear Sir: You call attention to the provisions of the statutes relative to the attaching of unorganized territory to an organized township. Section 778, G. S. 1913, makes provision for the doing of certain things therein specified upon the filing of a petition of not less than twenty legal voters residing in the territory to be affected. Assuming that the petition must be signed by voters in the unorganized territory to be attached, I have to advise you that the signing of such petition by twenty such qualified persons is a condition precedent to anything being done along that line. If there is not that number of qualified signers in the territory, or if a petition cannot be secured with that number of signers thereon in that territory, then no proceedings can be taken.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

December 29, 1915.

190

EDUCATION—School Districts—Power of to erect buildings not required for school purposes.

W. A. Erickson, Village Recorder.

Dear Sir: You inquire as to whether a school district may erect a building and lease the same to the municipality in order that such municipality may move its electric light plant into that building and furnish light and power to the school districts. I think your inquiry should be answered in the negative.

It is not within the province of a school district to erect buildings for purposes other than are necessary for the proper maintenance of public schools. It would seem to me that the proposition submitted by you would be beyond the power of the school district.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

April 20, 1915.

191

EDUCATION—School District—Power to grant village an easement.

Francis E. Murphy, Village Attorney.

Dear Sir: You ask whether your independent school district has a right to grant the village an easement on some of the property of the school district for road purposes.

In my opinion, your inquiry is to be answered in the negative.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

July 19, 1915.

192

EDUCATION—School Districts—Publication of proceedings.

F. D. Mitchell, Esq., Secretary School District No. 10.

Dear Sir: The school board of each independent district is required to publish once in some newspaper in the district, the official proceedings of such board within thirty days after its meeting. (Ch. 360 G. L. 1915).

Yours truly,

LYNDON A. SMITH,
Attorney General.

August 18, 1916.

193

EDUCATION—School District—Resident freeholder—Who is.

Sophus Anderson, Clerk District.

Dear Sir: You inquire whether a man is a resident freeholder if he lives upon the farm that his father owned before his death, the estate not having been probated, but he being an heir at law of the father and owning an interest as such heir in the land. Your inquiry is answered in the affirmative. It is not necessary in order to make the son a freeholder that the estate be probated.

You inquire further if a man buys an acre of land in a school district how long it will take for him to be able to sign a petition as a resident freeholder. If the man is a resident of the school district he becomes a resident freeholder as soon as he becomes an owner of real estate therein.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

September 26, 1916.

194

EDUCATION—School District Treasurer—Compensation of.

C. G. Schulz, Superintendent of Education.

Dear Sir: You state that the county attorney of Roseau County wishes to know whether the law relating to compensation of the treasurer in the common school district enacted in April, 1913, would apply to the salary of clerks elected for that year, or whether such clerks would be governed by the law in force at the time they were elected. The 1913 law in question limits the Treasurer's compensation to $25.

Under the old law (Section 1333 R. L. 1905) the compensation of a school district treasurer was to be an amount as might be determined at the regular school meeting of the district, not exceeding 2 per cent of the amount dispensed by him during the year, and then only to be allowed after his report had been approved by the Board. Without the action of the regular school meeting of the district, no compensation could be received by the treasurer.

Section 1333, supra, was amended by Chapter 409 G. L. 1913, and the law relative to the compensation of a treasurer changed so as to read as follows:

"The treasurer of such school district may receive as compensation such amount as may be determined at the regular school meeting of the district, not exceeding, however, twenty-five dollars per annum, which shall be allowed only after his annual report shall have been approved by the board."

I am of the opinion that a school district treasurer, in office at the time the 1913 law was passed, could not lawfully receive in excess of $25 for the then current school year.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

June 18, 1915.

195

EDUCATION—Compensation of district treasurer.

J. C. Jackson, Clerk, Board of Education.

Dear Sir: The law relative to the compensation of a treasurer of a common school district reads as follows:

"The treasurer of such district may receive as compensation such an amount as shall be determined at the regular school meeting of the district, not exceeding, however, $25 per annum, which shall be allowed only after his annual report shall have been approved by the board."

Section 2770, G. S. 1913.

The foregoing is the law relative to such compensation as amended by the legislature of 1913.

Prior to the enactment of that law the compensation of the treasurer was determined in practically the same way, but the amount thereof was not limited to $25.00, but was limited to an amount not exceeding 2 per cent of amounts dispensed by him during the year. Two things must concur in order for a treasurer to receive any compensation.

(1) The amount he is to receive must be determined at the regular school meeting of the district, and,

(2) Such amount can only be allowed after the annual report of the treasurer has been approved by the board.

In the absence of such approval and in the absence of favorable action by the school district meeting, no compensation can be paid.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

October 13, 1915.

196

EDUCATION—School site—Acquisition of additional land.

Julius O. Grove, County Attorney.

Dear Sir: You write as attorney for your school board, and state in effect that your school district has two sites upon which school buildings are erected, that additional ground has been acquired for one site so that it now constitutes a block, but that the other site only contains one-fifth of a block. You submit this question:

"Can the Board of Education of the school district buy or acquire additional site adjacent to or nearby the smaller site without submitting the matter to a vote of the people at a special meeting called for that purpose?"

In my opinion your inquiry is properly answered in the affirmative. Your attention is called to Section 1320, Revised Laws 1905, (not changed in the 1913 statutes) in which, by Paragraph 1, authority is granted to the school board to acquire other land adjacent to or near the present site so as to make such site at least one block in a city or village.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

January 26, 1915.

197

EDUCATION—School Site—No second balloting permitted under facts stated.

Anna Engstrom.

Dear Madam: Where a school district election is called to vote by ballot upon the question of the selection of a school house site and when the ballot has been had, and the will of those voting determined, it is

not competent for another ballot to be taken at the same election, but another election can be called to vote upon the proposition.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

May 5, 1915.

198

EDUCATION——School site—Power of the Board to condemn land—Employing attorney.

W. T. Kuntze, District Clerk.

Dear Sir: You state that a special school meeting was duly called and held for the purpose of selecting a school house site in your district, and that such site was duly selected. The school board and the party owning the land so selected cannot agree upon the price, and you inquire as to whether the school board may acquire this land by condemnation proceedings.

Your inquiry is answered in the affirmative.

It would be proper for your school district to employ an attorney to conduct the condemnation proceedings, and such action would probably be necessary. The school board cannot go upon the property and improve the same until the condemnation proceedings have been instituted and carried to such a conclusion that the land owner is secured or has been paid for the land.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

June 18, 1915.

199

EDUCATION—School House Site—Procedure for change of.

W. W. Pichard, District Clerk.

Dear Sir: Your attention is called to Chapter 249, General Laws 1911, in which you will find that the law relative to the change of school house sites was changed and now reads as follows:

"The annual meeting * * * shall have power * * *.

To designate a site for a school house and provide for building or otherwise placing a school house thereon, when proper notice has been given, but a site on which a school house stands or is begun shall not be changed except by vote therefor, designating a new site, by a majority of the legal voters of the district, who have resided therein not less than one year prior to the vote."

Qualified voters in the school district for the purpose of voting on this question, include both men and women. In order for a proposition to carry for the change of a school house site from one on which the

school house stands or is begun, there must be cast in favor of the proposition a majority vote of all the voters of the district who have resided therein for one year previous to the vote. A majority of those present and voting in favor of the proposition is not sufficient, unless such number is in fact a majority of such voters who have resided in the district for one year.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

August 2, 1915.

200

EDUCATION—School site—Selection of.

Andrew Kalberg, President School Board.

Dear Sir: The question of the selection of a school house site is one to be determined by the voters of the district, and not by the school board. If the site to be selected is a new one and an independent one (the old stite or sites to be retained by the district for school purposes) then all that is necessary to select a site is a majority vote of those present and voting at a properly called school meeting. If, however, it is proposed to change a site from one on which the school house stands or is begun, then there must be cast in favor of the change a vote of a majority of the voters in the district who have resided therein at least one year immediately preceding the taking of the vote.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

March 29, 1915.

201

EDUCATION—State Aid—Law relating to—Construed.

Hon. C. G. Schulz, Superintendent of Education.

Dear Sir: At the request of various school districts interested, you have submitted to the Attorney General the question as to the proper construction to be given to Section 11, Chapter 296, G. L. 1915, which section reads as follows:

"Districts whose local tax levy for maintenance of school exceeds twenty mills in any year may receive in addition to other aid, one-third of the amount raised in excess of that received from the twenty mill levy with a maximum of $2,500 to each high school, $1,800 to each graded school and to rural schools $200 for each teacher."

The inquiry in effect is as to whether a school district containing a high school can receive under this section the maximum annual aid of $2,500 and in addition thereto $1,800 for each graded school in that same district, and $200 for each teacher employed in accredited rural schools therein.

I am of the opinion that a district containing a high school may receive as, maximum state aid under the provisions of this section the sum of $2,500 and in addition thereto the maximum sum of $200 for each teacher in accredited rural schools in said district; that in a district containing a graded school (no high school therein) the maximum graded aid that can be allowed is $1,800 under the section referred to, and such district may also receive not to exceed $200 for each teacher employed in the accredited rural schools in said district; in a district not containing a high school or graded school there can be paid the maximum of $200 for each teacher employed in accredited rural schools.

The foregoing statement has application to school districts containing less than ten townships. In school districts containing ten or more townships there may be paid the maximum state aid under this section of $2,500 for each high school, $1,800 for each graded school and $200 for each teacher in accredited rural schools therein.

I am further of the opinion that the amounts hereinbefore named are the maximum amounts that may be paid for special state aid, and that it is within the power of the officials empowered to pay such state aid to use their judgment in fixing the amounts to be so paid within the limits aforesaid. For instance, there are two kinds of accredited rural schools, known as Class A rural schools and Class B rural schools; the former being schools the better equipped and furnishing better instruction. It would be competent for the officers in question to allow for teachers in Class A schools a higher rate of aid than for teachers in Class B schools.

Excess aid must always be within "one-third of the amount raised in excess of that received from the twenty mill levy."

Yours truly,

CLIFFORD L. HILTON,

Assistant Attorney General.

July 25, 1916.

202

EDUCATION—Superintendent—Authority over pupils after school hours.

Magnus H. Aygara.

Dear Sir: I have to advise you that this department has heretofore held that a superintendent could not prevent the holding of dances by school pupils outside of the school house and grounds, and not during school hours, and that if in disobedience of the superintendent's orders such dance is given, the school children could not be expelled for so attending the dance.

You inquire further whether the superintendent has a right to exercise any authority over pupils outside the school house and grounds, not considering those cases such as smoking, etc., concerning their conduct.

In my opinion this inquiry is generally to be answered in the negative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

November 17, 1916.

203

EDUCATION—Superintendent—Using own automobile.

Hon. Andrew E. Fritz, Public Examiner.

Dear Sir: You inquire whether a county superintendent of schools, who uses his own automobile in his necessary travel about the county in the performance of his duties, is entitled to include in his traveling expenses such items as gasoline, new tires and repairs, and whether the county board is required to allow such bills as a part of his actual necessary traveling expenses, under Section 1016, G. S. 1913.

Where an official is entitled to reimbursement for actual and necessary expenses for traveling, it is usually deemed to include only such amounts as he has been obliged to expend or pay out to others in transporting him. This ordinarily includes railroad fare, livery bills and hotel bills. In the case of county superintendents the legislature has relaxed the general rule that a county official can make no contract with the county by which money is paid from the county treasurer to such official (Section 1089, G. S. 1913) and has provided (Section 1019) that in certain counties the county board is authorized "to allow such superintendent a reasonable sum for traveling expenses and expenses of keeping one team." This relaxing of the statutory rule so as to allow such superintendent to keep a team at the expense of the county cannot well be considered as indicating that the legislature was willing to allow counties to permit such official to keep an automobile at public expense. "One team" and "an automobile" cannot be considered the equivalent of each other in legal parlance or in common usage.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

January 2, 1915.

204

EDUCATION—Tax levy—Board may exceed 15 mills.

Miss Annie Shelland, Department of Education.

Dear Madam: You call attention to the fact that the law for unorganized school territory requires that all children within such territory shall be furnished an education, and provision is made for the transportation of children to school or the payment of board for children who are attending school.

You ask if the unorganized territory finds it impossible to furnish children with this education from the money to be raised with a 15-mill tax, whether a levy for more than that amount can be made. The law gives the board of education for unorganized territory (Chairman, of county board, County Treasurer and County Superintendent of Schools) all the powers of a school board and of an annual town meeting. The law prohibits a common school district, (in which is not maintained a graded, semi-graded or high school) from levying a tax in excess of 15 mills for school maintenance. This law, however, does not contain the mandatory provision first above referred to requiring education to be furnished to all children in the district. I am of the opinion that the 15-mill limitation does not apply to unorganized territory, and that the board of education for unorganized territory may exceed the 15-mill levy, providing it is necessary in order that education may be furnished to the children in such district for the minimum length of time that schools are required to be held according to law.

Yours very truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

April 20, 1916.

205

EDUCATION—Teachers—In attendance at institutes.

Henry J. Zempel, Esq.

Dear Sir: It is the holding of this office that a teacher who attends the entire term of an institute (provided for in Section 241, Compiled School Laws of the State) is entitled to pay for the time that her school was closed, on account of such attendance, and that it is not necessary for her to make up the lost time.

This only applies to cases where teachers have been in regular attendance during the entire time of the institute.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

February 15, 1915.

206

EDUCATION—Teacher—Employment of temporary assistant to.

Messrs. Putnam & Carlson.

Gentlemen: You write as attorneys for the school board of School District 116, and inquire whether the school board may employ a student from the Normal Department at Blue Earth, who is not a qualified teacher, to assist the legally employed teacher, and pay such assistant compensation from the school district funds.

It appears that the school district in question is a large one and that the school board is satisfied that it will be advantageous for the district to have this assistant, it apparently not being deemed necessary to go to the expense of employing an extra qualified teacher.

You are advised that in my opinion your inquiry is properly answered in the affirmative. Of course the school district could not employ a teacher, as such, except one possessing the qualifications prescribed by law, but I can see no legal objection to the employment of an assistant for a qualified teacher, provided funds are on hand available for the purpose, and the necessities of the situation reasonably justify such expenditure.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

January 25, 1915.

207

EDUCATION—Teachers—Manner of payment of substitutes.

Tillie S. Thomason, Superintendent of Schools.

Dear Madam: You state that a teacher in one of your country schools was obliged to discontinue school on account of illness, and the school board decided to excuse her from school work for two weeks. It further appears that the school board hired a substitute to teach for the two weeks referred to, and the question has arisen as to whether the school board should pay the substitute or whether the regular teacher should be paid for the two weeks in question, and she in turn pay the substitute. The contractual relation was between the school board, and this substitute teacher, and the board should pay her. The regular teacher, on account of her inability to teach, having lost the two weeks in question should not be paid therefor, and there may be deducted from her stipulated monthly compensation one-half thereof.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

February 20, 1915.

208

EDUCATION—Teacher—Cannot be employed for a longer term than one year at a time.

Fred Davis, Esq.

Dear Sir: You inquire whether a school board can employ a principal legally for a term of three or five years.

I assume that you mean by "a principal" a person who is the principal teacher and not a superintendent of schools of an independent district.

Your inquiry is answered in the negative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

April 20, 1915.

209

EDUCATION—Teachers—Not obliged to make up time lost because of elements.

Alfred J. Ellison, Clerk School District 82.

Dear Sir: You inquire whether a teacher is obliged to make up for time lost on a day when neither she nor the children could come to the school house because of a blizzard.

In my opinion, your inquiry is to be answered in the negative.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

April 20, 1916.

210

EDUCATION—Teachers—Entitled to compensation under facts stated.

Anna Amundson, Treasurer School District No. 108.

Dear Madam: It appears that your school board had contracted with a teacher for a five months term of school and later found it necessary to have one more month of school in order to receive state aid. The school board entered into a contract with the teacher for the additional month. The fact that one of the days in such school month would be primary election day, and that on that day the school house would be used for election purposes was mentioned to the teacher. School was closed on the day in question and the teacher has declined to make up an additional day therefor. I think she is within her legal rights in so doing. The fact that she did not teach on Tuesday, March 14, was not her fault as the school house was not available for teaching purposes on that day.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

April 17, 1916.

211

EDUCATION—Teachers' Retirement Fund.—Annuitant may teach in private schools.

E. T. Critchett, Secretary, Teachers' Insurance and Retirement Fund.

Dear Sir: You call attention to the provisions of Chapter 199, G. L. 1915, by which it is provided that a teacher may be retired after serving twenty years or more, and that after such retirement such teacher may return to the work of teaching in the public schools, but that during such teaching the annuity or benefit paid to such person shall cease. You inquire whether the prohibition of such a beneficiary extends to teaching in private schools and to teaching individuals.

The last paragraph of Section 9 of the law referred to reads as follows:

"Any person retiring under the provisions of this section may return to the work of teaching in said public schools, but during said term of teaching the annuity or benefit paid to such person shall cease. Said annuity shall again be paid to such person upon his or her further retirement."

I am of the opinion that the prohibition referred to includes only teaching in the public schools. It would therefore follow that a beneficiary receiving an annuity under the act could engage in teaching in a private school or in teaching individuals, or any other lawful occupation, except "teaching in the public schools" without forfeiting the right to continue drawing the annuity.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

September 6, 1916.

212

EDUCATION—Teachers' Retirement Fund—Law construed.

E. T. Critchett, Department of Education.

Dear Sir: By direction of the trustees of the Teachers' Insurance and Retirement Fund Association, you submitted certain questions, and I herewith advise you as to the conclusions reached:

The first question submitted calls for a construction of the following words, found in Section 8, Chapter 199, General Laws 1915:

"Employed as a teacher when this Act takes effect."

The Act was approved by the Governor on April 20, 1915, and the following specific questions are asked:

(a) "Shall this be read literally, so as to mean that an applicant to become a member of the fund must have been actually engaged as a teacher on April 20, 1915, the date of approval of the Act?" or,

(b) "Is it to be construed as meaning one engaged as a teacher during the school year 1914-15?"

In my opinion (a) is to be answered in the affirmative, and (b) in the negative.

Section 9408, General Statutes, 1913, reads as follows:

"Every Act of the legislature which does not expressly declare when it shall take effect shall be in force from and after its approval by the Governor, or, if the Governor shall refuse or neglect to approve the same, then from and after it shall become operative without his signature, by virtue of the Constitution."

The second inquiry is as follows:

"Under Section 9 how shall the provision, 'the last five years immediately preceding the term of retirement' be construed?"

And under this inquiry the following two specific questions are asked:

(a) "Does this imply that a teacher must have been in continuous teaching service in Minnesota for five successive school years immediately preceding the date of making application?" or,

(b) "May a year or more elapse after a teacher has completed the five year teaching period in Minnesota before application is made?"

A question may perhaps arise as to what the words, "The term of retirement" mean. Do they mean the time of retirement of a teacher from the vocation of teaching, or do they mean the time of retirement of the teacher under the provisions of the Act, such teacher being a person who is entitled to become a beneficiary thereunder?

The Act in question is one relating solely to a Teachers' Insurance and Retirement Fund, and the natural conclusion would be that all provisions of the Act should be construed in the light of the purpose of the law, and have application only to persons coming under the provisions thereof. I am therefore of the opinion that a teacher must have been in continuous teaching service in Minnesota (outside of cities of the first class) for five successive school years, immediately preceding the time of retirement from teaching, and such teacher must also be entitled to participate in the benefits of the Act. I do not think that a teacher who completed twenty years of teaching, as provided under Sections 2 and 9, in the year 1907, and who has rendered no teaching service since, although fifteen years of the teaching service may have been in Minnesota, and the last five years of teaching done in Minnesota, can properly be said to be entitled to qualify under the provisions of said Section 9.

Although it would be competent for the legislature to provide that persons who have long since ceased to be teachers in the State of Minnesota, and perhaps even ceased to be residents of the State, might participate in the benefits of this Act, still I do not think that such was the legislative intent. If, however, it were the legislative intent, that intent must be carried out, even though there are hundreds of persons, many of whom live without the state, and have long since ceased to teach, who would come in and be beneficiaries under the Act, and thereby make the fund provided for wholly inadequate to pay the annuities.

The third inquiry submitted is:

"May teaching in county training schools and in summer terms of the state normal schools count toward the required teaching period stated, as the term teacher is defined under Section 1, and the teaching period under Sections 2, 8 and 9?"

In my opinion, teaching in county training schools, or in summer terms of the state normal schools should count toward the required teaching period stated, as referred to in Sections 1, 2, 8 and 9, of the Act.

Section 1 of the Act defines the word "teacher" as including "any teacher, supervisor, principal, superintendent, or certified librarian, employed in any educational or administrative capacity in the public schools of Minnesota * * *."

There is a well recognized public school system in the State of Minnesota, and for the support of which public moneys are secured by taxation, and otherwise. I am of the opinion that county training schools and summer terms of the normal schools can properly be considered a part of that educational system and that teachers, teaching therein, are to be considered as teachers "in the public schools of Minnesota."

The fourth question submitted is:

"Section 15 exempts cities of the first class, (being St. Paul, Minneapolis and Duluth) from the provisions of the Act: Question: 'May teaching service in these cities be counted as a part of the fifteen year teaching in Minnesota, referred to in the first part of Section 9? For example: A person may have been a teacher for ten years in one or more of the cities of the first class, and may later have rendered five years teaching elsewhere in the state. Would this fulfill the requirements of Section 9, for fifteen years teaching in the state, provided the last five years of service were rendered in the state, but outside the three cities, and immediately preceding retirement?'"

In my opinion, this inquiry is to be answered in the affirmative. Although the teaching in the cities of the first class, no matter for what length of time, would not qualify a person to become a member of the Teachers' Insurance and Retirement Fund Association, still the length of time that such teacher taught in the cities of the first class, would be teaching in the State of Minnesota, and would meet the requirements of the Act, in so far as the fifteen years teaching service in Minnesota was concerned.

The fifth question submitted is as follows:

"The second paragraph of Section 8 reads: 'Any person who shall accept employment in this state as teacher * * * after September 1, 1915, and who shall not have been employed in this State at the time this Act takes effect, etc. * * *.'"

"Does this expression, 'accept employment' refer to the time of signing the contract or does it have reference to the rendering of teaching service, to illustrate:

"A person who has not been a teacher previous to September 1, 1915, may sign a contract at some time between the passage of the Act and September 1, 1915, but employment begins on or after September 1, 1915. Does the date of signing the contract govern, or does the fact that the person had rendered no teaching service prior to the passage of the Act, but begins teaching next school year determine the fact that the compulsory feature of becoming a member of the fund applies?"

In my opinion, the expression "accept employment" does not refer to the time of signing the contract, but it does have reference to the actual entering upon, and rendering of teaching service under a contract. It is true that a person may make a contract with a school district, to teach in that district, and such contract may be made long prior to the time that such employment is to commence, but there is no practical way of compelling the person so contracting to teach in the district. I do

not think that person has "accepted employment" until she has actually started on the work of teaching under a valid contract, thereby rendering service which obligates the school district to remunerate her therefor.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.
(Approved) LYNDON A. SMITH,
Attorney General.

June 29, 1915.

213

EDUCATION—Teachers' pension act constitutional.

E. T. Critchett, Acting Secretary.

Dear Sir: You state that at the last meeting of the Board of Trustees of the State Teachers' Insurance and Retirement Fund, the following resolution was passed:

Resolved; That the Secretary of this Board be directed to secure from the Attorney General an opinion as to the constitutionality of Chapter 199, General Laws, 1915.

You are advised that in my opinion the act in question is constitutional.

Yours truly,
LYNDON A. SMITH,
Attorney General.

September 24, 1915.

214

EDUCATION—Teachers' retirement fund—Law construed—Leave of absence.

E. T. Critchett, Acting Secretary, State Teachers' Retirement Fund.

Dear Sir: At the request of the Board of Trustees of the State Teachers' Insurance and Retirement Fund, you submit the following question:

"Can a leave of absence be granted during any one of the last five years before retirement or can such year be considered as one of the last five successive years of teaching which are required for retirement? In the first paragraph of Section 9, Chapter 199, G. L. 1915, we find these words:

'Any member of the Fund Association who shall have rendered twenty (20) years or more of service as a teacher in the public schools, one year of which may have been a leave of absence for study, and at least fifteen years of which, including the last five immediately preceding the term of retirement have been spent in the public schools of this state and who ceases to be employed as a teacher for any reason shall be retired at his or her own request by the board of trustees and receive an annuity in accordance with the following schedule.'"

You are advised that in my opinion each of your inquiries is to be answered in the affirmative.

In the paragraph referred to, reference is made to twenty years and fifteen years "of service as a teacher in the public schools," and it is stated that "one year of which (service) may have been a leave of absence for study."

In my opinion it was the intention of the legislature to provide that the year's leave of absence referred to, might be included in the five years immediately preceding the time of retirement.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

September 24, 1915.

215

EDUCATION—Teachers' retirement fund—Who are members.

J. E. Kasner, County Auditor.

Dear Sir: You inquire if a person employed as a teacher September 1, 1915, who has never before taught in any public school in this state or elsewhere, is required to become a member of the retirement fund association, as provided for in Chapter 199, G. L. 1915, and whether such person is required to pay the fixed sum into such fund. Both of your inquiries are answered in the affirmative.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

February 17, 1916.

216

EDUCATION—Teachers—Substitutes need no contract.

J. R. Campbell, County Superintendent of Schools.

Dear Sir: This office is of the opinion that a school board may employ a teacher as a substitute for a regularly employed teacher who is ill, such new employe being hired for a temporary period only, and that such temporary employment need not be evidenced by a contract in writing signed by the members of the board and the teacher.

The law requires that a contract with a regular teacher must be in writing, in order to be valid, but where a regularly hired teacher, on account of illness, is prevented from teaching, and it is necessary to hire a substitute for a short period of time, such action may be taken by the school board without a written contract with the person so employed.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

April 20, 1915.

217

EDUCATION—Teachers' salary—Power annual meeting to bind school board.

J. R. Darling, Esq.

Dear Sir: You state that at the annual school meeting of your district it was voted that the school board should not pay over $55 per month for your teacher's salary. You ask whether the school board is bound by this action of the annual meeting.

Your inquiry is answered in the negative. The hiring of teachers, and the fixing of their compensation is a matter vested by law in the school board. There is, however, a limitation placed upon the school board in making expenditures, such limitation being that obligations shall not be assumed beyond the amount of money that will be available to pay the same.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

November 28, 1916.

218

EDUCATION—Appointing wife of superintendent teacher without unanimous vote of board.

C. G. Schulz, Superintendent of Education.

Dear Sir: You ask—"Does the election of the wife of the superintendent require the unanimous vote of the school board?"

You call attention to the provisions of law in which it is stated that in an independent school district the superintendent shall be ex officio a member of the school board, and also refer to the law that requires that the election of any teacher related by blood or marriage to any member of the board shall only be by the unanimous vote of the school board.

I am of the opinion that your inquiry should be answered in the negative. In other words, the wife of a superintendent of schools of an independent school district may be elected as a teacher of such district without the unanimous vote of the school board.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

November 2, 1916.

219

EDUCATION—Teachers—Wearing religious garb in schools.

W. F. Odell, Attorney-at-law.

Dear Sir: The question as to the right of public school teachers to wear the garb of a religious order while teaching in the public schools

has not, as far as I am advised, been passed upon by our Supreme Court. The matter has been before the Supreme Courts of certain other states, and the decisions are not in harmony.

I may inform you that Attorney General W. J. Donahower advised Honorable John W. Olson, the then Superintendent of Public Instruction, that the wearing of such garb by teachers while teaching in public schools was unlawful. The statutes of this state make the opinions of the Attorney General, rendered to the Superintendent of Public Instruction, decisive until the question involved shall be decided otherwise by a court of competent jurisdiction.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

March 31, 1915.

220

EDUCATION—Hiring of teacher related to member of board.

C. G. Schulz, Superintendent of Education.

Dear Sir: You state that a young lady was engaged by two members of the board to teach school, the contract being signed by the treasurer and clerk of the district, both of whom were distantly related to her by marriage. The Chairman of the school board refused to sign the contract; the teacher taught two months and resigned, and has received no compensation for such teaching.

At the last annual meeting of the school district a unanimous vote was cast in favor of paying her * * * for the two months' service rendered. The question presented is whether the school board may properly allow a bill for the services referred to, and whether the officers of the school district should draw an order therefor, and the treasurer pay the same.

I regret to say that in my opinion this inquiry must be answered in the negative. The law absolutely prohibits the hiring of a school teacher who is related by blood or marriage to any member of the school board, except upon unanimous vote of all the members of such board.

The hiring of teachers is a matter placed (within the restrictions of law) entirely in the hands of the school board, and the voters of the district at an annual or special meeting of the district have no voice in the hiring of such teacher.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

March 16, 1916.

221

EDUCATION—Transportation of pupils.

A. J. Stemmes, Treasurer, School District.

Dear Sir: You are advised that under the school laws of this state, a school board is authorized to arrange for the transportation of children to and from school, without being authorized so to do by a school meeting of the district. See Chapter 472, G. L. 1909.

It is within the power of the annual school meeting or a special a well upon the school house grounds. It then becomes the bounden duty of the school board to carry out the instructions of the district, provided funds are on hand available for the purpose.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

February 17, 1916.

222

EDUCATION—School board—Power of—To pay for lodging of pupils—Power to provide transportation.

A. D. Weston, Town Clerk.

Dear Sir: A school board of a common school district (not containing ten townships or more) has no right to pay board and lodging for children attending school in their district.

If the school board of a common school district decides to close the schools in its district, it may do so, and then provide for the free transportation of the pupils of its own district to the school in an adjoining or nearby district.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

January 6, 1915.

223

EDUCATION—Free transportation for pupils—Tax levy to cover expense of.

C. Rosenmeier, County Attorney.

Dear Sir: You inquire whether a common school district may legally vote money for the free transportation of pupils where such levy for that purpose would require an excess of the fifteen mills limit. In other words, you inquire whether the fifteen mills limitation covers all expenditures except the purchase of sites, and the building and equipment of school houses.

I am of the opinion that the expenditure for the free transportation of pupils is an item to be included in the tax levy "for the support of the schools" as referred to in Section 2917, G. S. 1913.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

October 3, 1916.

224

EDUCATION—State public school—Payment of expense of transporting child to.

E. N. Morrill, Judge of Probate.

Dear Sir: You inquire in regard to sending dependent children to the State School at Owatonna, as to whether the bill for sending them there, and the expense is to be presented to the county commissioners or can the judge of probate issue an order as in insanity cases?

I would say that if the commitment to the State School was issued in a proceeding brought by the county board, or any two members thereof, under the provisions of Section 1942, Revised Laws, 1905, then and in such case, under the provisions of Section 1946, Revised Laws, 1905, as amended by Chapter 442, Laws 1909, the fees and expenses of transportation incurred by the person authorized to convey a child to the State Public School, are to be audited, allowed and paid as was provided by law in insanity cases on April 22, 1909.

The law in force on that date, prescribing the manner of paying the fees and expenses of the person transporting a person to the insane hospital, is found in Section 4862, Revised Laws 1905, as supplemented by Chapter 57, Laws 1905.

If the State Public School is appointed guardian of a child in a proceeding instituted under the provisions of Chapter 260, Laws 1913, and the Court directs some person, designated by it, to transport such child to the custody of the guardian at Owatonna, then, in my opinion, the fees and expenses of the person taking the child to the state school, if not paid by the parent of the child, are to be paid by the county in the first instance on the certificate of the Probate Judge. Such certificate should recite that the person named therein is entitled to receive a specified sum as and for his fees and expenses in transportation of the child (to be named) from the place (named) to the State Public School at Owatonna, pursuant to an order of the Court appointing such school as guardian of the child (named) describing the order by the date thereof and appropriate reference to the proceedings in which it was made.

In other words, I am of the opinion that the fees and traveling expenses of the person transporting the child are, to quote a part of Section 14, Chapter 260, Laws 1913—"expenses of the proceedings provided for by this act."

The County Auditor, in my opinion, is authorized to pay the amount shown in the certificate to the person named therein without the allowance of the claim by the county board.

Yours truly,

C. LOUIS WEEKS,
Assistant Attorney General.

March 30, 1915.

225

EDUCATION—Pupil over 21 years of age—Non-resident—Liability for Tuition.

Mr. L. L. Kells.

Dear Sir: The inquiry submitted by you recites the fact that your school is a so-called "Putnam School," and that a pupil more than twenty-one years of age, residing in another district is receiving instruction in the Sauk Center School in academic and industrial subjects.

You state that you have advised the Superintendent of Schools that Sauk Center can make no charge to the home district of this non-resident pupil for tuition. In this you are corect.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

January 6, 1915.

226

EDUCATION—University—Duty of state auditor—Money to be paid University Treasurer.

A. C. Gooding, State Treasurer.

Dear Sir: I am of the opinion that the State Treasurer is warranted in paying over to the Treasurer of the State University, as distinguished from the Treasurer of Minnesota, any set sum of money as the Regents of the State University may request the State Auditor to set aside for the use of the University.

This seems to me to be authorized by the Constitution of the state (Article VIII Section 4) which says:

"All lands which may be granted hereafter by Congress, or other donations for said university purposes, shall vest in the institution."

Earlier in the section it says that "the endowments heretofore granted to the university are perpetuated unto the said university." This vests in the university the interest on such endowments and grants and therefore gives it the right to use the same as may be necessary for the purposes of the state university.

Yours truly,

LYNDON A. SMITH,
Attorney General.

October 4, 1916.

227

EDUCATION—University—Professors—Payment for extra services.

J. A. O. Preus, State Auditor.

Dear Sir: In reply to your letter relative to the payment of bills of University professors for extra services, I have to say that this matter is governed by the same principle as was stated by me in a letter to you, dated March 3, 1915. In this letter I quoted the following from the case of State vs. Vasaly, 98 Minn. 47:

"It is elementary that while a public official cannot require extra pay for services rendered by him for which compensation by way of salary is allowed by law, he may recover pay for other services which he may render outside of, and in addition to his ordinary official duties which could as well be performed by any other person as by him."

The comments on this decision made in the letter of March 3, 1915, hereinbefore referred to, are applicable at this time, in fact the wording of the opinion cited above is such as to require an investigation of each bill presented for extra services to insure its legality.

Yours truly,

LYNDON A. SMITH,
Attorney General.

August 5, 1916.

228

ELECTIONS—Canvass of ballots under facts stated.

A. B. Sander, County Auditor.

Dear Sir: It appears that you are in receipt of an envelope containing a soldier vote for Kanabec County. The address given on the envelope containing such vote is Mora, Minnesota. You are of the opinion the proper voting precinct may have been the town of Brunswick in your county, but you have no way of being sure about it. I assume that there is but one voting precinct in the village of Mora.

Under the 1916 law the vote is to be canvassed by you and placed with the precinct vote as indicated by the small envelope in question. As you did not send any county ballots to the Secretary of State, there will be contained in such small envelope only the ballot of the soldier covering the presidential electors, state officers and constitutional amendments. Make the canvass as above stated. If the county canvassing board has already completed its labors and adjourned, then it will be too late to canvass this vote, and you should place the small envelope in the larger one, seal it up, make the proper notations on the outside of the larger envelope, stating why it had not been canvassed, and safely preserve such large envelope with its contents.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

November 15, 1916.

229

ELECTIONS—Ballots—Distribution of under facts stated.

C. Rosenmeier, County Attorney.

Dear Sir: You state that one of the candidates for an elective office in your county desires to have printed and circulated a number of sample ballots, containing the entire list of county candidates, without making any marks after his own name. You state that the ballots will be exactly as the official ballot, except of course that the names or initials of the officials will not appear thereon, nor will they be of the same color as the official ballot. The man in question desires to mail the sample ballots to the voters.

You refer to Section 567, G. S. 1913, and state that there can be no question that the printing and distribution of the ballots is a legal expense. In this you are doubtless correct.

You then desire to know whether or not such sample ballots are covered by Section 573, compelling the person distributing the same to have printed thereon the name and address of the author, etc.

In my opinion your inquiry is to be answered in the affirmative.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

November 3, 1916.

230

ELECTIONS—Ballots—Only nominee's names appear thereon—Non-partisan offices.

John J. Selemske, Esq.

Dear Sir: The law now provides that a person cannot be nominated (except in case of vacancy) for a non-partisan office except at a primary election. It therefore follows that if an election is to be held in November for a non-partisan office (including county commissioner) then no persons can go upon the general election ballot except such as were chosen at the primary or are to have their names go upon the general election ballot pursuant to a filing made before the primaries where not to exceed two candidates filed for the office in question. There will be a blank space on the general election ballot in which a name can be written for the office of county commissioner, where there is one to be elected. If however, a vacancy should exist in the office by death, resignation or otherwise, and no person has been nominated therefor, as above indicated, then a name can go on the ballot by petition.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

June 13, 1916.

231

ELECTIONS—Candidates—Right to withdraw from ballot.

Edward Freeman, Village Attorney.

Dear Sir: You state that Chisholm is a village of over 5,000 inhabitants, and therefore uses the Australian Ballot System, under the provisions of Chapter 210 G. L. 1913. You inquire as to whether a person who was filed as candidate for office can withdraw as such candidate and run for another office, or else not be a candidate for any office at such election. You also ask whether, if such withdrawal is permitted, the same can take place after the last day for filing has passed.

You are advised that, in my opinion, both of your inquiries are properly answered in the affirmative. It has heretofore been held by this office as regards the withdrawing of a name of a candidate at a primary election, that independently of statute the right to withdraw exists prior to the time of making up the primary ballot. I think the same rule is applicable here.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

March 8, 1915.

232

ELECTIONS—Description of profession of candidate on ballots.

E. J. Jones, County Attorney.

Dear Sir: I have to say that candidates' names, not descriptions, go on ballots. It is a question of fact what the name of any specified candidate is. I have known a man who had as a first name "Doctor," also one whose first name was "Colonel." A citizen of St. Paul has for a first name "Bishop."

Yours truly,
LYNDON A. SMITH,
Attorney General.

June 5, 1916.

233

ELECTIONS—Carrying ballots to voters unable to attend polls.

Hon. Ernest Lundeen.

Dear Sir: You inquire as to whether the election judges may take the ballots of the soldiers in the hospital at the Soldiers' Home, the inmates of such hospital not being physically able to go to the polling place that will be established on the Soldiers' Home Grounds.

I am obliged to answer your inquiry in the negative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

June 1, 1916.

234

ELECTIONS—Secretary of State to prepare ballot.

J. A. O. Preus, State Auditor.

Dear Sir: After a careful consideration of the question as to whether or not election printing should be let to bidders, according to the general provisions of Section 4932 G. S. 1913, I have to say that in my judgment the election printing is to be attended to by the Secretary of State, and so attending to such matters he is not bound by the laws generally applicable to state printing.

The term used in the Statute is usually that the Secretary of State shall prepare the ballots and other instruments relating to election, and both by the terms of your inquiry, and the language of the Statutes, the real question is as to the meaning of the word "prepare" in this particular connection.

Webster defines "prepare" as "to fit, adapt or qualify for a particular purpose." The things printed for the particular purpose of making them ready for use in election matters seems to me to be preparing such things.

In Section 400 G. S. 1913, the Statute says, the

"Secretary of State, County Auditor and City Clerks shall place upon the ballot prepared by them, respectively, the names of all candidates."

Section 396 says:

"The officer whose duty it may be to have such ballots prepared and printed;"

Section 317 says that the White ballot "shall be prepared under the direction of the Secretary of State, and bound in lots of fifty."

I can come to no other conclusion than that the preparing of the ballot, and likewise other matter, includes the printing of the same, and that therefore, this printing is included in that mentioned in the last clause of Section 4932, G. S. 1913, as "otherwise provided for by law."

Yours truly,

LYNDON A. SMITH,
Attorney General.

September 18, 1916.

235

ELECTIONS—Color of paper used for ballots.

O. E. Kyllo, Village Recorder.

Dear Sir: You state that the Village of Goodhue on June 19 voted upon a bonding proposition, that all the provisions of law were complied with except that the ballots were not printed on lavender colored paper, and deposited in a lavender colored box, such paper not being obtainable.

The ballots were printed on light blue paper, and you inquire whether the election was illegal for the reason that lavender paper was not used. In my opinion your inquiry is to be answered in the negative.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

June 21, 1916.

236

ELECTIONS—White Ballots—Who furnishes.

John Boss, County Auditor.

Dear Sir: You are correct in your interpretation of Section 317 G. S. 1913, to the effect that the white ballots will be furnished you by the Secretary of State, ready for distribution, and that your local printer will not be obliged to print said ballots.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

October 12, 1916.

237

ELECTIONS—Bribery—Citizens offer to contribute to city treasury.

L. Klima, Esq.

Dear Sir: The statutes of this state include among the definitions of bribery, the following:

"Every person who wilfully, directly or indirectly, pays, gives or lends, any money * * * or other valuable consideration, to or for any voter, or to or for any other person, in order to induce any voter * * * to vote in any particular way, at any election or primary, shall be guilty of a felony."

Section 612, General Statutes, 1913.

My assistants and I agree that the proposition which you make with regard to giving to the City of Owatonna an amount of money equal to the amount that would be received from saloon licenses, if the city should vote against license at the coming election, would be so near a violation of the bribery statute referred to above that this office cannot give such an act any encouragement.

I also call your attention to Section 574 General Statutes 1913, and to paragraph six of Section 606 General Statutes, 1913.

If some statute or decision should be discovered which has a tendency to cast doubt upon the correctness of the foregoing opinion it will be carefully considered, and you will be advised hereafter of any change of view which I may have.

Your truly.

LYNDON A. SMITH,
Attorney General.

March 3, 1916.

238

ELECTIONS—City Recorder—Fees for distributing supplies.

John Boss, County Auditor.

Dear Sir: You are advised that, in the opinion of this office, your City Recorder is only entitled to $1.00; and also 10 cents per mile for each mile necessarily traveled in going to the county auditor's office to receive ballots and election supplies. This is true whether the city is composed of one or more wards, irrespective of the number of packages of supplies he may receive.

Your truly.

CLIFFORD L. HILTON,
Assistant Attorney General.

April 26, 1916.

239

ELECTIONS—Corrupt Practices Law—Applications to candidates for congress.

Hon. W. G. Calderwood.

Dear Sir: In reply to your letter I have to say that for the most part the Corrupt Practice of our state remains in force as to the acts of candidates during the campaigns preliminary to both the primary and the general elections.

The amount to be expended seems to be governed by the Federal Laws, and the reports of such expenditures are to be made to the Secretary of the Senate of the United States, rather than to the Secretary of State. All of the police regulations are in my judgment enforced in this state.

There is one other matter that I think is governed by the Federal Law, and that is the maintenance of headquarters. In this state a candidate cannot maintain directly any headquarters under the provisions of Corrupt Practices Act, but under the Federal law such headquarters can be maintained by a candidate.

Yours truly,

LYNDON A. SMITH,
Attorney General.

August 14, 1916.

240

ELECTIONS—Corrupt Practices Act—Application to candidates for Congress.

Julius A. Schmahl, Secretary of State.

Dear Sir: I have to say that the first question contained in your inquiry should be answered by saying that the federal legislation is controlling in this state on the subject of limit of expenditure.

The second question cannot be answered so readily or with certainty because the state primary election law is largely binding upon candidates for United States senator, and for representative in Congress. The law applying thereto is stated with clearness by the United States supreme court in the case of Ex Parte Siebold, 100 U. S. 371, 383-384. This action involved the question of the interpretation of the following clause of the Federal Constitution:

"The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the place of choosing senators." (Article 1, Section 4).

The statement of the law as based upon this constitutional provision is as follows:

"After first authorizing the states to prescribe the regulations, it is added. 'The Congress may at any time, by law, make or alter such regulations.' 'Make or alter:' What is the plain meaning of these words? If not under the prepossession of some abstract theory of the relations between the state and national governments, we should not have any difficulty in understanding them. There is no declaration that the regulations shall be made either wholly by the state legislatures or wholly by Congress. If Congress does not interfere, of course, they may be made wholly by the state; but if it chooses to interfere, there is nothing in the words to prevent its doing so, either wholly or partially. On the contrary, their necessary implication is that it may do either. It may either make the regulations, or it may alter them. If it only alters, leaving, as manifest convenience requires, the general organization of the polls to the state, there results a necessary co-operation of the two governments in regulating the subject. But no repugnance in the system of regulations can arise thence; for the power of Congress over the subject is paramount. It may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the state, necessarily supersedes them. This is implied in the power to 'make or alter.' * * *.

The objection, so often repeated, that such an application of congressional regulations to those previously made by a state would produce a clashing of jurisdictions and a conflict of rules, loses sight of the fact that the regulations made by Congress are paramount to those made by the state legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative."

In view of the law as stated in the quotation just made from an opinion of the United States supreme court, I cannot but reach the conclusion that Congress, having provided for the filing of detailed expense accounts with the clerk of the House of Representatives at Washington or to the Secretary of the United States Senate, as the case may be, has done away with the requirements of the State law that the statement of expenditures should be filed with the Secretary of State.

It should be expressly understood that the foregoing ruling does not in any way permit any member of Congress to do the things for-

bidden by the Corrupt Practices Act of this state so far as they do not relate to the expenditure of money or the refraining from stating the personal expenditures which the laws of the United States say "shall not be considered any part of the sum fixed as the limit of expense, and need not be shown in the statement herein required to be filed." See Chapter 33, Volume 37, United States Statutes at Large.

Yours truly,

LYNDON A. SMITH,
Attorney General.

April 26, 1916.

241

ELECTIONS—Corrupt Practices Act—Application of to campaign for constitutional amendment.

Hon. P. H. McGarry.

Dear Sir: This office has heretofore held that the Corrupt Practices Act applies to activities within this state, the purpose of which is to cause either the adoption or the defeat of a constitutional amendment. Subdivision 9 of Section 606, G. S. 1913, appears to admit of no other construction. There is other language that appears to bear out this construction; for instance, in Section 570, it refers to printing matter in a newspaper—

"for influencing or attempting to influence any voting at any election or primary through any means whatsoever."

Section 576, G. S. 1913, prohibits the giving of meat, drink, entertainment, etc., with the intent or hope to influence any person.

"to give or refrain from giving his vote at such primary or election to or for any candidate or political party ticket, or measure before the people."

The next Section uses substantially the same language. See also Section 580.

Our conclusion therefore must be that Section 592, G. S. 1913, prohibits any corporation from making contributions toward the campaign you have in mind. Such contributions must come from individuals. The political committee having such campaign in charge must file its statement of contributions and expenditures in the manner provided by the Corrupt Practices Act. The size of the contribution which an individual may make to such political committee is not limited.

Yours truly,

WILLIAM J. STEVENSON,
Assistant Attorney General.

February 24, 1916.

242

ELECTIONS—Corrupt Practices Act—Committee referred to must make report.

C. J. Swenson, Esq.

Dear Sir: The Attorney General has held that a County Campaign Committee, organized for the purpose of influencing a county option election, either for or against county option, is, under the Corrupt Practices Act, to be considered as a Political Committee, and therefore must make the report which the Corrupt Practices Act provides shall be made by a Political Committee.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

June 28, 1915.

243

ELECTIONS—Corrupt Practices Act—Application of law to county option election

W. E. Rowe, Esq.

Dear Sir: I have to say that my view of the question of the relation of the Corrupt Practices Act to citizens' committees is as follows:

Section 2 of the County Option Law says:

"In all elections hereunder, except as to matters herein otherwise provided for, all provisions of law governing general elections for county officers in this state, including penal provisions * * * shall apply and govern as far as applicable."

In Subdivision 6 of Section 40 of the Corrupt Practices Act occurs the following:

"The term 'election' shall mean and include all the general, special or other elections * * * under the election laws governing any election in any district, county * * *."

In Subdivision 9 of the same section occur these words:

"Every two or more persons who shall co-operate in the raising, collecting or disbursing of money used or to be used * * * for or against the adoption of any law, ordinance or constitutional amendment, shall be deemed a political committee."

Subdivision E of Section 19 of the Corrupt Act says:

"Statements shall also be made by any other political committee showing the total amount of receipts and disbursements and for what purpose such disbursements are made. Such statement shall be filed with the auditor of the county in which such committee has its headquarters, within thirty days after any primary or election."

Section 8 of said Corrupt Practices Act, Subdivision 2, says:

"No person, firm or co-partnership shall disburse, spend or contribute in any manner whatsoever for political purposes during any primary or election a sum of money in excess of $50, except through a political committee."

In several sections the act is made to apply to elections at which the voters are to vote upon any "measure before the people." See Sections 10, 11 and 14. Other expressions somewhat similar appear in other sections of the act.

Inasmuch as this law is a criminal law, it is required to be construed with reasonable strictness, yet the real intent of the legislature is to be obtained from its provisions and as so obtained is to control the interpretation of the statute. My judgment is that the proper interpretation of this law is that it applies, for the most part, to the elections at which the question of county option is to be voted on; that two or more persons who co-operate in efforts to pass or prevent the passage of the county option proposition form a political committee, which should in a general way, and sufficiently to comply with paragraph E of Section 19, keep account of their expenditures and file that account with the auditor of the county within thirty days after the election. It would also seem that by the terms of Section 8, the amount of money which may be given to and expended through a political committee is not limited.

There are some features of the Corrupt Practices Act which relate only to the election of persons to office. Such paragraphs as relate wholly to that subject, instead of to the more general matters relating to all elections, would not seem to be binding upon or applicable to elections under the county option law. For instance, Section 1 is confined to the expenditure of candidates for nomination or election to an elective office. Section 14 is probably applicable to elections held under the county option law. It is possible that a court might hold that the law was so fully directed to the election of candidates for office that it would not apply to elections upon measures. I do not hold this view and believe it more likely that it will ultimately be settled that those portions of the Corrupt Practices Act which apply to elections held for the purpose of voting upon measures will be sustained as separable from those provisions which apply only to the election of candidates for office.

Yours truly,
LYNDON A. SMITH,
Attorney General.

April 22, 1915.

244

ELECTIONS—Corrupt Practices—Campaign against county seat removal.

Wm. H. Lamson, Esq.

Dear Sir: I state that I do not find anything in the Corrupt Practices Act which requires the filing of statements of receipts and disbursements by self-constituted committees who are conducting a campaign for or against the removal of your county seat.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

February 24, 1916.

245

ELECTIONS—Corrupt Practices Act—Contributions by candidate to political club.

P. W. McAllister, Esq.

Dear Sir: You state that you are a candidate for Representative in the 34th District and you ask whether under the corrupt practices act you would be permitted to give toward the financial support of the Eighth Ward Republican Club.

It has been held that a candidate (not exceeding the maximum he is authorized to expend) may contribute to any political committee. I think that a political club such as you describe could properly be called a political committee and therefore that you could contribute to it.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

October 21, 1916.

246

ELECTIONS—Corrupt Practices Act—Filing expense account.

Hon. Knute Knutson.

Dear Sir: Relative to the necessity of a candidate for office filing an expense account on the Saturday preceding primary election day, when such candidate it not to be voted for at the primary for the reason that filings for the same office were not sufficient to require the placing of the names of candidates on the primary election ballot.

Your attention is called to Section 585 G. S. 1913, in which it is expressly provided that—

"Every candidate * * * shall on the second Saturday occurring after such candidate has first made a disbursement * * * and thereafter on the second Saturday of each calendar month until all disbursements shall have been accounted for, and also on the Saturday preceding any election or primary, file a financial statement, etc."

It is my opinion that you should, on Saturday, June 17, file an expense account.

Yours truly,

LYNDON A. SMITH,
Attorney General.

June 16, 1916.

247

ELECTIONS—Corrupt Practices—Newspapers—Political Advertising—Price of same.

W. S. Whitbeck, Esq.

Dear Sir: You are advised that there is no state law regulating the amount that a newspaper may charge for advertising the candidacy of a person who is running for an elective office.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

April 29, 1916.

248

ELECTION—Corrupt Practices Act—Non-candidate conveying voter to the polls.

Edward L. Rogers, County Attorney.

Dear Sir: You call attention to Section 579, G. S. 1913, and ask whether a person who is not a candidate nor connected in any way with any candidate for office can convey voters to the polls is guilty of any criminal offense, and if so, what is the penalty. In my opinion such person does commit an offense, and the general penalty provided for inSection 607, G. S. 1913, would be applicable.

You suggest that the last part of this section makes it only applicable to candidates, but with this suggestion I cannot agree. The portion of the section referred to reads as follows:

"And no person so convicted shall be permitted to take or hold office to which he was elected, if any, or receive the emoluments thereof."

It seems that the purpose of the legislature was that as far as candidates were concerned, in addition to the punishment provided for a conviction, the candidate should be deprived of the right to hold office or receive the emoluments thereof. This was well within the legislative power.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

July 26, 1916.

249

ELECTIONS—Corrupt Practices Act—Construed—Payment of expenses after election.

The Duluth Herald.

Gentlemen: I have to say that Section 584 of the General Statutes of 1913, is so clear that it cannot be interpreted to mean other than that which it specifically and concisely states.

The penalty prescribed by statute for paying a bill by a candidate or personal or party campaign committee, incurred before a primary or election in connection with a political campaign, is anything from a twenty-five dollar fine to three years in the State's prison, according to circumstances, and the disposition of the person sentencing a convicted offender.

The question then arises whether or not a law of this kind is unconstitutional. The Supreme Court of our state has held the corrupt practices act constitutional, with an intimation that there may be some things in it so unrelated to the purity of elections that they would be dropped out by the supreme court upon a consideration of those particular features of the law. I am of the opinion that the question whether or not a man pays an honest political debt, incurred before a primary or election, but not presented withih ten days after such primary or election, is not a matter which can affect the election already held, and that therefore it is not one of the clauses of the corrupt practices act which has an important bearing upon purity of elections. At the same time, there is no doubt but that the state may fix a short statute of limitations within which bills must be presented and debts paid so that the financial transactions of a political campaign may all be closed within a reasonable time after the election is over. I cannot say as a matter of law that the ten days' statute of limitations is unreasonble. I do not think a person would lose his office because of paying honestly a bill which had been overlooked by his creditor for more than ten days after a primary or election.

I am inclined to think, so far as Section 584 is a statute of limitations, it is good, and so far as the payment of a bill presented more than ten days after the primary or election is concerned, it might be held to be an offense, but such payment would not be a ground for the forfeiting of an office.

Yours truly,
LYNDON A. SMITH,
Attorney General.

February 18, 1915.

250

ELECTIONS—Corrupt Practices Act—School district bond election.

J. P. Wallace, Clerk.

Dear Sir: You state that your school district is soon to vote upon the issue of bonds to the State of Minnesota for the purpose of building a high school building, and you inquire whether it would be contrary to law for either or both sides to the question to convey voters to the polls for the purpose of voting, and whether it would be contrary to the provisions of law for pensons to circulate tickets, and solicit voters outside of the polling place.

Although the corrupt practices act is susceptible of the construction that neither of the things above referred to should be done, and although this office was at first inclined to the view that such a ruling should be made, still a number of the district courts have placed a differ-

ent construction on the law, and it has been held by such courts that it is not contrary to law to solicit voters or to convey them to the polls of a school election called for the purpose of voting upon a contemplated bond issue. This ruling of the courts has been followed and is now the ruling of this office.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

January 12, 1915.

251

ELECTIONS—Corrupt Practices act—What a compliance with.

Oscar C. Ronken, Esq.

Dear Sir: I am of the opinion that the proper answers to your inquiries are as follows:

1. Must an advertisement in a newspaper, intended to influence voting at such election, have at its head the names of these five committee members?

What would be required to be at the head of such an ad would be "paid advertisement" with the amount of money to be paid therefor, the name of the author and the person or persons authorizing the publication.

2. Would it be a sufficient compliance with the law if the name of the Secretary of this committee appears at the head of such advertisement?

It would be sufficient if the name of the secretary appeared with the name of the committee, assuming that the committee had instructed the secretary to cause such an ad to be published.

3. Would it be a sufficient compliance with the law to state merely that "the following is supplied by the friends of County Option, to be paid for by them at the rate of 10c per line.

I do not think it would.

4. In a circular to be issued by this committee containing several articles written or compiled by members of this committee, would it be a sufficient compliance with the law to state on the face of the circular the names and addresses of the committee without indicating which member is the author of which article?

I do not think so.

Yours truly,
LYNDON A. SMITH,
Attorney General.

May 12, 1915.

252

ELECTIONS—County Option—Irregularities in.

Constant Larson, County Attorney.

Dear Sir: You state that the county option election for Douglas County will take place next Monday. You refer to the provisions of the law found in Section 7 of Chapter 23, General Laws 1915, providing that:

"The judges of such election in each district shall take from the custodian thereof, and use at such election the register of voters used in said district at the general election next preceding said election so to be held as herein provided."

You further state that the city clerk of Alexandria informs you that these registers for the five election precincts in the city cannot be found, and you ask how, under these circumstances, the election should be conducted, and whether the oath required by said Section should be administered to all the voters before they are permitted to vote.

Section 7, above referred to, in addition to the portion above quoted, provides as follows:

"If any person shall offer to vote in any such districts whose name does not appear on such registration list, his name shall be entered thereon upon his taking such oath, answering such questions, and complying with such other provisions as shall be required by the then existing laws regulating the registration of voters. After his name is so entered and before he receives the ballot, the judges shall administer the following oath: 'You do swear that you are a citizen of the United States; that you are twenty-one years of age and have been a resident of this state for six months immediately preceding this election; that you are a qualified voter in this district; and that you have not voted at this election.' Upon taking this oath, if the judges are satisfied he is a qualified voter, he shall be allowed to vote. If such person refuses to take his oath, he shall not be allowed to vote, and his name shall be removed from the register."

Under the facts as stated by you, I do not think that an election, otherwise properly held, would be invalid for the sole reason that the registers could not be found, and the voters were not required to take oath above referred to—in the absence of proof that persons were allowed to vote who were not legal voters, and that their voting caused a result different from what it would have been had they not been permitted to vote.

A register should be kept of those voting, and in my opinion, the safest course to pursue would be to require each voter, before his ballot is received, to take the oath above prescribed, and that is the course that I would advise should be taken.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

May 28, 1915.

253

ELECTION—Hours for holding county option.

Stephen Singer, Esq.

Dear Sir: You state that the notices posted in your township for a county option election state that the polls will be open from six A. M. to 9 P. M., while in an adjoining town the notices so posted call for the polls to be kept open from 9 A. M. to 5 P. M. You ask which is correct and what the result will be under the circumstances stated.

The county option law provides generally that the county option elections shall be conducted in the same manner as are general elections for county officers. The law provides that the polls at a general election in a township shall be kept from 9 A. M. to 9 P. M., and therefore the polls at the county option election should be kept open during the hours last above stated, irrespective of what may be stated in the notices that are posted.

The county option law among other things provides that—

"Failure for any cause to give any of the notices herein required (including the posting by the town clerk of three election notices) or to make or file proof thereof, shall not be held to invalidate any election held hereunder."

It would therefore follow that the election would not be invalidated on account of the error above referred to.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

June 5, 1915.

254

ELECTIONS—County Option—Holding on day on which other elections are held.

Albert H. Enersen, County Attorney.

Dear Sir: I have to say that I have held that it is better, and probably within the intent of the law, not to have any other election on the day when a county option election is held. At the same time, I do not believe that the holding of other local elections on the day when a county option election is held would be deemed to render the result of that election invalid. The peculiar wording of the county option law, where it speaks of not holding "other regular elections" tends to confuse. It practically calls the county option election a regular election, and if it is a regular election, then the word "regular" means any election regularly held under a valid law, and the word "regularly," in harmony with that construction, would mean "governed by definite rules."

Yours truly,

LYNDON A. SMITH,
Attorney General.

May 18, 1915.

255

ELECTIONS—Fees of town clerk.

Anton Thompson, County Attorney.

Dear Sir: I have to inform you that the Attorney General has held that town clerks are entitled to one dollar, and mileage at ten cents a

mile for the trip made by such clerk in going to and returning from the postoffice or express office to receive the election ballots for the presidential primary.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

March 30, 1916.

256

ELECTIONS—Filing names of candidates for state offices by members of the Progressive Party.

Julius A. Schmahl, Secretary of State.

Dear Sir: Relative to the filing of the names of candidates for state offices by members of the Progressive Party, I have to say that I considered this matter carefully some time ago and came to the conclusion that the law relative to the nominating of candidates by petition could be resorted to by that party so far as the nomination of state candidates is concerned. I came to the conclusion that the filing of Mr. Schall as candidate of the Progressive Party for Congress in the Tenth Minnesota district prevented the filing of a petition for any other member of that party for the congressional office from that district, but did not prevent the filing of petitions for the nomination of state officers or congressmen in other districts.

Had a single person filed as a Progressive candidate for a state office, then in my opinion there would have been such action taken as would have constituted the holding of a state primary election by the Progressive Party, but in the absence of the filing of any one for any state office, I am of the opinion that the Progressive Party may resort to the filing of names of state candidates by petition.

Yours truly,
LYNDON A. SMITH,
Attorney General.

July 17, 1916.

257

ELECTIONS—Disposition of filing fees.

Oscar Swanson, Town Clerk.

Dear Sir: You refer to the law providing for the Australian ballot system under certain conditions in township elections and inquire as to what disposition shall be made of the money (filing fee) which is paid to the town clerk by candidates filing for office.

This money should be turned into the township treasury and placed in the general fund. Certain expense is to be incurred on behalf of the township by the clerk in the way of providing necessary tally sheets and ballots.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

November 17, 1916.

258

ELECTIONS—Candidates acting as election judges.

A. P. Hechtman, Esq.

Dear Sir: It appears that at your last annual village election certain members of the old board, who were candidates for re-election, acted as judges and clerks of election. Section 1252, G. S. 1913 provides that the council shall appoint judges of election for the annual village election, but that such persons so appointed shall not be candidates for any village office. This section applies to villages that have been incorporated or re-incorporated under chapter 9, G. S. 1913. You state that your village is organized under a special law which contains a clause to the effect that elections should be held as near as possible in conformity with the general laws. If section 1252, G. S. 1913 above referred to, is by the provision of your special law, applicable to village elections in your village, it was not proper that candidates for office should have officiated as election officers. Be that as it may, however, it has been heretofore held that such action was a mere irregularity and an election, if otherwise properly conducted, would not be invalid for that reason. It would therefore follow that the mere fact that candidates for village office acted as election judges at a village election, would not make the election void, and the result of the election as canvassed and returned could not be set aside for that reason.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

July 24, 1916.

259

ELECTIONS—Appointing judges and clerks when all voters are of same political faith.

William M. Wood, County Attorney.

Dear Sir: You state that in one of the precincts in your county it is impossible to find a person who is qualified to act as a judge or clerk of election who is known to be against the prohibiting of sale of intoxicating liquor and you inquire as to what shall be done under this situation. As you state the law provides in specific terms that no more than two of the judges and one clerk in any district shall be of like belief, either in favor of prohibiting the sale of intoxicating liquor or against prohibiting such

sale. Under the situation as you state that it exists, the only thing to do is to have the requisite number of judges and clerks, irrespective of their belief on the question that is to be voted upon.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

June 1, 1915.

260

ELECTIONS—Compensation of judges in cities—Who paid by.

Chas. D. Gould, City Attorney.

Dear Sir: I have examined carefully the statute with regard to the payment of judges of election for services. It provides that the cost of providing ballot boxes and polling places and equipping the same, in cities of the first class, shall be paid by the city where the election is held. There is no statute, so far as I have been able to discover, providing exactly what constitutes equipping polling places. I am of the opinion that the word "equipping" means putting in those polling places the things which are necessary to the conducting therein, in a legal manner, a proper election. This includes the obtaining by some one from the proper custodian thereof the ballot boxes, ballots, poll lists, etc., which are used in conducting properly an election.

In Section 443 G. S. 1913 provision is made for the judges procuring the registers, and in the next section it speaks of such judges appearing at the office of the custodian of the ballots. The second sentence in said Section 443 is this:

"The custodian of the ballot boxes and ballots shall deliver the same to the judges of the respective districts, together with their keys, the poll books, stationery and material required at such election."

The fair inference from these sections, including Section 535, is, to my mind, that the ordinary expenses of the several judges of election going to the legal custodian of the things necessary in the conduct of the election and getting the same, is that they shall be paid reasonably therefor by the municipality in the same way as the municipality would pay other public expenses incurred in its behalf.

If this conclusion be correct, then the city council is to determine how much shall be paid to the judges of election for securing the equipment of the polling places and is not governed by any law except the law of reasonable payment for services in the amount paid.

The question of returns is a little more doubtful perhaps, but my impression is that as to those things returned to the clerk of the city, the rule stated above applies, but as to the returns made to the county auditor the rule specified in paragraph 3 of Section 534 G. S. 1913 applies. This rule is that persons carrying returns to county auditors shall have one dollar for each trip necessarily made and ten cents for each mile of necessary travel. This means ten cents for each mile actually traveled by the going to or returning from the auditor's office.

Yours truly,

LYNDON A. SMITH,
Attorney General.

May 25, 1916.

261

ELECTIONS—Nominating petitions.

Clarence W. Halbert, Chairman State Central Committee.

Dear Sir: I have to say that I am of the opinion that filings can be made by nomination of voters, for state and congressional offices, after the primary elections in June, provided that the party does not have any primary elections, and that no person can sign a nomination by voters who has participated in any June 1916 primary election. The signers of a nominating certificate must comply with all the requirements of Sections 371-373 G. S. 1913. The only doubtful sentence in the law is the one which reads as follows:

"No person who has voted at a primary shall be eligible as a petitioner for any nomination to an office for which nominees were voted upon at such primary."

I am sure that two thousand persons (in case of a state office) or five hundred persons (in case of a congressional office) may sign a nominating certificate if they shall not have voted at a primary and may thereby nominate for a state or congressional office the candidate of their choice provided he has not participated in any primary himself.

Yours truly,

LYNDON A. SMITH,
Attorney General.

May 4, 1916.

262

ELECTIONS—Nominee ceasing to be resident.

D. W. Sullivan, Esq.

Dear Sir: If one of the men nominated for county commissioner moves out and there were three men running, the holding of this office has been that the third man moves up to second place and goes on the ticket. If there were not three men voted for, then the one man left becomes the sole candidate, subject, however, to the proper use of a petition for a third man and stickers at the general election.

Yours truly,

LYNDON A. SMITH,
Attorney General.

August 16, 1916.

263

ELECTIONS—Non-partisan officers cannot be nominated by petitions except in case of vacancy.

J. A. Lee, County Attorney.

Dear Sir: You ask:

"Can a man get his name on the official non-partisan county ballot at the November election for county commissioner by petition?"

Your inquiry is to be answered in the negative. Your attention is called to Section 371, G. S. 1913, in which it is expressly provided that—

"No person shall be nominated by petition pursuant to this section for any office now or hereafter declared to be a non-partisan office except in cases of vacancy."

It therefore follows that for the office of county commissioner, which is a non-partisan office, no one can have his name placed on the official ballot at the November election when there is any person whose name will go upon that ballot pursuant to action at or previous to the June primary election.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

June 23, 1916.

264

ELECTIONS—Only citizens may vote.

James Kelly.

Dear Sir: You ask if a man can vote in this state when he has only secured his first papers. Your inquiry is answered in the negative. The constitution now requires that a man must be a full citizen of the United States in order to be entitled to vote and that he must have been such full citizen for a period of at least three months preceding the election.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

November 4, 1916.

265

ELECTIONS—Paroled convict not a voter.

James Mantell, Esq.

Dear Sir: I have to inform you that under the law a man who has been convicted of murder in this state and is out on parole, and hence has not been restored to capacity, is not eligible to hold public office.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

April 1, 1916.

266

ELECTIONS—Duty of employer—Permit employe to vote at primary.

Mr. Charles S. Allbright.

Dear Sir: "Every employe entitled to vote at a primary election must be permitted to absent himself from his work for that purpose during the forenoon of such primary election day." This is made the law as to general and city elections by Section 472 of the election laws furnished by the Secretary of State.

By Section 349 of such laws, under heading "folding and depositing ballots," the following is found:

"So far as applicable, all provisions of this chapter relating to * * * time allowed employes for voting * * * shall be observed and enforced."

The result of this adoption by reference of the section first above mentioned is to make it incumbent upon employers to allow employes who are entitled to vote at a primary, the forenoon of the primary election day in which to vote.

Yours truly,
LYNDON A. SMITH,
Attorney General.

March 10, 1916.

Note: Opinions relating to presidential preference primaries omitted because of repeal of that law by Chapter 133, Session Laws 1917.

268

ELECTIONS—Primaries—Last day for filing.

James E. McLeod, Judge of Probate.

Dear Sir: It has heretofore been and is now the holding of this office that the county auditor would not be obliged to receive a filing for a county office after he has closed his office on the afternoon of Monday, May 29, 1916. However, if the county auditor should, after such closing hours, see fit to go to his office at a time prior to midnight of said May 29, and there accept a filing, such filing, if otherwise regular, would be lawful.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

May 26, 1916.

269

ELECTIONS—Primaries—Non-Partisan offices—Nominating Petition improper unless no candidate.

Iver J. Lee, Esq.

Dear Sir: You state that three men, A, B. and C, filed for the same county office; A and B received the highest number of votes at the primary and hence were nominated; later B withdrew and C will not let his name go upon the general election ballot, I presume by making a formal withdrawal. You ask whether under the facts stated a person can go upon the general election ballot by petition.

I am obliged to answer your inquiry in the negative. The law does not permit a person to go upon the general election ballot by petition for a non-partisan office unless there is a vacancy. Where there is one candidate nominated for a non-partisan office there is no vacancy because the law does not require that there shall be two nominees for each office.

Yours truly,

CLIFFORD L. HILTON,

Assistant Attorney General.

July 15, 1916.

270

ELECTIONS—Registration—Cities first, second, third and fourth class.

William Lee, City Attorney.

Dear Sir: I have to say that there have been two opinions given by this office this month which have had a bearing upon the question of who is entitled to vote. One of these opinions related to voting in cities of the first class and incidentally in cities of the second and third classes. These three classes of cities have registration days and with certain minor exceptions no one can vote in cities of the first, second and third classes except those who have registered.

Citizens of cities of the fourth class are entitled to vote without any registration, strictly speaking. The list of voters is made up by a board which prepares a list of voters. This board meets on Tuesday, seven weeks preceding a general election and on the Tuesday preceding the general election to prepare the proper list of voters for use in cities of the fourth class at the general election. See Sections 417 and 418, General Statutes of Minnesota 1913. There is, strictly speaking, no registration for cities of the fourth class, villages and townships, and any person offering to vote in any such district, whose name is not on the list at the opening of the polls, but who shall satisfy the election board by proper evidence that he is entitled to vote, shall be allowed to vote at such election without taking any oath. See Section 421 General Statutes 1913. The proceeding to be taken in case the board requires a person to qualify before voting is found in Sections 457 and 458 General Statutes of Minnesota 1913.

The short of the entire matter is that with certain exceptions, persons living in cities of the first, second and third classes must register before they can vote; and citizens living in cities of the fourth class, villages and townships vote without registering, but the election board may require, of their own motion, evidence as to a person's right to vote, or must require such evidence if a voter is duly challenged.

As to charter elections see Chapter 226 G. L. 1915.

Yours truly,

LYNDON A. SMITH,

Attorney General.

October 19, 1916.

271

ELECTIONS—Registration in cities fourth class.

John Bass, County Auditor.

Dear Sir: You inquire whether a voter in a precinct in your city, a city of the fourth class, must register at his polling place on October 28 to enable him to legally vote at the coming election on November 7. You then submit the further question as to whether a voter in a town, village or city of the fourth class is obliged to register prior to election in order to vote thereat.

You are advised that this office has held that no such registration is necessary in towns and villages or in cities of the fourth class. Registration days are provided for, but registration therein prior to election is not a condition precedent to voting.

Yours truly,

CLIFFORD L. HILTON,

Assistant Attorney General.

October 26, 1916.

272

ELECTIONS—Cannot vote in cities first class unless registered.

John E. Samuelson, City Attorney.

Dear Sir: No person can vote in any precinct of which he shall not at the time have been for thirty days a resident. (Constitution of Minnesota, Article VII, Section 1).

If a person shall have removed from one precinct in which he is registered, in a city of the first class, to another precinct of the same city, he can vote in said last named precinct only upon being registered therein. In order to be registered in said last named precinct he must go on registration day, to-wit: October 28, to the registration board of the precinct in which he is registered and from which he has removed more than thirty days prior to the date of the coming general election, and obtain a certificate showing that his name has been stricken from the voting list of such district as provided for in Section 426 G. S. 1913, which section reads as follows:

"When it appears from the statement or affidavit of an applicant for registration, or is otherwise known to the board (of the new precinct) that such applicant has been registered in another district, a certificate signed by the registration board of such other district (the old district), showing that his name has been stricken from the voting list of such district shall also be presented. Then if he is or will have been a resident of such new district for thirty days next preceding an election, his name shall be entered on the voting list; otherwise not. When the voter removes from one place to another in the same district the register shall show the change before his vote is received."

Your attention is called to Section 432 G. S. 1913 in which among other things it is provided:

"Only the votes of qualified registered voters shall be received by the judges at any general election in a city of the first, second or third class, except the vote of a person whose name was erased as provided for in Section 431, who takes the oath and proves his identity by the oath of another as hereinafter prescribed."

Section 431 above referred to contains the following language:

"Such board shall erase from the register the name of any person satisfactorily proven by the oath of two qualified voters of such district to be disqualified to vote at the coming election."

No person can vote in a city of the first class on November 7 unless prior to that date he has registered in the precinct. If, however, having been registered, his name has been erased by the board of registration under the provisions of Section 431 Statutes 1913, such person, notwithstanding such erasure, may vote in such precinct upon taking the oath set forth in Section 458 and proving his identity as provided for in said Section 458 Statutes 1913.

Yours very truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

October 24, 1916.

273

ELECTION DAY—Hours of closing for saloons.

Otto A. Poirier, President Police and Fire Commission.

Dear Sir: You ask whether under the state law which requires saloons to be closed on any general, special or primary election day, it is sufficient for the saloons to be closed during the hours when the polls are open. Your inquiry is answered in the negative. The saloons must be kept closed during the whole day upon which any general, special or primary election is held.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

April 19, 1916.

274

ELECTIONS—Soldiers voting law—Validity of.

Hon. J. A. A. Burnquist, Governor.

Dear Sir: I join with a majority of my assistants in the opinion that a law could be drawn within the limitations of the constitution providing for the members of Minnesota regiments (now in the service of the United States) voting at the front but in legal effect in their several precincts

as required at general elections. Such a law existed in this state during the civil war, but was not passed on by any court. Wisconsin and Iowa had such laws under constitutions similar but not identical with that of Minnesota, and these laws were held valid by the supreme courts of these states. The majority of states held the soldier-voting laws void under constitutional provisions perhaps equally similar to ours with those of Iowa and Wisconsin.

The haste which must be made to get a law passed for use in the impending general election would lessen the chances of it being drawn with such care and foresight as would give it the greatest probability of constitutionality.

Yours truly,

LYNDON A. SMITH.
Attorney General.

October 23, 1916.

Note: See Marion vs. Springer, 15 Iowa 304; State vs. Main, 15 Wisconsin 398; Lehman vs. McBride, 15 Ohio St. 573. Note in 25 L. R. A. 482.

275

ELECTIONS—Soldiers voting law construed.

Al. P. Erickson, County Auditor.

Dear Sir: You submit the following inquiries:

1. Should the vote be taken when the envelope containing same is not sealed nor shows signs of having been sealed?

2. Should the vote be taken where ward is given but not the district?

3. Where an envelope contains a ballot of a ward or district different from what is written on envelope, should vote be marked in ward or district given on ballot?

Also, when letter containing absent voter's ballot has been received without having been registered but has endorsement of judge of place of voting, should vote be counted; also same where there is no judge's endorsement?

I am of the opinion that your first inquiry should be answered in the affirmative.

Answering your second inquiry I have to say that in case there is any indication or description on the small envelope which will advise you as to which precinct of the ward in question the voter is entitled to vote in, then you should canvass the ballots and they should be counted with the vote of that precinct. If there is no indication or description on the envelope except the description of the ward, then the vote should not be canvassed by you.

Answering your third inquiry I have to say that where the small envelope names a certain district of a certain ward in your city, and the envelope therein contained is one which was to be voted in a precinct other than the one designated on the envelope, then the vote of the elector should be canvassed as of the precinct described on the envelope but only for

the offices t obe voted for in that precinct. The vote for offices not properly to be voted for in the precinct described upon the envelope should not be counted.

Answering your last inquiries I advise you that when a letter containing an absent voter's ballot has been received without having been registered, but has the endorsement of the judges of the place of voting, then such vote should be counted. When an envelope is received by you containing the vote of an absent voter and such envelope has no endorsement thereon of the election judges, the vote should not be counted.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

November 13, 1916.

276

ELECTIONS—Stickers—Use of in contests for county officers.

E. Lindahl, City Clerk.

Dear Sir: You inquire whether under the general election laws of this state, stickers can be used in voting for county officers.

Your inquiry is answered in the affirmative. On the general election ballot for county officers a blank space will be left so that a voter can, by use of a sticker, or the writing in of a name, vote for some person other than those whose names are printed upon the ballot.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

September 21, 1916.

277

ELECTIONS—Town clerks entitled to pay.

J. E. Kasner, County Auditor.

Dear Sir: In reply to your letter of April 3, I have to say that my assistants took up the matter that you inquire of and after discussing it came to the conclusion that town clerks should be allowed one dollar and mileage for the obtaining of ballots and supplies in all cases except when they were delivered at the post-office boxes of such clerks at their homes. The mileage is to run from the home of the clerk to the office at which the ballots and supplies were, or to which the ballots and supplies were sent and back to the clerk's home. Strictly speaking, under this rule a town clerk would be allowed one dollar and one mile each way in going from his place to his personal post-office box, but the conference came to the conclusion that this was not going out of the way which the clerk would go in getting his other mail and therefore he should not be paid for going to his own box to get mail delivered there.

The conclusion as to the taking of the ballots and supplies from the home of the clerk to the polling place was that there should be no pay for that. The law evidently contemplates that each clerk will go from his home to the post-office or express office at some time previous to the date of election and obtain the supplies and ballots and find out whether or not the ballots and supplies are what they should be and such as can be used at the ensuing election.

Summing up, I have come to the conclusion to hold that a town clerk to whom election supplies are sent, by mail or express, is entitled to one dollar and his mileage to and from his residence for procuring from the express or post-office, not including his personal box, the ballots and other election supplies sent him by the county auditor.

Yours truly,

LYNDON A. SMITH,
Attorney General.

April 4, 1916.

278

ELECTION—Vacancy in office of district judge filled by appointment until next biennial election.

Julius A. Schmahl, Secretary of State.

Dear Sir: You state that Judge Kingsley of the Tenth Judicial District, recently resigned and that his resignation was accepted by the Governor and Mr. Catherwood was appointed as judge of the district court in question. This resignation and appointment were both after the time for filing for offices to be voted on at the 1916 primary election.

You are advised that the appointee in question does not hold for the balance of the unexpired term of Judge Kingsley, but a successor to Judge Kingsley is to be elected at the November general election in 1916.

The office of district judge being a non-partisan one, and a vacancy existing, as above indicated, candidates for that position may have their names placed upon the general election ballot in November by petition, in accordance with the provisions of law.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

June 24, 1916.

279

ELECTIONS—Villages—Polls open when.

John M. Rees, County Attorney.

Dear Sir: Concerning the opening of polls in villages at general elections, I state that we have heretofore held that since the adoption of Chapter 23, Laws of 1913, the previous provision contained in Chapter 172 Laws of 1911 is specifically repealed, and that said law of 1913, relating

to "towns" must be construed as also including villages. If this construction is not adopted then there is no statutory provision relating to villages. See Subdivision 22, Section 9412, General Statutes 1913.

This will mean that the polls are to be kept open in villages from 9 A. M. until 9 P. M. at general elections.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

September 29, 1915.

280

ELECTIONS—Villages—Voting on issuance jail bonds on primary election day.

G. L. Schonlan, Village Recorder.

Dear Sir: There is no legal objection to the village voting on primary election day upon the question of the issuance of bonds of such village for the erection of a village jail. There must, of course, be two separate elections held and a separate ballot box and list of voters for the bond election.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

May 9, 1916.

281

ELECTIONS—Voter—In what precinct entitled to vote under facts stated.

J. A. Lee, County Attorney.

Dear Sir: You state that the charter of the city of Benson does not divide it into wards, but that a city ordinance establishes two voting precincts. You then ask the following questions:

"A moves from district number one to district number two previous to the election, less than thirty days before election. Benson being a city of the fourth class, does he lose his right to vote? If not, which district does he vote in?"

As you are aware, Section 1 of Article 7 of the state constitution provides that a qualified voter:

"Shall be entitled to vote at such election in the **election district** of which he shall at the time have been for thirty days a resident."

I assume of course that the election districts to which you refer were properly formed. You are advised that the man in question will not be entitled to vote at all at the coming general election. He will not have been a resident for the required period of thirty days in the district to which he has moved, and of course will not be entitled to vote in the old district if he has ceased to be a resident of that district.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

November 1, 1916.

282

ELECTIONS—Voter casting vote in precinct where he happens to be, and vote transmitted to home precinct.

C. D. Bacon, County Auditor.

Dear Sir: I have to say that there is a method provided by statute whereby a person can vote in his own precinct by casting a vote in some other precinct where he happens to be and having that vote transmitted to his home precinct.

This only applies to state matters, including presidential electors. It does not apply to the primary or to the election of local officers. I do not find any other provision than the one I have referred to which is contained in Section 468 General Statutes 1913.

Yours truly,

LYNDON A. SMITH,
Attorney General.

June 1, 1916.

See Absent Voter's Law, Chapter 68 Session Laws 1917.

283

ELECTIONS—Voting for more than one candidate at primary.

Julius A. Schmahl, Secretary of State.

Dear Sir: The question is asked whether an elector can vote at a primary for more than one candidate for a single office.

I am of the opinion that he cannot. The question relates to voting for candidates for nonpartisan offices. There are two candidates to be nominated for such offices whenever more than two persons file for such offices.

May each elector vote for each of those two candidates or only for one person out of the entire number whose names appear on the primary ballot?

At first blush it would appear that every elector could vote for two of such candidates, as the statute now in force, in the second sentence of Section 348 says that if an elector shall mark more names than there are candidates to be nominated for any office, his ballot shall not be counted for such office. It is further provided in the same sentence that if for any reason it be impossible to determine his choice for any office, his ballot shall not be counted for such office. Whether the first alternative permits the marking of two names or not is immaterial in view of the other part of the sentence. It is impossible to determine the choice of a person for an office if he votes for two persons as candidate for that office. The specification of the two persons which a certain person would like to see the candidates for an office does not furnish any data for determining his choice for such office. It is impossible to determine such elector's choice for an office unless he specifies the one person, and only the one person, whom he wishes to fill that office.

It does not seem to me that it is necessary to resort to the foregoing somewhat technical reasoning to arrive at the same conclusion. The intent of the legislature is the essence of the law prescribed by any statute which it passes. The section whose interpretation is necessary for a determination of the intent of the legislature is Section 348, as amended by Section 7 of Chapter 167 Session Laws 1915. This section first appeared in the Statutes of Minnesota in the Revision of 1905. It was then said to be not a change but a revision of the law in force since 1899. At that time there were no non-partisan offices. No person could vote at the primary then provided for for more than one candidate for any one office, and yet there was then the same provision as now, that "if he (the voter) shall mark more names than there are candidates to be nominated for any office * * * * his ballot shall not be counted for such office." This was then supposed to refer to cases where there were several offices similar in nature, as for instance where there were several candidates for the legislature from a single district.

This clause was continuously preserved as a part of our statutes apparently from 1899 to 1912. The statute which changed this section was repealed in 1915, and the statute in force for 13 years re-enacted. Since its reenactment it is only fair to give it the same meaning as that which it had during the long period during which it first constituted a part of our statutory law. This permits a harmonious interpretation of both clauses of the second sentence in said Section 348. It also harmonizes with the constitutional provision as to voting at general elections. This constitutional right of voting was recently stated by our Supreme Court to be as follows:

"A qualified voter has the constitutional right to record one vote for the candidate of his choice and have it counted one."

It is true that the constitution of this state has little effect upon laws governing primaries, but it is reasonable to interpret laws regulating primary elections in the light of and in harmony with the provisions of our constitution.

Taking all the provisions of law to which my attention has been called, which have a bearing upon the marking of ballots, the conclusion that seems to me more probably right than the opposite, is that it was the intent of the legislature that each person should designate his ultimate choice, among the names appearing on the primary ballot, of the person whom he would prefer to fill the office in question rather than that he should designate the two persons he would prefer should be the candidates for that office at the general election.

This construction of the statute in question conforms to the practical construction heretofore given it by the officers administering our election laws.

Yours truly,

LYNDON A. SMITH,

Attorney General.

June 6, 1916.

284

EXTRADITION—Canada—Rape—Acts constituting crime here must constitute crime in Canada.

E. H. Elwin, County Attorney.

Dear Sir: The Canadian statutes define the crime of rape substantially the same as does ours. (See Section 298, Criminal Code Canada). Section 301 of the Criminal Code of Canada makes it an indictable offense to have intercourse with a female **under fourteen** without her consent. It is thus apparent that it would not be an offense under the Canadian law to have intercourse with a female over fourteen years of age if she consents.

A warrant of rendition under the terms of the treaty is issued by the executive authority of the Dominion government upon the certificate of a magistrate that the evidence of criminality contained in the extradition papers (or offered aliunde) sustains the charge.

The treaty also provides:

"That this shall be done upon such evidence of criminality as **according to the laws of the place** where the fugitive or person so charged shall be found would justify his apprehension and commitment for trial if the crime or offense had **there** been committed." Webster-Ashburton Treaty 1842.

It follows that the question is one that must be passed on in the first instance by the Canadian judiciary and if the test is "their" definition of the crime the application would fail since it would affirmatively appear that the act charged, though criminal here was not criminal under the Canadian laws.

It has been held by the Canadian courts that the acts alleged in the complaint or indictment on which the application for the surrender of the fugitive is based, must constitute a crime under the Canadian laws.

Ex parte Lamiraude, 10 Lower Ct. Jurist, 290;

In-re Truman Smith, 4 Can. Practice Reports, pg. 415;

In-re Phipps, 1 Ontario Rep. 586, and of course must also be one of the crimes specified in the treaty.

In-re Wosmis, 22 Lower Can. Jurist, page 109.

Yours truly,

C. LOUIS WEEKS,
Assistant Attorney General.

July 5, 1916.

285

FIRE DEPARTMENTS—Relief fund—Interest accumulations.

George G. Magnuson, Esq.

Dear Sir: You inquire as to the proper disposition of the interest upon the fire department association funds turned over by the state auditor to the treasurer of each municipality maintaining a volunteer fire department, to be used for the relief of disabled members and for the equipment and maintenance of the department.

The law provides that in cities in which there is a duly incorporated fire department relief association, the city treasurer shall pay over the amount so received from the state auditor to the treasurer of the relief association and it is provided that this fund, whether held by the city treasurer, where there is no relief association, or paid over to the treasurer of the relief association where there is one, constitutes a special fund to be held in trust and disbursed only for the relief of sick or injured firemen or the purchase of equipment.

The statute contains no provision relating to interest upon this trust fund and in the absence of such provision I am clearly of the opinion that it attaches to and becomes a part of the trust fund. The statute very clearly, as it seems to me, does not contemplate that any part of this fund or any accumulation of interest thereon shall be used for general municipal purposes.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

November 8, 1916.

286

FIRE DEPARTMENTS—Relief Fund—Expenditure of.

C. A. K. Johnson, Secretary, Fire Dept. Relief Assn.

Dear Sir: You are advised that the special fund paid to a municipality by the county for fire department aid must be used for the two purposes specified in Section 3345, G. S. 1913, viz:

"For the relief of sick, injured or disabled members of such fire department, their widows and orphans, or for the equipment and maintenance of such department."

If this state aid is handled by an authorized relief association, such association can use such funds for the further purpose of providing for service pensions under the State law. The paying of a service pension appears to be the only provision in the statute whereby a retired member may be assisted. By retired member I mean one who has ceased to become a member and who is therefore no longer subject to duty. To state the matter in another way, I would say that the fund derived from the State can be spent for the relief of sick, injured or disabled members, of for service pensions, as provided by statute, to retired members.

If the funds of the association do not warrant paying the full pension to retired members, you can act under that portion of Section 3347, G. S. 1913, reading as follows:

"Such pensions shall be uniform in amount, but all may be decreased or increased within the amount above specified whenever the amount of funds on hand render such action advisable."

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

February 4, 1915.

287

FIREMEN'S RELIEF ASSOCIATIONS—Expenditure of state aid.

Andrew J. Myler, Esq.

Dear Sir: You state that the volunteer firemen of Minnesota are proposing to incorporate solely for their protection and for the purpose of paying benefits to themselves, their widows and orphans, when such benefits are needed because of injuries to, or death of members, due to accidents occurring while going to, remaining at, or returning from a fire. You inquire if the State aid now received by such firemen could be used in the payment of firemen's dues in such corporation.

It is doubtful if such State aid could be so used. The statutes governing the matter provide that such aid (2 per cent of the local insurance premiums) shall be sent to the treasurer of each municipality having an organized volunteer, or part paid and part volunteer fire department, provided the clerk of such municipality (and if there be an incorporated relief association, the treasurer of such association) file certain required reports. This aid you will note must be sent to the treasurer of the municipality. It can be disbursed only for the following purposes:

1. For the relief of sick, injured, or disabled members of such fire department, their widows and orphans.

2. For the equipment and maintenance of such department.

And where there is a relief association, "for service pensions."

It would seem that the legislature had determined who should expend all this aid, and for what purposes. These purposes do not include the payment of dues in any corporation, however beneficial. The diversion of these funds to any purpose not specified in the statutes prevents the issuance of further aid until the diverted funds are replaced.

There should be further legislation before any arrangements are made for the use of any State aid for any purpose not clearly and definitely specified in the Statutes of the State.

This letter does not relate to fire departments in the three large cities, and refers principally to the volunteer companies in villages and small cities.

Yours truly,
LYNDON A. SMITH,
Attorney General.

June 3, 1915.

288

FIRE DEPARTMENTS—Percentage on insurance premiuns may be expended for equipment.

W. H. Anderson, President Mankato Fire Department.

Dear Sir: It has heretofore been held by this department that the money received of a municipality from the State on account of fire insurance premiums paid in such municipality may be used "for the equipment and maintenance of such department" and that fire hose and other

fire fighting apparatus would be such "equipment" and is contemplated by the statute. I think that rubber boots and coats for the use of the firemen in fighting fires may properly be said to be fire fighting apparatus.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

November 12, 1915.

289

FIRE DEPARTMENT—Cannot be furnished free telephone.

R. C. Franklin, Secretary Alex Fire Department.

Dear Sir: The conclusion first reached by me, to the effect that a telephone might be installed at the Fire Department Headquarters by the telephone company and furnished to the city free of charge, would have been correct prior to the enactment of Chapter 152, G. L. 1915.

However, an examination of that chapter and further consideration by this department has forced the conclusion that your inquiry must be answered in the negative. I call your particular attention to Sections 7 and 11 of said Chapter.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

March 23, 1916.

290

FIREMANS RELIEF ASSOCIATION—Composition board trustees.

Andrew Fritz, Public Examiner.

Dear Sir: You inquire whether "the provisions of Section 2 of said Chapter 197 (G. L. 1909) regarding the board of trustees, apply also to firemen's relief associations maintained wholly by the two per cent tax on insurance premiums provided by Section 3344, G. S. 1913."

I have to say that while the matter is not entirely clear, yet it is my opinion that all of the laws relative to firemen's relief associations should be construed together, and that such construction would require an affirmative answer to your question. "Laws are presumed to have been passed with deliberation and with full knowledge of all existing ones on the same subject." State vs. Klasen, 123 Minn. 382, 385. The enactment of 1909 (Chapter 197) says at the beginning of Section 2 thereof; "The board of trustees of **every** firemen's relief association of this state shall be composed of the following persons" etc.

Yours truly,

LYNDON A. SMITH,
Attorney General.

August 12, 1916.

291

FIRE MARSHAL—Explosives—Storing of.

Robert W. Hargadine, Fire Marshall.

Dear Sir: You inquire whether there is any state law prohibiting storage of dynamite or other explosives within city limits other than Chapter 564 General Laws 1913.

Section 8761 General Statutes Minnesota 1913 is as follows:

"Every person who shall make or keep gunpowder, nitroglycerin, or other explosive or combustible material in a city or village, or carry it thru the streets thereof in a quantity or manner prohibited by law or by ordinance of such municipality, shall be guilty of a misdemeanor. And every person who by careless, negligent, or unauthorized use or management of gunpowder or other explosive substance shall injure or cause injury to the person or property of another, shall be punished by imprisonment in the county jail for not more than one year."

The manner of regulating the storing and keeping of explosives is generally provided for by ordinance in the various villages and cities of this state, and the section above, in absence of any municipal ordinance, would not seem to forbid the storage of dynamite in cities.

Yours truly,

ROLLIN L. SMITH,
Assisting Attorney General.

October 12, 1916.

292

FIRE MARSHAL—Inspection unsafe structures.

R. W. Hargadine, State Fire Marshall.

Dear Sir: You state:

"I have been asked to pass on the safety of the grandstand now being constructed at the Twin City Speedway and would like opinion as just what jurisdiction this department has in the matter."

You are advised that your jurisdiction, in regard to the Twin City Speedway, is found in Section 2, of Chapter 564, General Laws 1913. On examination of this section, you will see that your jurisdiction is confined to the protection of life by reason of fire; and if you find any buildings or structures at the Twin City Speedway that are not, in your opinion, sufficiently protected against the loss of life or injury to person by reason of fire, you would have jurisdiction to require that such buildings or structures have placed therein sufficient and adequate fire protection. To this extent only does your jurisdiction extend. I cannot find anything in the law that confers upon you the power or duty to inspect the manner of construction of any building or structure to ascertain its safety to the public, except in so far as life or limb may be concerned and endangered by fire.

I am not unmindful of the language found in Section 13, but in my opinion this is not applicable to your inquiry.

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

September 1, 1915.

293

GAMBLING—Gift enterprise—Subscription contest by newspaper under facts stated illegal.

Stephen A. Johnson, County Attorney.

Dear Sir: You state that your local paper is conducting a subscription contest involving the awarding of prizes in accordance with certain advertisements which you enclose and which are herewith returned to you. Provision is made for the giving of an automobile and five other prizes to the persons receiving the highest number of votes. The number of votes to which the contestants are entitled to receive depends upon the number of subscriptions procured. A ten per cent commission on subscriptions secured is to be given to the contestants who do not participate in the prizes.

Section 2 of Chapter 374, G. L. 1913, provides:

"Whenever any person for the purpose of inducing the public to subscribe for or buy any newspaper * * * for a valuable consideration offers and advertises to give a premium, gift or prize, * * * shall be deemed to be engaged in a 'gift enterprise,' unless such premium, gift or prize is absolute and does not depend upon any chance or contingency whatever."

Under the facts stated the winning of the principal prize depends upon a contingency, namely, that the contestant shall receive the highest number of votes. It is therefore my opinion that the scheme is in violation of the act referred to.

Yours truly,
ALONZO J. EDGERTON,
Assistant Attorney General.

August 7, 1915.

294

GAMBLING—Slot machine—Certain devices considered.

Constant Larson, City Attorney.

Dear Sir: You call attention to certain slot machines operated in the city of Alexandria and which the Mayor has ordered removed, upon the assumption that they are gambling devices, the operation of which is prohibited by the laws of this state.

Your attention is directed to Opinion No. 223, Attorney General's Opinions 1914. I assume that you have this volume at hand, but if not, your county attorney has a copy, which of course is accessible to you.

The City Attorney of St. Cloud, in his communication, to which the opinion indicated is an answer, describes the machine as having substantially the same features as those described in your communication. He calls attention to the circumstance that:

"The manufacturers have attempted to get by the proposition that this machine is a gambling device by having an indicator show in plain English exactly what the player is to get, before he deposits his coin in the machine. It is argued by the makers that the man takes no chance on this machine, for he knows every time just exactly what he is going to get. This is all right so far as it goes, but as a matter of fact the man plays, not for the present play, but to see what he can get on the second play. If he only gets one chip the first time tried, and one chip the second time tried, he plays it the third time and fourth time, in order to see what he will get the next time."

It would not seem to require much argument in support of the proposition that a machine of this class is especially designed to stimulate the gambling propensity and is within the mischief which the law seeks to restrain.

Clearly the Mayor's action in prohibiting the operation of these machines was right.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

April 27, 1916.

295

GAME AND FISH—Application of laws to international waters.

Carlos Avery, Game and Fish Commissioner.

Dear Sir: You inquire whether Section 4873, G. S. 1913, applies in fixing the legal size of lake trout to all fish of this variety whether taken from Lake Superior or other international waters or from inland waters of the state.

With the information at hand I am of the opinion that your inquiry should be answered in the affirmative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

October 3, 1916.

296

GAME AND FISH—Bag limit for game birds.

Carlos Avery, Game and Fish Commissioner.

Dear Sir: You ask for a construction of that portion of Chapter 237, G. L. 1915, which fixes the bag limit of birds. The language of the act to which you refer is as follows:

"But no person shall, in any one day, take or kill more than ten birds of any and all varieties, **except wild ducks, of which not over fifteen shall be taken or killed in one day** or have in his possession at any time, more than thirty game birds of any and all varieties, **except wild ducks, of which not more than forty-five may be had in possession at any one time.**"

It is clear that the above quoted provision makes two classifications of game birds, wild ducks constitute one classification, and the other classification is made up of all other game birds of any and all varieties. You are advised that it is the opinion of this department that a person who has complied with the requirements of law, may during one day, lawfully take or kill fifteen wild ducks and during the same day may also lawfully take or kill ten game birds of other varieties. Following the above construction relative to the daily bag limit, this department is of the opinion that a person, lawfully acquiring the same, may have in his possession at any one time forty-five wild ducks, and also thirty game birds of other varieties.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

September 4, 1915.

297

GAME AND FISH—Breeding grounds—Unprotected animals—Discharge of firearms.

Carlos Avery, Executive Agent, Game and Fish Commission.

Dear Sir: You state that the board of game and fish commissioners on January 6, 1915 by resolution designated certain lands in the vicinity of Lake Minnetonka as game propagating and breeding grounds, as provided in chapter 95, G. L. 1913. You then ask:

"Will you please furnish the commission with your opinion as to the effect of this resolution of the board, stating whether the effect is merely to establish a permanent year-round close season for game, animals and birds protected at any time by law in this territory; or whether it also has the effect of prohibiting wild birds or animals of any kind from being killed, or discharging firearms in said territory, at any time, as prohibited in the case of state parks?"

Chapter 95 G. L. 1913 reads as follows:

"No person shall kill or pursue with intent to kill, take, snare, or have in possession by any means upon any Minnesota state forest reserve lands or parks, or upon any lands that may be designated by the state game and fish commission as game propagating and breeding grounds, any wild animals or birds protected at any time by the law. The killing or having in possession of each of such protected animal or bird shall constitute a separate offense. Provided, that this act shall not prohibit the killing or destroying of wolves, or other noxious animals by or under the supervision of the State Game and Fish Commission."

You are advised that, in my opinion, this law contemplates merely that upon lands that may be designated by the state game and fish com-

mission as game propagating and breeding grounds, such wild animals or birds as are protected at any time by the law, shall not at any time be killed, pursued with intent to kill, taken, snared, or had in possession. It would therefore follow that wild animals and birds that do not come within the class that are at any time protected by law are not to be included in or protected by said chapter 95; but that such unprotected animals and birds may be hunted, pursued, had in possession, etc. at any time.

I am further of the opinion that said chapter 95 does not prevent the discharging of firearms generally in such territory so set aside. It would therefore not be unlawful to discharge firearms in that territory in the hunting of such unprotected birds and animals, insofar as this chapter is concerned, and unless such discharging of firearms was made unlawful by some ordinance or other law.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

February 1, 1915.

298

GAME AND FISH—Carrying of firearms while training dogs during closed season.

Carlos Avery, State Game and Fish Commissioner.

Dear Sir: Your inquiry is in the following language:

"Please advise whether in your opinion Section 4783 of the General Statutes should be construed to permit the carrying of firearms and the use of the same with blank cartridges or otherwise in the training of bird dogs between September 1 and September 7?"

The specific question submitted by you is to be answered in the affirmative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

July 7, 1916.

299

GAME AND FISH—Disposition of confiscated articles.

Carlos Avery, Game and Fish Commissioner.

Dear Sir: You submit the following inquiry:

"In cases where guns or other paraphernalia used in violation of the law have been confiscated by wardens of this department and the court proceedings result in conviction of the persons from whom such articles have been seized, has this department, in your opinion, any authority to relinquish or release articles to parties from whom they were taken, under these circumstances?"

Your inquiry is answered in the negative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

December 1, 1915.

390

GAME AND FISH—Game refuges.

Carlos Avery, Game and Fish Commissioner.

Dear Sir: You ask for a general construction of Chapter 288, G. L. 1915. You enclose a certain petition and in addition to the information contained therein, advise us that there are two duck passes on the land owned by one of the petitioners and which said duck passes are under lease to certain parties and that such duck passes are included within the proposed game refuge.

At the start it may be noted that one of the provisions of the act above referred to is as follows:

"No lands shall be included in such game refuge which are owned and occupied as a private duck pass."

I am of the opinion that when a lessee is in possession of a private duck pass, then such duck pass is to be considered as "owned and occupied as a private duck pass" and hence that an order cannot be made which can include such duck pass in a game refuge.

An approved form of petition should, among other things, be addressed to the "State Game and Fish Commissioner" and contain the signatures of the owner or owners, lessee or lessees of the lands therein described, which lands must aggregate in area not less than 640 acres. The petition should show the description and amount of land owned by each petitioner. The law in question provides for the right of petition by such persons, but it does not make it obligatory upon the Game and Fish Commissioner to make his order declaring the lands described in the petition as a game refuge. A discretion is vested in the commissioner to grant or refuse to grant the request.

I am of the opinion, taking into consideration the provisions of the act, the statements made in its title and the general purposes of all legislation relative to game, that it was the primary purpose of the law making body by this legislation to promote the increase and preservation of wild aquatic fowl rather than by preventing them from being hunted, except on duck passes, within the limits of such refuge make the passes more valuable. If, in your judgment, the establishment of a game refuge, properly petitioned for, will bring about this main result, then you may well make your order to that effect. If, however, such end will not be subserved by the making of such order, and the only result to be attained of any moment by the establishment of a game refuge would be to make duck shooting better upon the passes referred to, the establishing of the refuge not especially tending toward the preservation of game or the bringing about of the primary purpose of the game refuge law, then you could well in the exercise of your discretion, refuse to grant the petition.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

September 22, 1915.

301

GAME AND FISH—Big game licenses.

Carlos Avery, State Game and Fish Commissioner.

Dear Sir: You ask:

"Whether a licensed resident hunter is permitted to take one moose **and** one deer or whether he can take only one moose **or** one deer."

You are advised that a licensed resident hunter can only take one moose **or** one deer.

Attention is called to the fact that a non resident hunter may take one male antlered moose and one deer. The legislature has evidently made this distinction between resident and non-resident licensees and its declaration in that regard is conclusive.

See Section 4793, G. S. 1913 and Chapter 287, G. L. 1915.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

September 29, 1915.

302

GAME AND FISH—Hunting license—Auditor's fee.

Carlos Avery, Game and Fish Commissioner.

Dear Sir: You inquire whether the county auditor may in addition to retaining his ten cents commission for the issuance of hunting licenses also retain a charge for incidental expenses, such as express, postage etc.

Your inquiry is answered in the negative. Your attention is called to Section 4792, G. S. 1913, in which, among other things, it is provided:

"Ten cents of the amount received for the issuance of said license ($1.00) shall be retained by the county auditor as his fee and the **balance** remitted to the state treasurer * * *."

As you will note this statute expressly provides that all that can be deducted from the fee is ten cents for the auditor and the entire balance must be remitted to the state treasurer.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

May 16, 1916.

303

GAME AND FISH—Hunting license for minors.

L. D. Barnard, County Attorney.

Dear Sir: You are advised that a minor may hunt without a license. Without the use of the coupons attached to a license, game cannot be shipped and therefore a minor without a license cannot ship game. Al-

though a license is not required for a minor over the age of fourteen years, still a county auditor may issue a license to such minor upon proper application and payment of the fee. A minor not fourteen years of age is not permitted under the law to carry firearms.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

September 1, 1915.

Note: See Chapter 226 Session Laws 1917 which requires license of all residents regardless of their age.

304

GAME AND FISH—Interstate waters—Foreign license protects resident of this state.

N. A. Nelson, County Auditor.

Dear Sir: Relative to fishing by residents of Minnesota in the St. Croix, it appears from your statement that the legislature of Minnesota, in 1913 passed a law making it unlawful to fish crappies, pike or other game fish in the St. Croix until May 29, notwithstanding that such fish might be caught in the inland lakes of the state beginning May 1.

Under the law of the State of Wisconsin such fish may be caught in the St. Croix beginning May 1, and the question you submit is:

"Can a resident of Minnesota, armed with a license to fish in Wisconsin, fish pike in Lake St. Croix between May 1 and May 29 and bring the fish so caught into the State of Minnesota?"

In my opinion, your inquiry is to be answered in the affirmative, in so far as the Wisconsin waters of Lake St. Croix is concerned. In other words, a resident of the State of Minnesota to whom has been issued a Wisconsin non-resident fishing license may fish in Wisconsin waters, including the Wisconsin portion of Lake St. Croix, and may bring the pike so caught into the State of Minnesota.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

May 11, 1916.

305

GAME AND FISH—Interstate waters—License—Where valid.

Nicholas Thomey, County Auditor.

Dear Sir: You inquire if it necessary for a party hunting on Lake Traverse to have hunting licenses issued from both Minnesota and Dakota.

Sections 1 and 2 of the General Statutes of Minnesota for 1913, read as follows:

"The sovereignty and jurisdiction of this state shall extend to all places within the boundaries thereof as defined in the constitution, and concurrently, to the waters forming a common boundary between this and

adjoining states, subject only to such rights of jurisdiction as have been or shall be acquired by the United States over places therein."

"That all courts and officers now having and exercising jurisdiction in any county or counties which are now formed or which may hereafter be formed in any part of this state bordering upon Big Stone Lake, Lake Traverse or the Red River of the North, shall have and exercise jurisdiction in all civil and criminal cases upon such waters concurrently with the courts and officers of other states bordering on such waters, so far and to such extent as the said bodies of waters or either of them shall form a common boundary between this state and any other state."

In my opinion a Minnesota license is good and sufficient protection up to, but not including, the Dakota shore line and vice versa.

Yours truly,

EGBERT S. OAKLEY,
Assistant Attorney General.

August 30, 1916.

306

GAME AND FISH—License for international waters.

Carlos Avery, Executive Agent, Game and Fish Commission.

Dear Sir: You enclose a communication in which certain questions are asked and based upon the facts stated, you inquire whether Sections 4875 and 4876 must be construed to prevent the sale or the shipment to any point within or without the State, of fish taken from any of the international waters between the State of Minnesota and Canada. You also call attention to Sections 4820 to 4824, inclusive, General Statutes 1913, and wish to know if the same are in conflict with Sections 4875 and 4876, supra.

Our present game and fish law is based primarily on Chapter 344, General Laws 1905, that chapter being a general act relative to the preservation, propagation, protection, taking, use and transportation of game and fish and certain harmless birds and animals, as its title indicates. This chapter has been amended from time to time in certain particulars. From 1905 until the present time it has been the practice of the Game and Fish Commission, following the provisions of law that have been in force, to license the use of seines and nets in international waters, such fishing being generally referred to and known as "commercial fishing." It has, during all of said time, been the practical construction placed upon the law that fish so caught under a license in such waters could be shipped within and without the state, and also sold within or without the state, except as to certain game and fish during the closed season for the taking of such fish. It has, since the sale of bass has been prohibited, been considered to be against the law for bass caught in international waters to be shipped or sold in this state; it has been considered unlawful for pike to be sold in this state during the closed season for the taking of pike, even though such pike were caught in international waters. It has always been considered unlawful to sell or expose for sale in this state undersized pike at any time, even if such fish were caught in international waters.

Section 6 of Chapter 566, General Laws 1913, was evidently passed for the purpose of indicating legislative permission for the sale of fish caught in international waters in season by residents of the state with hook and line, so that in addition to the right to sell by those licensed, the right of sale was also possessed by residents of the state catching fish with hook and line, though unlicensed.

It will be noted in passing that Section 6, supra, reads as follows:

"Fish, **especially** all species of bass, caught in international waters in season by residents of this state with hook and line, may be offered for sale."

Evidently in this section an error was made, for the sale of bass was expressly prohibited under another law, and the word "especially" undoubtedly was used by mistake instead of the word "except." It will be noted that Chapter 347, General Laws 1915 amends the 1905, 1911 and 1913 law relative to fishing in international waters and leaves out Section 6, Chapter 566, General Laws 1913.

Assuming that the practical construction that has been placed upon the law by the Game and Fish Commission is correct, and that the licensing under authority of law of fishermen to catch fish in international waters with nets and seines, impliedly at least, granted permission for the shipment and sale of fish so lawfully caught, we then come to the proposition as to whether fish so caught in lakes contained wholly or partly within counties containing 150,000 inhabitants or more can be shipped and sold.

Section 51, Chapter 344, General Laws 1905, reads as follows:

"No person shall sell, have in possession with intent to sell, or offer for sale, any fish caught in any lake situated partly or wholly within a county in this state that has a population of 150,000 or more."

At the time this law was passed, there were only two counties in the state having the population specified—Ramsey and Hennepin counties, neither county having therein in whole or in part any international waters, —and it was undoubtedly the purpose of this legislation to prevent the sale or offering for sale of fish caught in any of the lakes situated wholly or partly within Ramsey or Hennepin counties. Since the passage of that law one other county has grown into the class named, that is St. Louis county, which has become a county having a population of 150,000 or more.

A number of the more important international lakes, including Lake Superior, Rainy Lake, and others, are situated in part in St. Louis county, and therefore come within the language of said Section 51, General Laws 1905, which has not been amended or repealed in express terms, unless international waters are not to be included. To hold that the shipment and sale of fish caught in the lakes last above referred to was prohibited, would destroy a large industry in this state, and would without apparent reason, place a ban upon commercial fishing in the lakes referred to, which ban would not apply to other international lakes, and which are not in counties of 150,000 population or more, such as Lake of the Woods.

Taking into consideration that Section 51, General Laws 1905 was passed primarily for the purpose of protecting lakes in Hennepin and Ramsey counties, and did not affect international waters, and further that said section has in no way in express terms been amended since its enactment, and further considering the fact that in the 1905 Laws and from

time to time since (and even at the 1915 session) the legislature has specifically provided for the licensing of the use of nets and seines by fishermen in **international waters**—the legislature being fully conversant with the fact that a large industry had grown up in this line of business—and that the fish so caught had been and were the subject of shipment and sale, I have reached the conclusion that it cannot be said to have been the legislative intent to prohibit the proper sale and shipment of fish caught in international waters situated wholly or in part in St. Louis county; but said Section 4876, G. S. 1913 (Section 51 G. L. 1905) could and does apply to lakes other than international situate in St. Louis county.

It therefore follows that in my opinion, fish lawfully caught by a licensed fisherman, in international waters, whether in St. Louis county or not, in the open season for such fish (except bass), may be shipped and sold within or without the state.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

May 25, 1915.

307

GAME AND FISH—License resident hunting.

Carlos Avery, Game and Fsh Commission.

Dear Sir: You call attention to Sections 4794 G. S. 1913 and Chapter 287 G. L. 1915, the latter amending Sections 4791 and 4792 G. S. 1913. You inquire as to whether one years residence is required before obtaining a resident hunting license.

Your inquiry is answered in the affirmative.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

October 21, 1915.

308

GAME AND FISH—License—One year residence.

S. E. Bysom, Esq.

Dear Sir: The statute provides that in order to be considered a resident of the State for the purposes of securing a resident hunting license, one must have resided therein for one year. It is competent for the legislature to prescribe the length of time required for residence for various purposes and it is not necessary that the same length of time should be prescribed for all such purposes.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

September 12, 1916.

309

GAME AND FISH—Applicant for license not a "resident" under facts stated.

H. C. Horack, Esq.

Dear Sir: You inquire as to whether a person who is a citizen and resident of Iowa, but who owns a summer home in and spends more than three months each year in this State and pays taxes on the property he owns in Minnesota, can be considered as a resident of the State of Minnesota under the game laws of this State wherein it is provided that non-residents must be licensed in order to be permitted to hunt or fish.

In my opinion your inquiry is to be answered in the negative. Such persons are not residents of Minnesota within the meaning of the law referred to.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

July 15, 1916.

310

GAME AND FISH—Power non-resident licensee to express fish out of state.

Carlos Avery, Game and Fish Commissioner.

Dear Sir: You inquire whether, under Section 4875 G. S. 1913 a licensed non-resident angler is permitted to ship fish outside of the state by express.

Your inquiry is answered in the negative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

September 14, 1916.

311

GAME AND FISH—Shipment by licensee to self.

Carlos Avery, Game and Fish Commissioner.

Dear Sir: You call attention to Sections 4791 and 4792, G. S. 1913, in which provision is made for the issuance of hunting licenses to residents of Minnesota for small and large game, and also in which provision is made for shipment of game by licensees by themselves to themselves, license tags being attached. You state that it is a common practice to make shipments of game under these sections consigned by a licensee and addressed to the licensee in care of another party, this other party being expected to call for and take the game from the express company. You state that the practice is in effect an evasion of the law and is sometimes used to cover shipments from the licensee to another party. You

ask to be advised whether in our opinion a shipment made in this manner is legal, and if not, whether the game so shipped is subject to confiscation.

I am of the opinion that where a licensee properly ships game to himself at his place of residence it is not necessary for such licensee to go in person to receive the game, but that such game may be by the express company lawfully turned over to the duly authorized agent of the licensee. However, the transaction must be a bona fide one, and if the fact is in any given instance that delivery is being made to some one other than the licensee or the duly authorized agent for him and is thus constituting an evasion of the law, the game is contraband and can be seized.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

September 21, 1916.

312

GAME AND FISH—State commissioner—Authority to limit number of licenses for rough fish.

Carlos Avery, Executive Agent, Game and Fish Commission.

Dear Sir: You ask for the opinion of this department as to whether the Game and Fish Commission may limit the number of licenses issued for certain lakes; whether any discretion may be exercised, and whether licenses must be issued to all applicants.

In my opinion, the Game and Fish Commission may, and should, exercise a reasonable discretion in the number of licenses that it issues for any particular lake.

It was evidently the purpose of the legislature to provide for the ridding of lakes of rough fish, and at the same time incidently to provide a certain revenue to the State of Minnesota. If, as a matter of fact rough fish could only be taken from a certain lake in a satisfactory manner (profitably to the fishermen and the state) by having the fishing operations conducted only by one licensee, then I think that the Game and Fish Commission would be fully justified in only granting one license. If, on the other hand, in the exercise of sound judgment and discretion, the Game and Fish Commission should determine that the interests of the state would be best subserved by having two or more licensees for the lake in question, then the commission would be justified in licensing the required number, if applications were made therefor.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

May 27, 1915.

313

GAME AND FISH—Limit of catch of sunfish.

W. H. Holz, County Auditor.

Dear Sir: You are advised that in the opinion of this department more than twenty-five sun fish cannot legally be taken by one person in any one day. I call your attention to Section 4896, G. S. 1913, in which it is provid-

ed that catching, taking or killing of more than twenty-five fish by any one person in any one day (except fish in the Mississippi River or in international waters with nets or seines) shall be deemed wanton waste and destruction of such fish taken in excess of such number.

Yours truly,

CLIFFORD L. HILTON,

Assistant Attorney General.

July 6, 1916.

314

GAME AND FISH—Open season for deer.

G. A. Youngquist, County Attorney.

Dear Sir: You ask for a construction of the words, "between November 10 and November 30 of the same year," as they are used in Section 4890, G. S. 1913, and ask whether the section in question would permit deer to be killed on November 10 and November 30, as well as all intervening days.

I am of the opinion that your inquiry is to be answered in the negative. The current of authority seems to be that when language is used such as above quoted, both of the dates mentioned are to be excluded.

Yours truly,

CLIFFORD L. HILTON,

Assistant Attorney General.

December 1, 1915.

315

GAME AND FISH—Possession of untagged game birds.

W. B. Taylor, Esq.

Dear Sir: You are advised that it is not necessary for a resident of this state who has lawfully secured game birds, to place tags upon such birds, (the number of them being within the limit permitted by law), in order for him to take them with him on a train to his place of residence, such person not shipping the game birds in question by express, freight, or as a checked package.

Yours truly,

CLIFFORD L. HILTON,

Assistant Attorney General.

October 30, 1915.

316

GAME AND FISH—Serving game at "free lunch" counters unlawful.

Carlos Avery, Game and Fish Commioner.

Dear Sir: You ask for an opinion of this office as to whether the service of vension, moose meat or game birds of any kind on a saloon free lunch counter is unlawful.

In my opinion your inquiry is to be answered in the affirmative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

December 20, 1915.

317

GAME AND FISH—Warden—Authority to search articles in interstate transit for contraband.

Carlos Avery, Executive Agent, Game and Fish Commission.

Dear Sir: You ask whether:

"A game warden has the right to examine fish in transit shipped from points in this state to points without the state."

You refer to Sections 4766-67, General Statutes 1913, which provide authority for game wardens to make the necessary examination and search for contraband game and fish.

In my opinion, your inquiry is to be answered in the affirmative. The fact that the fish referred to may be the subject of interstate commerce does not deprive the game warden from examining the same for the purpose of ascertaining whether or not contraband fish are being shipped, and the police regulations of the state being violated.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

May 27, 1915.

318

HEALTH—Burial permit—Unnecessary for ashes of cremated body.

Dr. H. M. Bracken.

Dear Sir: You make inquiry relative to the law having to do with burial permits and make a statement in a certain case where a burial permit was made out for the disposal of a body in a certain cemetery; the body was cremated and later the friends took the ashes of this cremated body to another city in order that they might be placed in the family burying plot. The sexton of the cemetery at the last named place demanded a removal permit before the ashes should be disposed of. You ask whether a removal permit was necessary before the ashes of a cremated body can be buried or disposed of in a cemetery other than the one in which the cremation was carried on.

In my opinion your inquiry is properly answered in the negative. The ashes of a cremated body can be disposed of without burial and I do not consider that a burial or removal permit is necessary in order that the ashes of a cremated body may be placed in a cemetery other than the one in which they were first deposited.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

November 30, 1915.

319

HEALTH—Common drinking cup—Factory a public place.

W. F. Houck, Commissioner of Labor.

Dear Sir: You inquire whether Section 8790, G. S. 1913, relating to use of common drinking cups, applies to a factory where a considerable number of laborers are employed.

The section under consideration reads as follows:

"In order to prevent the spread of communicable diseases the use of common drinking cups in public places, public conveyances and public buildings is hereby prohibited."

A public place has been defined as meaning any place not private and to which the general public have access during reasonable hours. Strictly speaking a factory is not within this definition. But it is possible that the legislature has used the term loosely and not in its etymological sense, and intended the act to apply to all places where people assemble in such numbers as to render the communication of disease likely through the use of a common drinking cup.

A statute designed as a measure for the protection of the public health which discriminates in favor of private places as against public places, other things being equal, and permits the use of a common drinking cup in the one and prohibits it in the other, would be of doubtful validity.

Some reasonable ground or difference must exist in order that the legislature may make the distinction. In the act under consideration it is difficult to find any valid legislative basis for such classification.

Bearing this in mind, and presuming that the legislature intended to enact a valid law, and taking notice of the danger which the legislature was seeking to eliminate, it is my opinion that the act was intended to apply to all places in which a considerable number of people assemble, although such place may not be a public place in the sense that the public generally are admitted thereto, and that your inquiry is to be answered in the affirmative.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

October 23, 1916.

320

HEALTH—Employment by school board of physician and nurse.

Dr. H. M. Bracken.

Dear Sir: Your communication is as follows:

"In dealing with communicable diseases in connection with children, the question often comes up as to what advise we shall give boards of education. In many instances it is absolutely necessary, in order to control such diseases among school children, to advise the board of education to employ a physician to act, temporarily at least, as a medical inspector for the school children, and also to employ a nurse, temporarily or permanently.

Before giving such advise we want to know whether boards of education can employ physicians or nurses for this purpose."

You are advised that it has been heretofore and is now the holding of this department that it is within the power of a school board to employ a physician or school nurse. The function of such physician or nurse and the work which shall be performed by them and the amount to be paid them as compensation is largely discretionary with the school board. The activities of such physician or nurse should be confined to the examination of the school children relative to their healthful or unhealthful condition and to the making of a report thereon in such way as will best bring about a change of the unhealthful conditions. There should only be general directions as to the remedy of the situation found. It is not within the province of the physician or nurse to give treatment; the scope of their duties is confined to matters that have to do with the health of the school children from the stand point of public welfare and should not include anything that more than incidentally affected the welfare of the private individual.

"The school board shall have general charge of the business of the district and of the school houses and the interests of the school thereof."

The interests of the schools require that children who are afflicted with a communicable disease shall not be allowed to attend school and expose other children to the contagion. The State of Minnesota and the people thereof expend millions of dollars annually for educational purposes and all reasonable permissible precautions should be taken to prevent anything that would at all seriously impair the efficiency of the schools. I am of the opinion that it is well within the power of a school board, provided moneys are available for the purpose, to employ a school physician and nurses.

In this connection I may state to you that this office has previously held in two opinions covering this proposition, as follows:

"I believe that it is within the implied, if not the express authority of the district, to employ a physician. In reaching this conclusion the board would be justified in considering the likelihood of increased attendance at the schools on account of such employment, as well as the probability of the pupils profiting both mentally and physically therefrom. It is well understood that the best results cannot be obtained in the attempt to instruct children who are suffering from physical ailments, which ailments are oft times not known to themselves or their parents or

guardians. A physician thus employed would also take notice of the sanitary conditions of the school buildings, the lack of fresh air, if such exists, and suggestions made by him would undoubtedly be most beneficial."

"The services rendered by him are only to be in the nature of supervision and general examination; he will not be expected, required or permitted, either at the expense of the district, or otherwise officially, to treat, prescribe for or attend the pupils of the school either by prescribing for them, furnishing medicine or otherwise, such medical attention will be beyond the scope of his authority or duty."

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

March 10, 1916.

321

HEALTH—Liability of county for necessaries of persons in quarantine.

C. M. King, County Commmissioner.

Dear Sir: You ask:

"Is this county legally responsible for food, fuel and other necessary supplies, furnished persons in quarantine, who by reason of such quarantine are unable to secure for themselves such food, fuel, water and oil for lighting purposes, etc. as it is absolutely necessary for their needed sustenance and care during the period of such persons' confinement in quarantine?"

This inquiry is properly answered in the affirmative, provided the persons for whom such supplies are furnished can properly be called "poor persons."

The expense incident to the control of communicable disease includes, "all medical and other help required for the prevention or supression of communicable diseases, or for the carrying out within its jurisdiction the lawful regulations and directions of the state board and its officers and employes."

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

February 8, 1915.

322

HEALTH—Osteopathic physician may be health officer.

Dr. H. M. Bracken.

Dear Sir: You inquire as to whether an Osteopathic Physician can be appointed to act as chairman of the board of health in a city of this State.

You are advised that, in the opinion of this office, an Osteopathic Physician may so act and can hold the position of local health physician.

Section 4643, G. S. 1913 provides that at least one member of every local board of health shall be a physican and that he shall be the local health officer and executive of the board. Section 4994 G. S. 1913 provides, among other things, that a duly licensed Osteopathic Physician shall be subject to all local and State laws and regulations that govern other physicians with respect to the control of communicable diseases, and that such Osteopathic Physicians shall be entitled to all privileges of such other physicians in matters pertaining to the public health.

I am therefore of the opinion that your inquiry is to be answered in the affirmative and that an Osteopathic Physician may therefore be a local health officer.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

April 20, 1915.

323

HEALTH—Pay of physician employed by town board.

Dr. H. M. Bracken.

Dear Sir: You call attention to Section 4646 G. S. 1913, which reads as follows:

"Every local board of health shall employ, at the cost of the town, county or place in which it exists, when necessary, all medical and other help required for the prevention or supression of communicable diseases, or for carrying out within its jurisdiction the lawful regulations and directions of the state board of health and its officers and employes; and upon its failure so to do, the state board may employ such assistance at the local charge. But all persons whose duty it is to care for another infected with a communicable disease, to isolate such patient, or to fumigate or otherwise disinfect any article or place, shall be liable for the reasonable cost thereof to anyone performing such duty or to any county, town or municipality paying such cost."

You state that it is a common thing for a physician to be instructed by a town board of health to establish quarantine; carry out the necessary duties, and fumigate the premises when the time has come for the release of quarantine, and then for such physician to be told that under the section above quoted he must collect the bill from the parties cared for, or those responsible for their care, if they are able to pay. In many instances the parties, irritated at the action that has been taken in establishing quarantine, refuse absolutely to pay the physician.

See Sections 4647-48, G. S. 1913.

You then submit the following inquiry:

"Can the township repudiate all responsibility where the individuals or those who are responsible for the individuals are able to pay; or if the physician has presented his bill against the individuals and been refused payment, then is it the duty of the physician to turn his bill over to the township, expecting payment from that source?"

I am of the opinion, under the facts stated by you, that when a physician is ordered by a town board of health to do and perform certain services under Section 4646 G. S. 1913, that the pay for such services is a primary duty of the township, the town board of which made the employment. If the individual responsible for the payment is financially able to make the same, or perhaps in any event the physician should make an effort to collect from such individual, this effort should be made in the ordinary way by presenting a bill, or making a demand for payment.

If payment is refused, I do not think it is necessary for the physician to bring the action to recover the money from such individual. After having made the necessary effort and payment not being made, then the physician should present his bill to the town board and is entitled to receive his pay. After having paid the bill, the town board can proceed to collect it from the individual responsible, if he is able to pay; if not, can put a bill in to the county for one-half of the necessary cost incurred by it in the control of the communicable disease. Sections 4647-48 G. S. 1913.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

March 23, 1916.

324

HEALTH—Power of local health board to compel diseased person to enter sanatorium.

Paul Ahles, County Attorney.

Dear Sir: After making a statement of facts relative to a person having a communicable disease, (pulmonary tuberculosis) in a township in your county, and stating that the State Board of Health is of the opinion that the patient should be removed to a sanatorium for consumptives, or treated locally in a way that will properly handle the disease and prevent its spread, you ask whether the local board of health would have power under the law, by force, to compel the person in question to go to a sanatorium for consumptives.

I think your question must be answered in the negative.

I find no provisions of law that will warrant the use of force for that purpose. It is manifest that the person in question must not be allowed to so conduct himself as to spread the disease, and he must be either taken care of under the direction of the local board of health, by being sent to the proper sanatorium, or so isolated in Avon, or elsewhere, as will protect the public.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

March 25, 1915.

325

HEALTH—Public records—Death and birth certificates.

Dr. H. M. Bracken.

Dear Sir: You state that a request was made that you permit a certain individual to copy the names of the fathers of the children born in this state each month, excepting those in the cities of the first class. You ask whether it is your duty as custodian of these birth certificates to allow outsiders to come in and copy such records for advertising and other purposes.

The death and birth certificates in your office, being the originals, are under your control as State Registrar, and are properly to be considered as public records. Certified copies of these records are made by you from time to time as occasion may require. Being public records, they are open to the inspection of the public at all proper times, unless the inspection of such records and the obtaining of information therefrom would in any way be detrimental to the public interests. You do not suggest that the obtaining of the information by the person in question will in any way detrimentally affect the public interests, and I am therefore of the opinion that you may properly permit him to secure the information that he desires. Of course, as custodian of these public records, you are chargeable with their care and protection and should not allow them to go out of your possession, nor to be placed in any situation so that such records might be changed, mutilated or destroyed.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

March 30, 1915.

326

HIGHWAYS—Abandonment of—How accomplished.

George F. Sullivan, County Attorney.

Dear Sir: Your letter reads as follows:

"A county road, three miles in length, was duly established in this county in the year 1907, about one-half mile of this road was opened up, worked and traveled, the remainder of the road has not been opened up, worked or traveled and in some places it is enclosed by fences.

My question is whether or not that portion of this road which has not been opened up and traveled has been abandoned?"

Answering your inquiry I have to say that in my opinion the road referred to, having been established by public authorities, is not to be deemed abandoned. Section 79 of Chapter 235, Laws 1913, provides that certain roads in counties having a population of two hundred thousand or more may be deemed or declared abandoned when the same has not been used for public travel for a period of three years. I am of the opinion, however, that roads established by public authorities can only be vacated in the manner provided by statute. When a road is established and the

damages paid, the public acquires an easement in the nature of a title, and this title cannot be divested by adverse possession. (Revised Laws 1905, Section 4072).

Yours truly,

C. LOUIS WEEKS,

Assistant Attorney General.

April 21, 1915.

327

HIGHWAYS—Anticipation of collection of road tax.

Olin C. Myron, County Attorney.

Dear Sir: I beg to advise you that in my opinion a town board, after having levied taxes for road and bridge purposes, can anticipate the collection thereof and incur obligations to be paid from the road and bridge fund after the taxes so levied are collected. Of course you are familiar with the provisions of Section 1190, Statutes 1913. As stated by you the incurring of the obligations before the money is at hand to pay the same, necessitates the payment of interest. This, however, involves a matter of policy rather than one of legal power to make the expenditure. I would also call your attention to the provisions of Section 40, Chapter 235, Laws 1913.

Yours truly,

C. LOUIS WEEKS,

Assistant Attorney General.

July 8, 1916.

328

HIGHWAYS—Cattle tunnels—Maintenance of.

A. J. Burling, Town Clerk.

Dear Sir: I beg to advise you that it is not the duty of the county board to maintain a tunnel under a state or county road. Such duty devolves upon the town. If the road under which the tunnel is constructed is not on a section or sectional subdivision line it is to be maintained by the town board at the expense of the town after the first year. If, however, the road is on a section or sectional subdivision line, it is to be maintained by the town at the expense of the owner for whose benefit it was constructed.

Yours truly,

C. LOUIS WEEKS,

Assistant Attorney General.

August 8, 1916.

329

HIGHWAYS—Claims—Presentation of—Persons employed by road overseer.

John H. Gerber, Esq.

Dear Sir: I advise you that where the town supervisors authorize the overseer to hire men and teams to do certain road work, that the contracts made by the overseer are contracts made with the town and the persons with whom made must each present a claim to the town board for the amount due him under his contract. It is improper for the town to issue an order to the overseer and permit him to pay the several persons with whom he has contracted.

Yours truly,

C. LOUIS WEEKS,
Assistant Attorney General.

March 31, 1915.

330

HIGHWAYS—"County aid" for building bridges by villages—"Culverts" defined.

S. C. Pattridge, County Attorney.

Dear Sir: You call our attention to the provisions of Section 2517, Statutes 1913 (Section 30, Subdivision 3 of Chapter 235, Laws 1913) and state that a certain municipality in your county has asked for aid under the provisions of said section for the construction of certain culverts in such municipality; as you phrase it—"just ordinary culverts of a small type."

You ask if in our opinion the word "bridges" as used in said subdivision is to be construed as including culverts as described by you, so as to make it mandatory upon the county board to appropriate such money as may be necessary therefor from the county road and bridge fund, not exceeding the amount of taxes paid into the county road and bridge fund during the preceding year on property within the corporate limits of such village or city.

I beg to advise you that in my opinion the word "bridges" does not include culverts and that the county is not obligated to appropriate money to pay the expense of constructing such culverts, even though such expense does not exceed the limitation as to the amount to be appropriated, prescribed by said subdivision.

Webster defines a culvert as being a transverse drainage way—a small bridge. Section 80 of Chapter 235, provides for the installation of "culverts" by town boards. It is thus apparent that the legislature by using the two words in the act intended to give a somewhat different meaning to each word and it is to my mind apparent from a reading of said Subdivision 3 that the word "bridges" as used therein was intended

to apply to structures of larger proportion than would be included under the classification or designation of "culverts." Thus said subdivision 3 provides that the council "shall determine the plans and specifications for the bridge."

Yours truly,
C. LOUIS WEEKS,
Assistant Attorney General.

October 17, 1916.

331

HIGHWAYS—County board can not alter or amend award of damages.

Paul Ahles, County Attorney.

Dear Sir: Relative to the award of damages by the county commissioners upon the establishment of a road, I think it is indisputable that in determining the amount of damages which shall be awarded to a land owner for taking his land for road purposes, the county commissioners act in a quasi judicial capacity. (Section 36, Chapter 235, Laws 1913). That when they have once made an order they have exhausted their authority in the premises and cannot thereafter alter or amend the order, at least with respect to the amount of damages.

State ex rel vs. Peter, 107 Minn. 463.

The only remedy of an aggrieved person is by an appeal as provided for in Sections 37, 61, etc. of said Chapter 235.

A committee of the county board have no authority to make any agreement as to the amount of damages to be awarded. (See Sections 35 and 36, Chapter 235, Laws 1913).

Yours truly,
C. LOUIS WEEKS,
Assistant Attorney General.

June 15, 1915.

332

HIGHWAYS—Dismissal of petition by petitioners—Finality of refusal of town board to establish.

L. M. Hollis, Esq.

Dear Sir: I beg to advise you that in my opinion where a petition for the establishment of a town road has been duly filed with the town clerk; by him presented to the town board; an order made by the town board fixing the time and place when and where it will meet and act upon the petition, and a copy of such order has been served upon the occupants of the land and ten days' posted notice has been given, the board has acquired jurisdiction of the proceedings so instituted and such proceeding cannot be dismissed, but on the contrary it is the duty of the town board to hear and determine the petition and either grant or deny the same. The petitioners are not the only persons interested and under the provisions of Section 61, Chapter 235, Laws 1913, any taxpayer of the town may appeal

from the refusal of the town board to establish the road. Allowing the petitioners to withdraw the petition would be an unwarranted interference with the right of taxpayers to appeal.

In my opinion, where a town board has refused to establish a road petitioned for, and such refusal has not been appealed from, the board has jurisdiction to entertain another petition, within a year, asking for the establishment of a part of the road described in the petition denied; provided the road described in the second petition is substantially different from the road described in the petition denied—to illustrate:

If a petition called for the establishment of a road two miles long, a petition asking for the establishment of a road one mile long which followed for the distance of one mile a part of the course described in the petition for the two mile road, might be a substantially different road subserving a public purpose sustantially different than that called for by the road two miles long.

As to your third question, I would say that where a road has been duly established by a town or county board the same can be vacated or altered only upon a petition duly presented to the board so establishing the road. The state engineer has no jurisdiction to alter or establish a road.

Yours truly,
C. LOUIS WEEKS,
Assistant Attorney General.

May 3, 1916.

333

HIGHWAYS—Dragging fund of town—How used.

Maurice Crowell, Town Clerk.

Dear Sir: I advise you that the dragging fund of a town cannot be used for any purpose other than the purchasing of a suitable number of drags and dragging the roads of the town; nor can such fund be transferred to any other town fund.

Yours truly,
C. LOUIS WEEKS,
Assistant Attorney General.

June 11, 1915.

334

HIGHWAYS—Dragging fund—Purchase of grader.

Edward L. Rogers, County Attorney.

Dear Sir: I beg to advise you that I am of the opinion that a town cannot lawfully purchase a road grader and pay therefor out of the dragging fund of the town and this even though the grader might be used as a substitute for a drag in dragging the roads of the town. It is a matter of common knowledge that a grader is primarily intended for a purpose other than that of a drag and that the same is much more ex-

pensive than a drag, both as to original price and cost of operation for dragging purposes. Section 41 of Chapter 235, Laws 1913, as amended by Chapter 116, Laws 1915, provides:

"The proceeds of such tax levy shall be kept in a separate fund to be known as a dragging fund and shall be expended by the town board **only** for the expense of procuring a suitable number of drags and dragging the roads of the town."

Yours truly,

C. LOUIS WEEKS,
Assistant Attorney General.

June 9, 1916.

335

HIGHWAYS—Duty of town to open road when funds sufficient.

H. A. Krogh, Esq.

Dear Sir: You ask:

"Does the law require a town to construct a road within a certain time if it has been laid out?"

I state that in my opinion a town cannot be compelled to construct a road which has been established, where it has not sufficient funds on hand and available for that purpose. On the other hand, if a town having established a road, has sufficient funds to pay for the opening and construction of the road so established, **as well as the performance of all other road work in the town,** then and in that case mandamus could be successfully maintained against the town board to open and construct the road.

State vs. Town of Sommerset, 44 Minn. 549.

State vs. Board of County Commissioners, 83 Minn. 65.

Yours truly,

C. LOUIS WEEKS,
Assistant Attorney General.

April 22, 1915.

336

HIGHWAYS—Duty of village to maintain "state road" within village.

T. S. Brokken, Village Recorder.

Dear Sir: I beg to advise you that it is the duty of a village to maintain a street within the corporate limits of said village, although such street may have been designated as a state road for the purpose of procuring state aid for the improvement of such street within the corporate limits of such village. State roads, outside the corporate limits of a village, are maintained by the county in which such road is situate.

Yours truly,

C. LOUIS WEEKS,
Assistant Attorney General.

April 28, 1916.

337

HIGHWAYS—Establishment by town board—Reconsideration of order establishing.

C. S. Palmer, Esq.

Dear Sir: I beg to advise you that in my opinion where a town board has duly established a town road, it cannot at a subsequent meeting of the town board, and after adjournment of the meeting at which the road was established, reconsider its action so establishing the road.

Yours truly,

C. LOUIS WEEKS,
Assistant Attorney General.

May 13, 1916.

338

HIGHWAYS—Establishment by user—Dedication.

C. Rosenmeier, County Attorney.

Dear Sir: You ask if in our opinion Section 2563, General Statutes 1913 "does away with any other method of establishing a road by user?"

Asnwering your question strictly, I am of the opinion that it should be answered in the affirmative, bearing in mind, however, that an inference of dedication possibly may be predicated upon long continued user. In such case, however, the easement of the public arises not by virtue of user, but by virtue of dedication, the fact of the dedication being proven by the user. It is difficult perhaps to distinguish this from an easement by prescription which presupposes a grant.

In my opinion a public road may be established in three ways:

1. By proceedings under the statute for the establishment and laying out of a road on petition, etc.

2. By user **and working** for at least six years; this by virtue of the statute which has been in force in this State since 1877 (Laws 1877, Chapter 50, Section 1) and which statute is now embodied in Section 56, Chapter 235, Laws 1913.

3. By a common law dedication.

Klink vs. Town of Walnut Lake, 51 Minn. 384.

Brewing Co. vs. Grand Forks, 118 Minn. 470.

We will not attempt to discuss what evidence would be necessary to establish the fact of the dedication of the land by the owner thereof to or for use as a highway. The evidence must show that there was an intent to dedicate, that is, there must be evidence proving the act or acts indicating an intention on the part of the land owner to dedicate the land and an acceptance by the proper authorities of the dedication. User by the public, without keeping in repair or working may establish an acceptance by such "proper authorities."

Wilder vs. City of St. Paul, 12 Minn 123.

Klink vs. Town of Walnut Grove, 118 Minn. 470.

It would not be proper to speak of a road established by common law dedication as being one acquired by prescription; prescription presupposes a grant and in such a case the adverse possession must be for the period of limitations fixed for the recovery of real property. An inference of a common law dedication might arise from a user for a shorter period, on the other hand, a user for a longer time than the time prescribed by the statute of limitations for the recovery of real property might be insufficient to establish an inference of dedication.

When a common law dedication is deemed to have been proven by long continued user, such result is based on the doctrine of estoppel rather than an assumption that there has been a precedent grant of the easement by the owner of the land to the public.

Wilder vs. City of St. Paul, 12 Minn. 124.

I think a consideration of the distinction between the acquiring of a way by a common law dedication and by prescription, above adverted to, will obviate any difficulty in understanding the language found in the Klink case, wherein the court expressed a doubt as to whether "public right may be acquired by prescription." The court said it was not necessary in that case to determine whether a public highway could be established by prescription and that the evidence that was introduced in that case to prove the establishing of a public highway by prescription would also tend to establish a highway by common law dedication, and hence the defendants were entitled to a new trial for the error of the trial court in charging that the evidence would not justify a finding of such a dedication. This was clearly a holding that if the evidence did, on the new trial, establish a common law dedication, it would be a defense of the trespass complained of in the complaint. The court in the Klink case also said with reference to the statute which is now found in Section 76 of Chapter 235, Laws 1913:

"The statute referred to is somewhat in the nature of a statute of limitations prescribing a time after which, under the conditions specified in it, to-wit; using, keeping in repair and working, the owner shall not be heard to question the existence of the highway, but that was not intended to be the only mode by which a highway may be dedicated."

I do not think that a highway can be established in this State by prescription independently of Section 76, Chapter 235, Laws 1913, except that evidence of long continued user would be evidence tending to establish a common law dedication. Evidence of user for a time less than the time fixed by the statute of limitations for bringing of actions for the recovery of land might be sufficient to justify a finding of a common law dedication, especially in connection with evidence of acts by the land owner which tended to show an intent to dedicate. Thus, in connection with acts showing an intent to dedicate, as for instance the removal of fences, the user would be more important to show the acceptance by the public authorities then to show the intent of the owner to dedicate.

Yours truly,

C. LOUIS WEEKS,
Assistant Attorney General.

May 26, 1915.

339

HIGHWAYS—Guide posts and signs.

Ralph V. Blethen, County Attorney.

Dear Sir: Section 684 R. L. 1905 provides:

"Every town shall erect and maintain suitable guide posts and boards at such places on the public roads therein as shall be convenient for the direction of travelers."

In my opinion this section is applicable to state and county roads, as well as town roads. The duty so imposed upon the several towns can be enforced, however, only in case the towns have sufficient funds for that purpose, as well as all other town purposes. Section 3 of Chapter 235, Laws 1913, provides:

"State roads shall be constructed, improved and maintained by the counties."

Section 4 provides:

"County roads shall be established, constructed and improved by the several county boards."

Section 30 provides:

"County boards shall have general supervision of all county roads."

I am of the opinion that the erection and maintenance of guide posts upon public highways is a custom of such long standing that such practice is to be regarded as incidental to the improvement and maintenance of highways and that when a reasonable necessity for expenditure of public moneys for that purpose exists, the authorities charged with the improvement and maintenance of highways may lawfully expend public moneys for that purpose.

It follows that if the towns through which the state and county roads have failed or neglected to perform the duty imposed upon them by Section 684 R. L. 1905, above quoted; that the county, as an incident of its power and authority to maintain and improve county and state roads, may expend county road and bridge funds for the purpose of purchasing and erecting such guide posts as are reasonably necessary for the convenience of the public traveling the roads.

Yours truly,

C. LOUIS WEEKS,
Assistant Attorney General.

March 25, 1916.

340

HIGHWAYS—Ownership of soil—Right of road officials to take sand and gravel for road purposes.

Carl Johnson, Esq.

Dear Sir: I beg to advise you that in my opinion the public authorities have no right to take gravel, rock or any other material from within the road limits of a road without the consent of the adjoining land owner and use such material on another road, where the removal of such material

from the place from which it is removed is not necessary for the purpose of making the road passable where it runs along the land of such adjoining owner. Probably under the law of this State, material could be taken from one place in the road in front of an adjoining owner's land for the purpose of making the road passable at another place where it runs along the same owner's land, even though it was not necessary to remove it from the place from which it was removed for the purpose of making the road passable at that particular place.

Material which it is necessary to remove for the purpose of making the road passable at the place where such material is removed may be used on the same or other roads if the adjoining owner does not claim such material. All of the foregoing is applicable only in case the village or town has not purchased the fee of the land. Ordinarily the title to public highways in this State is vested in the adjoining land owner and the public only acquires an easement or right of way for public passage with the incidental right to remove such soil or material as is necessary to make the road passable.

Yours truly,

C. LOUIS WEEKS,
Assistant Attorney General.

June 17, 1916.

341

HIGHWAYS—Right of town to purchase easement for ditch to drain road.

Charles Kenning, Esq.

Dear Sir: I am of the opinion that a town board has a right to acquire, by contract, the right to construct a drainage ditch across private lands for the purpose of draining a town or county road where the road so to be drained is one which it is the duty of the town board to maintain and keep in repair. The right to construct a ditch across another's land and thereafter to go upon the same for the purpose of cleaning out the same and keeping it open is an easement. An easement can be acquired by a grant from the owner of the land over which the easement is exercised. A grant is merely a conveyance and should be made by deed, signed by the owner of the land and, in case he is married, by his wife. It should, after execution, be filed for record with the Register of Deeds of the county.

Yours truly,

C. LOUIS WEEKS,
Assistant Attorney General.

May 17, 1916.

342

HIGHWAYS—State roads—What is for maintenance purposes.

George W. Cooley, State Engineer.

Dear Sir: I advise you that in my opinion a road established in 1867 by legislative authority is not to be regarded as a "state road" for the purposes of maintenance, unless the same has been duly designated as a state road by the county board and the State Highway Commission.

Yours truly,

C. LOUIS WEEKS,
Assistant Attorney General.

May 17, 1915.

343

HIGHWAYS—Annual town meeting can not direct where road and bridge fund shall be expended.

Ole P. Larson, Esq.

Dear Sir: I have to say that a vote of the annual town meeting of the town directing that a specified sum of money be expended in road work on a specified road is not binding upon the town board. The law provides that the town board shall have general care and superintendence of the roads. The action of the annual town meeting is of no legal effect and is merely advisory.

Yours truly,

C. LOUIS WEEKS,
Assistant Attorney General.

March 1, 1915.

344

HIGHWAYS—State rural highway fund.

Franz Jevne, County Attorney.

Dear Sir: I beg to advise you that in my opinion any money in the State Rural Highway fund may be lawfully used for the payment of warrants lawfully drawn on that fund, although the money in such fund consists of money received from the state in payment of its share of the cost of construction or improvement of state rural highways in your county, or of money received in payment of liens against benefited lands. Money received from the sources last above indicated does not necessarily have to be set aside as a sinking fund to retire bonds issued for state rural highway purposes.

Yours truly,

C. LOUIS WEEKS,
Assistant Attorney General.

July 27, 1916.

345

HIGHWAYS—Town clerk and supervisors cannot be employed on, under facts stated.

J. R. Taylor, Esq.

Dear Sir: I advise you that members of the town board and the town clerk cannot lawfully be employed upon road work in towns having twenty-five (25) or more legal voters. The fact that there were only twenty-three (23) voters present at the last annual town meeting is not conclusive upon the number of voters in the town.

If, as a fact, there are more than twenty-five (25) legal voters the law is applicable to your town irrespective of whether or not all of the voters attended the last annual town meeting.

Further, I advise you that even if there are less than twenty-five (25) legal voters in your town, members of the town board and the town clerk cannot lawfully be employed on road work unless the annual town meeting fixed the price which should be paid to such officers for work performed by them upon the roads. In other words, the statute provides that in towns having less than twenty-five (25) legal voters—
"officers may be employed upon road work by the day at such price as may have been fixed by the town at its annual meeting."

Yours truly,

C. LOUIS WEEKS,
Assistant Attorney General.

May 29, 1915.

346

HIGHWAYS—Town officers working on.

L. O. Myhre, Town Supervisor.

Dear Sir: I have to say that the Supreme Court, in the case of Town of Buyck vs. Buyck, 112 Minn. 94, stated explicitly that "the employment of members of the board of supervisors and the town clerk to work upon the road was a violation of Section 688 R. L. 1905."

The statute referred to is still in force. I do not know of any case which holds that any other town officers than those above mentioned are forbidden to work on the road under supervisors. The statute referred to above relates only to supervisors, town clerk and town board. There is a provision in that statute that "in towns having less than 25 legal voters, said officers may be employed upon road work by the day at such price as may have been fixed for such work by the town at its annual meeting."

Yours truly,

LYNDON A. SMITH,
Attorney General.

September 27, 1916.

347

HIGHWAYS—Towns—May perform road work by force account.

Maurice J. Godfrey, Town Clerk.

Dear Sir: I beg to advise you that in my opinion a town can construct or improve its roads by day labor. In such case, the work is to be done under the supervision of the town road overseer of the district in which the road is situate, but subject to the paramount supervision of the town board. That is, the town board may direct the road overseer to employ the necessary men and teams for the doing of the work, but the town board may also prescribe the prices which shall be paid by the overseer for labor and teams. Contracts for the purchase of material, if any, should be entered into by the town board acting as a board.

Yours truly,

C. LOUIS WEEKS,
Assistant Attorney General.

November 13, 1916.

348

HIGHWAYS—Through cemetery—Consent of owners.

Bernard Pawlak, Village Recorder.

Dear Sir: Section 6323, G. S. 1913 provides that no road or street shall be laid through lands laid out and dedicated as a private cemetery without the consent of the owners. I assume that this cemetery is a private one and if so, the section above seems to answer your question.

Yours truly,

LYNDON A. SMITH,
Attorney General.

April 6, 1916.

349

HOLIDAYS—Result when it falls on Sunday.

William M. Ericson, Judge of Probate.

Dear Sir: You ask whether May 31 is a legal holiday under the proclamation of the Governor so that your office should be closed on that day, or whether you would be at liberty to set hearings for that day.

There is no provision of law making May 31 a legal holiday, even though that date follows a Sunday which is Memorial Day. The provisions of law relative to a condition such as will exist this year (that is a legal holiday coming on Sunday) is found in Sections 6010 and 6011, G. S. 1913, and as will be noted has application only to commercial paper. There appears to be no law that makes it unlawful to transact the business

of your court on a day that may be selected by the Governor's proclamation as a holiday in place of or in addition to a holiday provided for by statute and which said holiday falls on Sunday.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

May 15, 1815.

350

HOTELS—Fire escapes—Duties of inspector.

William G. Mee, State Hotel Inspector.

Dear Sir: You state that the St. James Hotel at Red Wing, containing twenty-six rooms on the fourth floor, is equipped with three outside iron ladder fire escapes located at the end of the hallways which were ordered installed by your department to comply with Chapter 206, G. L. 1911 (said law requiring "suitable fire escapes"), and you further state that you have ordered iron platforms, three feet by six feet at each floor above the first to comply with the provisions of Section 8, Chapter 569, G. L. 1913 (Section 5120, G. S. 1913), which requires an—

"iron stairway outside of the building extending from the cornice of the building to within twelve feet of the ground and connecting on each floor above the ground with an opening from such floor, which stairway shall have platform landings at each floor not less than six feet in length and three feet in width and which stairway shall be guarded by an iron railing not less than thirty inches in height * * * *".

You ask whether you may issue a State Hotel license to said hotel after these orders have been complied with.

It is within the police power of the state to require suitable fire escapes in hotels—22 CYC 1073, note 22. It is also within the power of the state to specify the kind of fire escapes which shall be used. The fact that innkeepers have complied with a former law which simply required "suitable" fire escapes, does not excuse them from complying with the provisions of a subsequent law which requires construction of "iron stairways." It is undoubtedly competant for the legislature to amend the law and require iron stairways of certain specifications in place of "suitable" fire escapes.

Yall vs. Gillham, 86 S. W. 125 (Mo).

Section 5115, G. S. 1913, provides that you may issue hotel licenses after having approved an application therefor and Section 5121, G. S. 1913, provides for cancellation of licenses in cases of failure to comply with the law after conviction for violation thereof. No particular standard to govern you in issuing licenses in set out in the statute, save that applications therefor must be approved by you. In granting or refusing licenses you exercise a discretion which ordinarily cannot be controlled by the courts.

Every person appointed to any public office is required to take the constitutional oath (Section 5733, G. S. 1913). That oath is to faithfully discharge the duties of his office to the best of his judgment and ability.

The object of your appointment is stated to be "for the purpose of carrying into effect the provisions of the act," (5114, G. S. 1913) and you are required whenever a hotel is not equipped in accordance with the provisions of the act, or so as to violate any of the laws of the state, to notify the owner, and such owner shall forthwith comply with the law. (5116 G. S. 1913).

It is difficult to see how you can consistently issue a license in this case in the light of these provisions. I am of the opinion therefore, that you should not issue this license until the provisions of the 1913 law are complied with and an iron stairway is installed.

Yours truly,

LYNDON A. SMITH,
Attorney General.

October 14, 1916.

351

HOTELS—Inspection—Church or lodge suppers.

William G. Mee, State Hotel Inspector.

Dear Sir: You ask:

Whether churches and fraternal organizations are required to take out a restaurant license in conducting one of their ordinary church and lodge suppers.

It is somewhat difficult to give or lay down any general definition of the word "restaurant" within the contemplation of the hotel inspection law of this state. It certainly does not appear to us that a church or lodge serving a supper, as these affairs are usually and generally conducted, can by any reasonable contruction of the law be held to become a restaurant and required to secure a license from the hotel inspector.

Of course we desire that we must not be understood as holding that a place where meals are regularly served for a continuous period of time at regular hours and to all who may patronize the place, even though conducted by a church or lodge, would not be a restaurant and required to obtain a license, but the service of a church or lodge dinner or supper as usually conducted, for one or two meals, seems to us could not by any fair construction of the law constitute the organization serving it a "restaurant" as used in the hotel inspection law.

Yours truly,

JOHN C. NETHAWAY,
Assistant Attorney General.

December 30, 1915.

352

INCOMPATIBLE OFFICES—Assessor and road overseer are not.

Jesse E. Bogart, Esq.

Dear Sir: You inquire as to whether the office of township assessor and road overseer are incompatible. In my opinion your inquiry is to be answered in the negative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

May 26, 1915.

353

INCOMPATIBLE OFFICES—Chairman county board and clerk of election are.

Simon Swenson, County Commissioner.

Dear Sir: You are advised that the chairman of the county board cannot act as a clerk of a primary election, or a general election. The chairman is a member of the County Canvassing Board of both elections and the two offices are incompatible.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

January 31, 1916.

354

INCOMPATIBLE OFFICES—City council member and water commissioner are.

Thomas J. Feely, Esq.

Dear Sir: You ask:

"Is it proper for the village council to appoint one of its own members to the water commission?"

An examination of Section 1824, G. S. 1913 will show that the council fixes the compensation of the members of the water board. This being so the offices would be incompatible and it would not be proper for the council to appoint one of its own members.

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

December 22, 1915

355

INCOMPATIBLE OFFICERS—City clerk and assessor not—In city referred to.

E. D. Buffington, City Attorney.

Dear Sir: Your letter in substance is an inquiry whether the city clerk of the City of Stillwater would be eligible to accept and hold the office of city assessor were he elected to the last named office by the city council.

I am unable to find wherein the duties of either office are dependent upon or under the supervision of the other. The rule that is to guide us in determining the incompatibility of offices is well stated by the Supreme Court where it said:

"There is no express incompatibility created by the constitution or by statute. To render two offices incompatible at common law, so that the acceptance of one would, ipso facto, vacate the other, the functions of the two must be inconsistent, as where an antagonism would result in the attempt by one person to discharge the duties of both offices. But where one office is not suborinate to the other and the relations of the one to the other are not repugnant and inconsistent, then the two are not incompatible."

Kenney vs. Goergen, 36 Minn. 190-192.

Later the Supreme Court, in reviewing this rule, said:

"Incompatibility does not depend upon the physical inability of one person to discharge the duties of both offices. The test is the character and relation of the offices; that is, whether the functions of the two are inherently inconsistent and repugnant. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control or assist him."

State vs Hays, 105 Minn. 399, 401, and cases cited.

So I advise that the city clerk of Stillwater may hold and perform the duties of the offices of city clerk and city assessor.

Yours truly,

JOHN C. NETHAWAY,
Assistant Attorney General.

April 7, 1915.

356

INCOMPATIBLE OFFICES—County attorney and mayor are.

James H. Hall, County Attorney.

Dear Sir: You inquire whether the same person may hold the offices of county attorney and mayor of a city within his county at the same time.

In my opinion your inquiry is to be answered in the negative. The offices are incompatible.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

December 31, 1916.

357

INCOMPATIBLE OFFICES—County attorney and village attorney are.

Clayton Cooper, County Attorney.

Dear Sir: You ask whether the offices of county attorney and village attorney in the same county are incompatible. Your inquiry is anwered in the affirmative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

April 18, 1916.

358

INCOMPATIBLE OFFICES—County commissioner and town clerk are.

P. S. Olsen, County Attorney.

Dear Sir: You inquire as to whether the offices of county commissioner and town clerk are incompatible and I have to advise you that it has been and is now the opinion of this office that your inquiry should be answered in the affirmative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

December 31, 1916.

359

INCOMPATIBLE OFFICES— County commissioner and town road overseer not incompatible.

R. J. Stromme, County Attorney.

Dear Sir: You ask:

"Are the offices of county commissioner and township road overseer incompatible?"

Your inquiry is answered in the negative.

Yours truly,
C. LOUIS WEEKS,
Assistant Attorney General.

March 29, 1915.

360

INCOMPATIBLE OFFICES—County commissioner and town supervisor are not—County commissioner and chairman town board are.

E. C. Schmising, Town Clerk.

Dear Sir: You are advised in answer to your last questions that this office has heretofore held that the offices of county commissioners and town supervisor are not incompatible and may be held by the same person. We have also held that a chairman of the town board is not eligible to election as county commissioner, if he is a member of the board of election choosing a commissioner to fill the vacancy. He must first resign his office of chairman of the town board and cease to be a member of the board of election.

The town board should fiill any vacancy on such board within a reasonable time.

Yours truly,

WILLIAM J. STEVENSON,

Assistant Attorney General.

January 28, 1916.

361

INCOMPATIBLE OFFICES—County superintendent and member of board of independent district are.

P. C. Tonning, Assistant Superintendent of Education.

Dear Sir: You ask:

Whether a county superintendent may serve as member of the school board of an independent district in his county. You call attention to the official relations which exist between a county superintendent and an independent school district in his county. You refer to the fact that the county superintendent receives enrollment and attendance reports, and from these reports he makes a report to your office showing the number of pupils entitled to apportionment at the end of the school year. Such superintendent also files in his office certificates of teachers teaching in such independent district. He also might be in a position to require the use of the school buildings in the independent district for the holding of institutes for teachers. In case an independent district has associated with it other districts or constitutes a consolidated school district the county superintendent would have to approve the application for the formation of such association or consolidation, and his recommendations and approval are required for the distribution of aid to such schools.

For some, if not for all of the reasons, relations and duties above referred to, I am of the opinion that the offices are incompatible and the county superintendent of schools cannot serve as a member of the board of an independent district in his county.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

July 21, 1916.

362

INCOMPATIBLE OFFICES—Judge of municipal court and assessor are not.

Max Distel, Justice of the Peace.

Dear Sir: You inquire whether a judge of a municipal court can at the same time hold the office of assessor.

In my opinion, your inquiry is to be answered in the affirmative. I do not think the two offices are incompatible.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

March 2, 1916.

363

INCOMPATIBLE OFFICES—Judge of probate and justice of peace are not.

H. P. Bengston, County Attorney.

Dear Sir: You inquire whether the Judge of Probate may also hold the office of Justice of the Peace. It was held by this department in 1907 that the same person might hold the office of Judge of Probate and Justice of the Peace. You call attention to the Juvenile Court Law and a question has arisen in your mind as to whether that law would make the two offices incompatible. I do not think it has that effect.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

June 1, 1916.

364

INCOMPATIBLE OFFICES—Municipal judge and city attorneys are.

Joseph A. Quinn, Esq.

Dear Sir: You ask:

"In your opinion would it be legal for the same person to hold the office of municipal judge and also act as city attorney?"

You are advised that in view of the duties imposed upon a city attorney under Section 277, General Statutes 1913, wherein it is provided that all prosecutions for misdemeanors and violations of the city or village ordinances the city attorney shall have charge of these cases, that it would be inconsistent for the city attorney, with these imposed duties, to act as judge of the court before which the cases are prosecuted. Therefore your question is answered in the negative.

Yours truly,

JOHN C. NETHAWAY,
Assistant Attorney General.

January 14, 1915.

365

INCOMPATIBLE OFFICES—Justice of the peace and city recorder are.

J. J. Hadler, Village Attorney.

Dear Sir: It was held by Attorney General Childs in 1893, that the office of village justice and village recorder are incompatible and that both offices may not be held by the same person at the same time. This rule was approved and followed by Attorney General Young in 1906, and these rulings have been followed and applied by this department in a number of subsequent opinions.

It is the established rule that when a person accepts an office incompatible with one which he then holds, he thereby impliedly resigns and vacates his former office.

Yours truly,

JAMES E. MARKHAM,
Assistant Attorney General.

December 12, 1916.

366

INCOMPATIBLE OFFICES—Justice of the peace and deputy clerk of court are.

Frank C. Goss, Clerk of Court.

Dear Sir: The offices of clerk of court and justice of the peace are incompatible. This being the case, I cannot see how a justice of the peace can act as a deputy clerk of court without being called upon sometimes to do things which conflict with his duties as justice of the peace, or at least have a strong bearing on them. If this is the case he can not be deputy clerk of court, and I am of the opinion that he can not.

Yours truly,

LYNDON A. SMITH,
Attorney General.

January 23, 1915.

367

INCOMPATIBLE OFFICES—Village assessor and justice of the peace are not.

C. C. Ives, Esq.

Dear Sir: You inquire as to whether the same man can hold the office of village assessor and justice of the peace. In my opinion he can. I do not think the two offices are incompatible.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

November 19, 1915.

368

INCOMPATIBLE OFFICES—Village constable and justice of peace are.

E. W. Rohlen, Esq.

Dear Sir: You inquire whether you can hold the offices of village constable and township justice of the peace at the same time. I think your inquiry should be answered in the negative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

April 27, 1916.

369

INCOMPATIBLE OFFICES—Justice of peace and village treasurer under facts stated are.

G. A. Gunnarson, Esq.

Dear Sir: You state that the Township of Hallock and the Village of Hallock are not separated for election and assessment purposes. I am of the opinion that the office of justice of peace of the township and treasurer of the village of Hallock are incompatible and cannot be held by the same person at the same time.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

April 27, 1916.

370

INCOMPATIBLE OFFICES—Member of legislature and boiler inspector or township officer are.

J. J. Winter, Esq.

Dear Sir: The constitution prohibits a member of the legislature from holding any other office under the constitution and laws of the State of

Minnesota and of the United States except that of postmaster. It therefore follows that you cannot hold the township office in question or the office of state boiler inspector during the term which you have been elected to the state legislature.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

November 28, 1916.

371

INCOMPATIBLE OFFICES—Member of legislature and deputy bank examiner are.

Albert H. Turrittin, Superintendent of Banks.

Dear Sir: Relative to the right of a member of the legislature to hold another office, to-wit: that of "special deputy examiner," I have to say that the position which is the present equivalent of the position of "special deputy examiner" under the law when the public examiner was at the head of the banking department, is an office just as certainly as the position of superintendent of banks, and therefore no member of the legislature is eligible to appointment thereto.

Yours truly,
LYNDON A. SMITH,
Attorney General.

September 28, 1915.

372

INCOMPATIBLE OFFICES—Member of legislature and delegate to political convention are not.

Hon. E. E. Lobeck.

Dear Sir: There is apparently no legal objection to a member to the legislature being a delegate to a national convention. Neither is there any objection to a state senator becoming a candidate for congress without resigning his senatorship. A member of congress is a federal official and no matter what the state regulations may be, they can have no bearing upon the qualifications of a congressman. The federal constitution makes congress itself the judge of the qualifications and election of its members.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

January 28, 1916.

373

INCOMPATIBLE OFFICES—State senator and city attorney are.

J. H. Twitchell, City Clerk.

Dear Sir: I state that it is immaterial what may be the provisions of your city charter as to the qualifications of your city attorney under the facts stated. If the position of city attorney is a city office, and you assume that it is, and your charter so indicates, then a state senator is prohibited by the Constitution of Minnesota from holding such office during the term for which he is elected.

Section 9 of Article 4 provides:

"No senator or representative shall, during the time for which he is elected, hold any office under the authority of the United States or the State of Minnesota, except that of postmaster."

It has been repeatedly held by the Attorney General that any city office within this state is an "office under the authority * * * * of the State of Minnesota." This constitutional disqualification extends throughout the entire term for which the member of the legislature is elected.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

July 10, 1915.

374

INCOMPATIBLE OFFICES—School district treasurer and town treasurer are not.

A. H. Vikla, District Clerk.

Dear Sir: You inquire whether the same person may at the same time hold the office of school district treasurer and township treasurer. Your inquiry is answered in the affirmative. The offices are not incompatible and may be held by the same person at the same time.

Yours truly,
CLIFFORD L. HILTON,
Assistan Attorney General.

March 22, 1916.

375

INCOMPATIBLE OFFICES—Town clerk and town assessor are not.

G. H. Smith, Town Clerk.

Dear Sir: In reply to your letter of March 31 I have to say that the offices of town clerk and town assessor do not appear to conflict with each other and it has been held heretofore by this office that the same person may hold both of these offices.

Yours truly,
LYNDON A. SMITH,
Attorney General.

April 3, 1916.

376

INCOMPATIBLE OFFICES—Town supervisor and fire warden are not.

O. M. Eckbeck, Esq.

Dear Sir: You inquire as to whether a township supervisor may be a fire warden. Your inquiry is answered in the affirmative.

Section 3806 G. S. 1913, among other things, provides as follows:

"The state forester may appoint supervisors, constables and clerks of towns * * * * fire wardens for their respective districts, and it is hereby made their duty to do all things necessary to protect the property of such municipalities from fire and to extenguish the same."

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

May 9, 1916.

377

INCOMPATIBLE OFFICES—Town treasurer and assistant road overseer are not.

C. D. Lewis, Esq.

Dear Sir: I beg to advise you that in my opinion a town treasurer can lawfully hold the office of assistant town road overseer.

Yours truly,

C. LOUIS WEEKS,
Assistant Attorney General.

August 2, 1916.

378

INCOMPATIBLE OFFICES—Village assessor and village marshal are not.

C. Jacobson, Village Constable.

Dear Sir: You inquire in affect as to whether the office of village assessor and village marshal are incompatible.

I see no incompatibility in the two offices.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

February 18, 1915.

379

INCOMPATIBLE OFFICES—Village clerk and assessor are.

Wm. McDonnell, Esq.

Dear Sir: You state that you were elected to the office of village assessor, without opposition, and also the office of village recorder. You ask whether you can hold both offices.

Your inquiry is answered in the negative; the two offices ar incompatible.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

April 9, 1915.

380

INCOMPATIBLE OFFICES—Village clerk and county surveyor are not —Member village council and member board health are.

E. M. Kimball, Village Recorder.

Dear Sir: I do not think the offices of village clerk and county surveyor are incompatible and I am of the opinion that both offices can be held by the same person at the same time.

This office has **heretofore held** that the office of member of the village council and member of the board of health of such village are incompatible and cannot be held by one person at the same time. A person who is a member of the village board of health and is elected to the office of village trustee may qualify for the office of trustee, thereby vacating his position as a member of the village board of health.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

March 16, 1916.

381

INCOMPATIBLE OFFICES—Village recorder and village officer are.

M. A. Cummings, Village Clerk.

Dear Sir: In reply to yopr letter of March 31 I have to say that it is not legal for you to be village recorder and to occupy, at the same time, any positions in the village at a salary.

Yours truly,
LYNDON A. SMITH,
Attorney General.

April 3, 1916.

382

INCOMPATIBLE OFFICES—Water and light commissioner and village council member.

Attorney General's Office.

Louis Hallum, County Attorney.

Dear Sir: You state that the village council of Aitkin proposes to appoint a commission under Section 1807 to 1814 inclusive. You then ask:

1. "Can a member of the present council lawfully act as a member of such commission, that is, be both councilman and commissioner?"

The law quoted by you provides that a water and light commission must be elected or appointed by the village council. This being so the rule laid down by Mr. Mechem in his work on public officers would seem to require a negative answer to your inquiry. He there says:

"It is contrary to the public policy to permit an officer having the power to appoint to an office, to exercise that power in his own interest by appointing himself."

You also ask:

2. "Under Section 1811, may the same person hold the office of commissioner and secretary?"

These two offices would certainly be incompatible and could not be held by one and the same person, and this inquiry must be answered in the negative.

You also ask:

3. "Would it be lawful for the village attorney to serve on the commission or are the two incompatible?"

Under the ruling of our Supreme Court in 117 Minn. 323, the commission has no authority to employ an attorney, it being the duty of the city attorney to act for a water and light commission and it would seem to be rather inconsistent for the city attorney, as adviser of the board to be himself a member of that board. The better rule to follow in such a case is for the city attorney not to act as one of the water and light commissioners.

You also ask:

4. "Is it unlawful for a corporation to be interested in contracts with a village, when one or more of its stockholders are members of the council, assuming that the contract is otherwise lawful?"

This question must be answered in the affirmative. It has been held by this department in an opinion under date June 17, 1912, addressed to H. E. Leach, Owatonna, answering a similar question, that such contracts would be unlawful and a violation of the statute prohibiting officers of a municipality from being interested in contracts made with such municipality.

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

May 24, 1915.

383

INSURANCE—Investments permitted to a domestic life company.

State Insurance Commissioner.

Dear Sir: Section 1635, R. L. 1905, authorizes any domestic insurance company, including of course, any domestic life insurance company, to invest its funds in the "stocks or bonds **at the market value, approved by the commissioner,** upon which interest or dividends of not less than three per cent have been regularly paid for three years immediately preceding the

investment of any such public service corporation incorporated by or under the laws of the United States or any State or the Dominion of Canada or any Province thereof."

This subdivision was amended by Chapter 82, Laws 1915. Section 1 of Chapter 163, Laws 1907, provides that a domestic life company shall not invest its funds in stocks, nor in bonds "not secured by adequate collateral security." Chapter 163, does not repeal Section 1635 so far as the latter authorizes domestic life companies to invest their funds in bonds, but it does add an additional qualification which must inhere in the bonds purchased by domestic life companies, i, e., such bonds must be secured by adequate collateral security and when more than one-third of the value of the collateral security consists of shares of stock, such collateral security shall not be deemed adequate.

Chapter 163 does repeal Section 1635 insofar as the latter section authorizes domestic life insurance companies to invest in stocks. The re-enactment of Section 1635, R. L. 1905, found in Chapter 82, Laws 1915, does not repeal Chapter 163, Laws 1907.

"A later law which is merely a re-enactment of a former does not repeal an intermediate act which has qualified or limited the first one, but such intermediate act will be deemed to remain in force and to qualify or modify the new act in the same manner as it did the first."

Powell vs. King, 78 Minn. 83.

It follows that a domestic life insurance company may invest its funds in the bonds of a public service corporation incorporated under the laws of the Unitel States or of any State or the Dominion of Canada or any Province thereof, **provided** such bonds are secured by **adequate** collateral security and are **approved by the insurance commissioner.**

Under the amendment of Section 1635, R. L. 1905, set forth in Chapter 82, Laws 1915, it is no longer necessary that interest of not less than three per cent shall have been regularly paid on the **bonds** for three years immediately preceding the investment. A domestic life company cannot, however, pay more than the market value of the bonds. Bonds, the payment of which are secured by a mortgage of property are "secured by collateral security." The question of the adequacy of the security is one of fact to be determined with reference to the facts in each case.

Yours truly,

C. LOUIS WEEKS,
Assistant Attorney General.

March 23, 1916.

384

INSURANCE—Standard policy—Gasoline permit.

State Insurance Commissioner.

Dear Sir: You ask:

"Whether or not the Minnesota standard fire insurance policy, prescribed by law, prohibits the use, storage, sale or handling of gasoline, without a special permit therefor?"

I am of the opinion your question should be answered in the affirmative. The standard policy provides inter alia as follows:

"The (this) policy shall be void * * * * if camphene, benzine, naphtha, or other chemical oils **or burning fluids** shall be kept or used by the insured on the premises insured, except that what is known as refined petroleum, kerosene, or coal oil may be used for lighting, and **in dwelling houses** kerosene oil stoves may be used for domestic purposes, to be filled when cold, by daylight, and with oil of lawful fire test only."

Subdivision 2 of Section 1640, R. L. 1905, as amended by Chapter 331, Laws of 1909, authorizes the attachment to or printing in a policy of a permit for the use of gasoline.

The last quoted provision authorizes the insurance company to stipulate that the insured may use and store gasoline upon the premises insured under such restrictions and conditions as it may prescribe. Obviously where such permission is given, the policy it not "made void" by such use and storage.

Yours truly,

C. LOUIS WEEKS,
Assistant Attorney General.

October 25, 1915.

385

INTOXICATING LIQUOR—What is.

Anna Rathbun.

Dear Madam: Intoxicating liquor is such when it will intoxicate if drunk in such quantities as a person might ordinarily be able to drink. In this state the intoxicating quality of liquor is not determined by the percentage of alcohol, but by the effects of the liquor.

The laws relative to the sale of intoxicating liquor do not apply to medicine. I think that the nearest summary statement of the law is that liquors which would **make a person sick rather than intoxicated** would be deemed medicines but if the intoxication from drinking would come, and come before ordinary illness, it would be treated as intoxicating. On a trial the question of whether a liquor was intoxicating or medicinal would be submitted to the jury.

Yours truly,

LYNDON A. SMITH,
Attorney General.

August 24, 1916.

386

INTOXCATING LIQUORS—Action to abate unlicensed drinking place.

C. G. Dosland, County Attorney.

Dear Sir: I beg to advise you that an action to abate an unlicensed drinking place must be instituted in the name of the Attorney General (131 Minn. 451).

Before signing the complaint in such an action the Attorney General would want submitted to him an affidavit of the witness, or witnesses, by whom the material allegations of the complaint would be proven, and he would also expect that you would prepare the papers and attend to the case, signing the papers with him. He would request you to do this under the provisions of Section 105 G. S. 1913.

Inasmuch as the Attorney General verifies the complaint, he feels that the affidavits above referred to should be furnished to him as a justification for his commencement of the action and as a basis for his verification.

Yours truly,

C. LOUIS WEEKS,
Assistant Attorney General.

August 25, 1916.

387

INTOXICATING LIQUOR—Confiscation without warrant—Jurisdiction justice peace—Seizure of firearms.

A. C. Murray, Village Recorded.

Dear Sir: I do think a village marshal has a right to seize liquor which is delivered to a suspected blind pigger without first obtaining a search warrant such as is provided for in the law to be issued in such case. An offense committed against the state law in any county may be prosecuted before any justice of the peace in that county, it is not necessary that the justice in the election precinct where the offense was committed be used. A village marshal has no right to take weapons away from a tramp or vagrant that he is chasing out of the town and retain them without instituting a prosecution. If the party in question is violating the state law by carrying concealed weapons, he should be taken before a justice and prosecuted, a formal complaint being made and a warrant issued. I call your attention to Sections 3159, 3172, 7619 and 8770, General Statutes 1913.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

September 25, 1916.

388

INTOXICATING LIQUOR—Counties voting no license—Operations by licensee during six months period.

C. G. Dosland, County Attorney.

Dear Sir: Your inquiry is as to whether, after county option has carried in a county and a certificate so showing has been filed with the county auditor, it is unlawful for persons to solicit purchases of intoxicating liquor in such dry county.

In my opinion, you inquiry is to be answered in the affirmative.

After the filing of such certificate the retail licensee may continue in business until the expiration of his license, not exceeding six months, but, in my opinion, salesmen for wholesale liquor houses are not permitted to solicit business from such licensed saloon keepers or others in the dry county in question. It has been held that such solicitation cannot be carrier on by mail. You inquire as to how a man, lawfully engaged in the saloon business, can secure his supplies.

There is no law to prevent him from sending an order to a wholesale house for the needed supplies, or the filling of that order by the person receiving the same, provided the sale is in all respects lawfully consummated in wet territory.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

June 12, 1915.

389

INTOXICATING LIQUOR—Counties voting no license—Purchases by residents of dry county made in county voting wet.

Simon Swenson, Esq.

Dear Sir: If the county votes in favor of county option it will not be in violation of any state law for the residents of that county to send an order into wet territory for inoxicating liquor, the order to be accepted and filled in such wet territory by the person authorized to make the sale, provided delivery is made to the purchaser in such wet territory or to a common carrier. Delivery to a common carrier is considered as a delivery to the consignee.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

May 26, 1915.

390

INTOXICATING LIQUORS—Drinking on public highway—Acts of hospitality.

Wm. Towl, Mayor.

Dear Sir: You ask:

1. "Can a person be arrested for drinking liquor on a public street?"

Your inquiry is answered in the negative, unless the actions of the person so drinking amount to disorderly conduct. I find no provision of law that in terms prohibits drinking on a public street.

2. "Can a man give away or serve liquor at a table in his own house?"

He probably can if the giving away or serving of the liquor is a matter of hospitality. Our Supreme Court, in the case of State ex rel. Henry Krebs vs. Frank Jones, 88 Minnesota, 27, intimates that this may be done, for the court in that case says:

"It may be further conceded * * * * that the relator might have given complaining witness a glass of whisky or spirits at his home under conditions of social friendship."

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

May 4, 1915.

391

INTOXICATING LIQUORS—"From and after" construed in county option law.

Messrs. Murray and Baker.

Gentlemen: You call attention to the county option law, in Section 11 of which is found the following language:

"Six months from and after the filing of the certificate of the county canvassing board as hereinafter prescribed."

You ask for a construction of the words "from and after the time of the filing of the certificate."

I am of the opinion that in computing the six months period the day of the filing of the certificate is to be excluded. In Parkinson vs. Brandenburg, 35 Minnesota 294, the court held:

"Where a statute provides that it shall take effect 'from and after its passage,' in computing the time when it takes effect, the day of its passage is to be excluded."

"The general rule * * * * is that where a particular period sought is to be begun or computed from and after some recognized division of time, the day so specified is to be excluded in the computation of the time, unless the contrary appears."

See note to 15 L. R. A., N. S. 686, and cases there cited.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

November 26, 1915.

392

INTOXICATING LIQUORS—County option law construed.

G. H. Rustad, City Attorney.

Dear Sir: You call attention to Sections 11 and 12 of the County Option Law recently passed by the legislature and state that the retail liquor licenses of the City of Moorhead all expire on June 30th, 1915. You then ask:

"Assuming that an election is held under the County Option Law, on or about June 1st, 1915, and that the majority of votes cast on the proposition should be in favor of prohibition, then and in that event, would the city council have the authority to grant licenses from the

30th day of June, 1915, or are they prohibited from so doing by Sections 11-12 of said law? In other words, does Section 11 suspend the laws from the date of the filing of the certificate by the canvassing board, or are the laws suspended after the expiration of six months from the date of said filling?"

You are advised that in my opinion if the vote at the special election, called under the County Option Law should result as above stated, then after the filing of such certificate it would not be competent for the city council of Moorhead to issue any intoxicating liquor licenses.

I have examined this matter with considerable care and the opinion reached by me is not the one I was at first inclined toward. I am led to my present conclusion by consideration of the operative portions of Sections 11 and 12, and in reaching the conclusion have done so by eliminating certain provisions that do not have a bearing power upon the question that you submit. Section 11, insofar as here applicable, may be read as follows:

"If the majority of the votes at any such election be cast in favor of prohibiting the sale of intoxicating liquors, then, and in that event, and not otherwise, from and after the time of the filing of the certificate of the county canvassing board, as herein prescribed, the operation and enforcement of every statute and of every municipal charter now existing or hereafter enacted or adopted, so far as the same shall * * * * in any way authorize or relate to the granting or issuance of any such license shall become and be wholly suspended in said county and in each town, city and village therein, and the selling or storing or having in possession for sale or soliciting, receiving or taking any orders for, intoxicating liquors in any county whatsoever * * * * and shall be illegal and prohibited, except as hereinafter other expressly provided, and except further that licensees may sell intoxicating liquors until such time as their licenses shall be annulled under the provisions of this act."

There then follows a provision which, in my judgment, is the exception to which reference is above made in the language, "except as hereinafter otherwise expressly provided." The provision, so referred to, is in the following language:

"And six (6) months from and after the time of the filing of the certificate of the county canvassing board as herein prescribed, the operation and enforcement, within said county, and in each said town, village and city therein, of every statute, municipal charter and ordinance, now existing or hereinafter enacted or adopted, so far as the same shall relate to the sale of intoxicating liquor by licensees or the conduct or regulation of licensed public drinking places shall likewise become and be suspended."

It will be noted that this provision does not purport during said six months period to remove the suspension of the law prohibiting the granting of licenses.

By reference to Section 12, it will be noted that during the period of the suspension of the statutes, etc., it is unlawful for any licensing board to grant any licenses for the sale of intoxicating liquor, and I think the suspension in question begins upon the filing of the certificate. This section further provides:

"Every such license attempted to be granted in said county during such period of suspension * * * * shall be null and void."

I am therefore of the opinion that while a licensee has six months from the time of the filing of the certificate in which to operate his saloon, if his license extends for that length of time, there is no provision authorizing the council to grant him a new license covering the unexpired portion of the six months' period which might exist after the termination of the previous license period.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

March 11, 1915.

393

INTOXICATING LIQUORS—Law construed—County option—Prosecutions—Shipments by carrier.

Olin C. Myron, County Attorney.

Dear Sir: I advise you as follows:

1. After the filing of the certificate, showing that county option has carried in your county, prosecution may nevertheless be conducted against a person for maintaining an unlicensed drinking place, and a search warrant be issued.

2. A prosecution under the County Option Law wherein the punishment exceeds the jurisdiction of a justice of the peace, cannot of course be tried and determined by such justice, and the binding over to the grand jury is the limitation of the power of the justice of the peace. The prosecution will lie, notwithstanding the County Option Law, for violation of the Intoxicating Liquor Laws of the State, such as the sale of liquor to minors.

The County Option Law does not prohibit the shipping of liquor into a county by freight, express or parcels post. In other words, where a sale of intoxicating liquor is lawfully made in wet territory, the solicitation, sale and delivery of liquor being thus lawfully made in wet territory, the liquor in question can be shipped into dry territory. A delivery by a seller to a comon carrier for conveyance to the purchaser is considered as a delivery to the purchaser at the place where such delivery is made.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

July 20, 1915.

394

INTOXICATING LIQUORS—County option law applies to home rule cities.

B. H. Phinney, Esq.,

Dear Sir: Section 3140, G. S. 1913, prescribes a penalty for any member of a county board or municipal council who shall knowingly vote in favor of granting an illegal license for the sale of intoxicating liquor, or,

who being present, shall fail to vote against it, and also makes it a misdemeanor for an officer to knowingly sign or issue any such illegal license.

You state that an application for a license has been filed with the city council, notwithstanding the fact that Koochiching County voted dry under the County Option Election last August. The application will come before the council on November 15. You state that the position taken by the applicant and by certain members of the council, who are in favor of granting the license, is that the County Option Law as passed cannot affect cities governed by a Home Rule Charter.

The law does not permit your being advised officially, but I may say to you, unofficially, that, in my opinion, the County Option Law is statewide in its application, and applies to cities governed by Home Rule Charters, and that, therefore, Section 3140, above referred to, is applicable.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

November 9, 1915.

NOTE.—See State ex rel v. City of International Falls—132 Minn. 298.

395

INTOXICATING LIQUORS—County option law does not effect conditions in county until vote is taken.

Dr. C. D. Richmond.

Dear Sir: You state that Cottonwood county is dry but that the question of license or no license is to be voted upon in the village of Jeffers, a petition having been duly signed and filed. You ask whether the village can vote upon the question, the County Option Law having been passed.

We have to advise you that the County Option Law does not affect the liquor question in a county until after a vote has been had under that law.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

March 8, 1915.

396

INTOXICATING LIQUORS—Acknowledgment by signers to county option petition.

B. J. Stoa, Esq.

Dear Sir: You inquire whether it is necessary for a signer to a petition calling for a county option election, to appear before a Notary Public, Justice of the Peace or other officer empowered to administer oaths, affix his signature to such petition and properly acknowledge the same. Your inquiry is answered in the affirmative. It will not do for

such proposed signer to sign his name to a petition and then have some other citizen make an affidavit to the effect that the signer in question was a legal voter and did sign the petition.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

April 28, 1915.

397

INTOXICATING LIQUORS—County Option—Village in two counties—Authority to license sale in portion of village.

Raymond H. Dart, County Attorney.

Dear Sir: You call atention to Chapter 23, G. L. 1915, being the so-called "County Option Law," and state that upon the proper submission of the County Option Question the voters of Meeker County voted in favor of prohibiting the sale of intoxicating liquor in such county.

You further state that a certain village includes territory both in your county and in Stearns County, the latter named county being one in which the sale of intoxicating liquor is not prohibited under the County Option Law. The business section of the village in question is located in your county, and these saloons in that village have been heretofore located and operated in such county. Your inquiry is as follows:

"Can an incorporated village including territory citizenship of two adjoining counties, one of which has voted against the sale of intoxicating liquors under the provisions of Chapter 23, lawfully license the sale of such liquor in the portion of the village located in the county which has not so voted?"

You are advised that, in the opinion of this office, the village council of the village in question may issue licenses for the sale of intoxicating liquor to the number permitted by law and to properly qualified persons, such saloons to be located in that portion of the village which lies within the limits of Stearns County.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

December 20, 1915.

398

INTOXICATING LIQUORS—Habitual drunkard—Notice—Right to withdraw.

Paul Ahles, County Attorney.

Dear Sir: You inquire whether a notice to a saloon keeper not to sell intoxicating liquor to an habitual drunkard can be withdrawn after the same has been given, or, in other words, whether a saloon keeper is prohibited from selling to a person who has been posted within one year, even if the party posting the same withdraws his notice.

In my opinion, after such notice has been given it becomes effective for the period stated and it is not competent for the person giving such notice, or any one else, to withdraw the same and thereby permit the sale of intoxicating liquor to the prohibited person.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

May 11, 1916.

399

INTOXICATING LIQUORS—Illegal sales—Breweries in dry counties—

John H. Mark, County Attorney.

Dear Sir:

1. Can a brewery in a county which has voted dry conduct its business the same during the six months period as before, can it sell during the six month period to saloons running in said county?

No.

2. Can a brewery in a county which has voted dry, ship its beer to a saloon in another county which has also voted dry? (That is, of course, during the six month period.)

No.

3. Can a brewery in dry county make a cash sale at brewery to parties taking beer into another county?

No.

4. Can a brewery in dry county establish a branch house in wet county and ship its products back in said dry county?,

It can sell in such wet county under such restrictions as the law imposes.

Yours truly,

LYNDON A. SMITH,
Attorney General.

May 26, 1915.

400

INTOXICATING LIQUORS—Inebriate farm tax—Refunds—Death of licensee.

J. E. Jenks, City Attorney.

Dear Sir: You call attention to Section 4128, General Statutes 1913, which provides for the payment of a two per cent tax on all liquor license fees to the State of Minnesota. You state that during the last year, on account of the death of two saloon keepers, two licenses were annulled. You ask whether the city is not entitled to have refunded to it from the state treasury a pro rata portion of such two per cent. In my opinion your inquiry is answered in the negative. It was not necessary for the city to make a refund of any portion of the two per cent tax that had already been paid to the state. The money received into the state treasury from

such two per cent tax must remain there until it is disposed of pursuant to some legislative appropriation. I notice by Section 52 of Chapter 401, General Laws 1913, that certain refundments were made by the legislature.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

March 29, 1915.

401

INTOXICATING LIQUORS—License—Improper to issue after county votes dry.

Rev. G. B. Currie.

Dear Sir: After a certificate has been filed by the canvassing board with the County Auditor, showing that county option has carried in a county in which the question has been properly submitted, it will be unlawful for a municipal council to grant a license for the sale of intoxicating liquor. After the election is held and before the certificate in question has been filed, it would be competent for the municipal council to grant such license to an applicant therefor, he being a person properly qualified to hold such license and being one whose application has been properly made and published. This is true, even though the Council in question were satisfied that a majority of the votes had been cast in favor of county opinion.

It will be noted that the law does not say that if the vote shall result in favor of county option then no license shall be issued, but such prohibition as to the issuance of licenses only becomes effective after the filing of the certificate.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

May 18, 1915.

402

INTOXICATING LIQUORS—Number of licenses—Death of Licensee—

M. R. Everett, Esq.

Dear Sir: You state that at the time of the passage of the statute limiting the number of saloons to one for each five hundred inhabitants or fraction thereof, your city, which has fifteen hundred inhabitants, had four saloons and that that number of licenses have been in force since March 16, 1909, the date of the adoption of the law referred to. You now state that one of the licenses in question has become annulled by the death of the licensee and you inquire in effect whether such annulment will reduce the number of licensed saloons that your city may have to three.

Assuming that the question of license or no license has not been voted on since 1909, or if it has, that license carried, you are advised that your

city council may lawfully issue intoxicating liquor licenses so that not more than four such licenses are in force at any one time. The licenses need not be issued to the same persons who held them before.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

January 14, 1915.

403

INTOXICATING LIQUORS—Licenses—Power to issue when petition for county option election filed

B. H. Potter, Village Clerk.

Dear Sir: You ask if the council can act, or grant a liquor license after the petition to vote on County Option has been filed with the County Auditor.

Your specific question is answered in the affirmative, presuming of course that all the necessary pre-requisites in the way of application, etc., have been complied with.

The prohibiton in the "County Option Law" relative to the granting or issuing of licenses, becomes operative after the filing of the certificate with the county auditor, showing that County Option has carried.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

June 11, 1915.

404

INTOXICATING LIQUORS—Power to grant license when village separated from town.

L. A. Matter, Village Clerk.

Dear Sir: You state:

"There are two incorporated villages within our township, the villages have separate voting districts, but have the same assessor as the township, one of the town supervisors lives in the township, one in one village and one in the other. The question I wish to know is if the township which has no saloon should put the license question to a vote and vote no license at the town election, if the other village now had a saloon, would the vote of the township (in which the village also vote) close the saloon in the village? Both villages vote on all township affairs, only they have separate road districts."

I assume from your inquiry that the villages in question are in separate election districts from the township, although you say that the "villages have separate voting districts." You probably mean by this that the villages hold village elections in which the township voters do not participate.

Your attention is called to the case of State ex rel Lower vs. McKinnon, 148 N. W. Rep. 99, in which the Supreme Court says:

"Where the town and village located within it are not separated, as they may be upon compliance with the statutes to which we have before referred, and a local option election is called by the town, in which the village participates, and the vote is against license, the common council of the village is without power to grant a license * * * and a sale under a license validly issued, and unexpired at the time of the local option election, is lawful."

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

January 29, 1915.

405

INTOXICATING LIQUORS—Road house law construed—Effect on licenses.

Paul Ahles, County Attorney.

Dear Sir: You inquire relative to the so-called road-house law and inquire whether this law operates to cancel all existing licenses or whether they continue to run until they expire. The law to which you refer is Chapter 147, G. L. 1915 and reads as follows:

"No license to sell intoxicating liquor within this state shall be issued or granted, except in incorporated cities, villages and boroughs. Such license may be granted by the council of any such city, village or borough. Every such license shall be for one year from its date, unless sooner annulled, shall specify the room in which sales are allowed, and shall state that the person named is authorized to sell such liquor only in such place and at the time, in the manner and to the persons allowed by law."

Under the provisions of this law licenses issued by county commissioners for premises for the sale of intoxicating liquor will, unless revoked for cause, continue to be in force until the expiration of the time for which the same were granted. This law does not purport to cancel or annul such existing licenses, but was intended to prevent the further issuance of licenses by county commissioners.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

May 13, 1915.

406

INTOXICATING LIQUORS—Licenses surrender and reissue of.

James P. McDonnell, Village Recorder.

Dear Sir: You state that a county option election will be held in your county on June 14; that two saloon licenses expire after that date one of which expires July 25, or more than a month after election. The saloon-

keeper asks that the village council call in his license now, refund the amount of the unexpired term, and issue to him, upon the payment of the regular license fee, $1,250, a new license to cover the whole year; this new license of course to run for only six months after election if county option should carry.

You ask whether the village council has the right to call in the license, refund the amount unexpired, and issue a new license.

Your inquiry is answered in the negative.

Yours truly,

CLIFFORD L. HILTON,

Assistant Attorney General.

May 14, 1915.

407

INTOXICATING LIQUORS—Licenses—Termination of when county votes no license—wholesaling.

Norman E. Peterson, County Attorney.

Dear Sir: You submit the following inquiry:

"In case of an election under the County Option Law, which results in a majority vote on the dry side of the question, does the wholesaling of liquors in said county become unlawful immediately upon the canvas of the vote?"

In my opinion, your inquiry must be answered in the affirmative. Under the provisions of Section 11.

"From and after the time of the filing of the certificate of the county canvassing board * * * the selling or storing or having in possession for sale, or soliciting, receiving or taking any orders for intoxicating liquors **in any quantity whatsoever**, and the keeping of any structure, place, or vehicle, transient or permanent, where such liquor shall be stored or kept for sale in any quantity whatever in any place in such county, shall be illegal and prohibited, except as hereinafter otherwise expressly provided."

The law then goes on and provides for the exception last above referred to, this exception covering the retailing licensees who are permitted to sell intoxicating liquor until such time as the licenses shall be annulled under the provsions of the Act. In other words, a licensed saloonkeeper can continue to operate under his license until the same expires or has been revoked according to law, not exceding six months from the date of filing of such certificate.

Yours truly,

CLIFFORD L. HILTON,

Assistant Attorney General.

May 26, 1915.

408

INTOXICATING LIQUORS—License—Wholesale of in villages.

George C. Babcock, President Village Council.

Dear Sir: You state that your village is a wet village and that the liquor license is $2,000 per year. You further state that there is a wholesale liquor house being started there. You inquire whether there is any way in which you can stop them from doing business.

Your inquiry is answered in the negative, providing the concern confines itself to the wholesaling of intoxicating liquors. It appears that your village is wet under the Local Option Law, and of course your county is not a county option county. The law does not prohibit or require the licensing of a concern that sells intoxicating liquors in quantities in excess of five gallons excepting in dry territory.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

August 2, 1916.

409

INTOXICATING LIQUORS—Local option—Cities fourth class having home rule charter.

Wesley Kinney, City Attorney.

Dear Sir: You inquire as to whether the question of license or no license can be voted upon in a city of the fourth class, operating under a Home Rule charter. In other words, your inquiry is as to whether chapter 387, G. L. 1913, applies to your city.

Your inquiry is properly answered in the affirmative. It was manifestly the intention of the legislature that the local option question might be submitted in all cities of the fourth class in this state, irrespective of whether such cities were operating under Home Rule Charters, or otherwise.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

March 22, 1915.

410

INTOXICATING LIQUORS—Offenses—Concurrent jurisdiction of city and county attorneys as to prosecutions.

J. E. Lundrigan, Village Attorney.

Dear Sir: I have to say that it is my opinion that Sections 277 and 3185 General Statutes of Minnesota 1913 should be read together and the duties imposed by those two sections should be performed by the officers upon whom they are imposed. When duties are imposed upon more than

one officer, which duties are of similar character, those officers should consider that they are imposed upon both and are to be performed concurrently and severally. It would follow from this that both the county attorney and the village attorney should prosecute violations of the liquor laws, in a village, which has a municipal court, in such municipal court. The prosecuting officer taking charge of a case should be deemed to have the management thereof as against the other, should he attempt to interfere with such management.

This concurrent jurisdiction of the two officers can be reconciled by a course of reasoning similar to that used by the Supreme Court in the case of State v. Robinson, 101 Minn. 277 at page 289. It also harmonizes with the different opinions heretofore rendered by this office.

In my judgment, neither prosecuting officer can say that it is not his duty to prosecute cases which are triable ordinarily before a justice of the peace to the same extent that he would be required to prosecute were there no jurisdiction in any other prosecuting officer.

The concurrent jurisdiction of village and county attorneys to prosecute probably exists in the matter of binding over to the grand jury those who violate the liquor laws in cases where the punishment of such violation is in excess of that which a justice of the peace can prescribe. The county attorney alone has jurisdiction of the prosecution after the municipal court has decided that there is probable cause to believe that the crime has beer committed and that the person under examination committed that crime.

The word "misdemeanor" is used with reference to cases that are to be tried in municipal court, but I take it, it does not mean misdemeanors of which the municipal court has not the jurisdiction to try. The selling of liqour without a license is such an offense. (State v. Kight, 106 Minn. 371).

Yours truly,

LYNDON A. SMITH,
Attorney General.

May 27, 1915.

411

INTOXICATING LIQUORS—Possession of.

Wm. Towl, Mayor..

Dear Sir: There is no law which states the exact amount of intoxicating liquor that any one individual may have in his possession at any one time for his own private consumption. Intoxicating liquors of course cannot be sold or otherwise disposed of in any quantity whatever in no license territory. A stock of liquors that a saloonkeeper has on hand at time his municipality becomes dry territory cannot be sold or otherwise disposed of by him in such territory, but he can ship it out of the territory into wet territory.

Yours very truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

April 3, 1915.

412

INTOXICATING LIQUORS—Public officers' duties—prosecutions by individuals.

To Whom it May Concern:

Below is the substance of a letter written by my predecessor shortly before I became Attorney General, which indicates how a foundation for proceeding against public officers not doing their duty in the prosecution of illegal liquor selling, should be laid:

"You have submitted to this department certain specific information as to the time, place and manner in which the laws regulating the sale of intoxicating liquors have been violated in the City of ..... We think such evidence constitutes prima facie proof of such violation, but it does not appear from the record submitted to us, that such specific information was ever laid before any of said public officers with a request that they act thereon.

It appears from the record submitted by you that you have made complaints to such officers relative to the nonenforcement of the law, but so far as such record discloses, such complaints were general in character and did not point out the time, place and manner in which the law had been violated.

The statute makes it the duty of the 'County Attorney to prosecute all violations of the laws regulating the sale of intoxicating liquors arising in his county.' Before it can be charged that the county attorney has failed to perform such duty, it must be made to appear that he either knows of his own knowledge, of the specific fact which would furnish reasonable basis for the institution of a prosecution, i. e., the time, place and manner, and by whom the laws have been violated, or that such information had been presented to him by a person willing to swear to a criminal complaint. It does not appear from the papers submitted to this department by you that the county attorney had such informaion or that any person having knowledge of the specific facts, has offered to make such a complaint. He states his readiness and willingness to institute criminal prosecution if evidence on which the same can be maintained is submtted to him.

With reference to your complaint * * * permit me to call your attention to the statute. Section 1561 Revised Laws 1905 provides as follows, so far as here material:

'The president or mayor of every municipality shall make complaint of any known violation. * * *,'

of the provisions of law regarding the sale of intoxicating liquors therein. It would therefore seem to follow that in making a complaint, the mayor must set forth the time, place and manner in which the law has been violated and by whom. Had you or your association submitted to the mayor the testimony contained in the affidavits of the two witnesses, which you submitted to this department, and he had then failed or neglected to make complaint either to the grand jury or to a magistrate, we then, in such case, are of the opinion that the action of this department requested by you should be instituted. So, too, if such information had been presented to the county attorney and he had refused or neglected to institute

prosecution we think he would be properly chargeable with malfeasance and be subject to [proceedings] * * * for removal. It does not appear, however, that such definite information was ever presented to either of said officers.

So likewise, we are of the opinion that the record submitted by you fails to disclose that the chief of police has failed to summarily arrest any person found violating the provisions of Chapter 16, Revised Laws 1905. Conceding that the chief of police is a 'policeman' within the purview of the section, yet the statute provides, so far as here material, that:

'Every sheriff, constable, marshal, and policeman shall summarily arrest any person found committing any act forbidden by this chapter and make complaint against him.'

That the law is being violated seems indisputable and that evidence of such violation could be procured by the police department and prosecution based thereon, if there was a disposition so to do, seems probable, but as above pointed out, we do not think the record as now presented by you, shows facts from which we could draft a complaint charging any of said officers with wilfully refusing or neglecting to perform any duty imposed by the statute quoted. * * *"

The above letter has been considered by this office as a correct statement of the law involved and has remained unmodified by any ruling.

I have held that an officer cannot be removed from office for not making a complaint of illegal liquor selling when he has not such knowledge thereof as would be defense against a suit for malicious prosecution brought against him by an acquitted defendant, for making that complaint.

LYNDON A. SMITH,
Attorney General.

413

INTOXICATING LIQUORS—Refundment under county option law.

John Gillan, Village Recorder.

Dear Sir: You call attention to Section 12 of Chapter 23, G. L. 1915, being the so-called county option law, and ask when the refundment therein referred to is to be made. You ask whether the refundment in question is to be made immediately upon the filing of the certificate showing that county option had carried, or whether the refundment of the unearned portion of the license fee is to be made when the time is up for which the saloon can continue to run, being six months after the filing of the certificate.

In my opinion the time for making the refundment is at the end of the six months period and not at the time of the filing of the certificate showing that county option has carried.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

June 9, 1915.

414

INTOXICATING LIQUORS—Sale under execution.

S. S. Lyon, Esq.

Dear Sir. You inquire whether, under the law, the constable would have the right under a writ of attachment, to seize a stock of intoxicating liquors and sell the same, as he would other merchandise, to satisfy a judgment.

Your inquiry is answered in the affirmative.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

February 8, 1916.

415

INTOXICATING LIQUORS—Town dry—Village in town wet—result.

Franz Jevne, County Attorney.

Dear Sir: I understand from your communication that on March 9, 1915, the question of license for the sale of intoxicating liquor was submitted in a township in your county and that as a result thereof, license failed to receive a majority of all the votes cast at said election; that a certain village lies wholly within the boundaries of said town and that the license question was duly submitted at the village election, held on the same date (March 9, 1915) and that as a result of said last named election, license did receive a majority of all votes cast thereat. I further understand that the village has not been separated from the township of Jameson for election and assessment purposes. You inquire whether upon the conditions as above set forth, the village is license or no license territory.

You are advised that the village is license territory; that under the facts stated the determination of the question in the village controls in that village, irrespective of the result of the vote at the township meeting, at which meeting the voters of the village did, or had a right to, participate.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

March 17, 1915.

Note: See case of State ex rel L. J. La Londe vs. Thomas P. White, as sheriff, 130 Minn. 336.

416

INTOXICATING LIQUORS—Unlicensed drinking place—unnecessary to prove sale.

Francis E. Murphy, Village Attorney.

Dear Sir: I have to say that it is not necessary to prove an actual sale of intoxicating liquor in order to convict a person for running an unlicensed drinking place. See Section 3198, General Statutes 1913.

Yours truly,

LYNDON A. SMITH,
Attorney General.

May 12, 1915.

417

JUSTICE OF THE PEACE—No power to suspend sentence after pronounced.

E. H. Nicholas, County Attorney.

Dear Sir: A justice of the peace is absolutely without authority to suspend a sentence after it is pronounced, or to remit a fine upon the payment of costs in all proceedings, except such as are enumerated in Section 8964, General Statutes 1913.

Section 8964, General Statutes 1913, gives power to courts of record (of which, of course, a justice court is not one) to suspend sentences.

It would appear that it was the legislative intention under Section 8964, to place within the power of the justice of the peace the suspension of sentences after conviction for the first or second offense. This section of course only applies to the crime of drunkenness. There is no provision in the statute which would compel the justice of the peace to require the payment of costs before suspending sentence.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

January 13, 1915.

418

JUSTICE OF THE PEACE—Not entitled to mileage in making report to county attorney.

Andrew E. Fritz, Public Examiner.

Dear Sir: You ask whether a justice of the peace has the right to charge for mileage for reporting to the county attorney under Section 7646 G. S. 1913.

The fact that Subdivision 35 of Section 5767 G. S. 1913 allows him mileage for necessary travel does not justify his charging any mileage for making such report to the county attorney. The making of the report

does not necessarily require the justice to travel any number of miles. The mere taking of the report to the postoffice, should the justice do so himself, is not the kind of necessary travel contemplated by the statutes, in my opinion.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

January 2, 1915.

419

JUSTICE OF THE PEACE—Payment fees in criminal cases.

Andrew E. Fritz, Public Examiner.

Dear Sir: You refer to Section 7646, G. S. 1913, also to Section 7654 of the same statute, and then ask:

"Can a justice of the peace withhold his fees or shall he cover the whole amount into the treasury and bill the county for his fees?"

Your question is answered by the opinion of this department dated May 23, 1911, from which I quote:

"The justice, the jurors and the witnesses must present their bills to the county board the same as other bills against the county. If the costs are paid to the justice before commitment, they can be disbursed by the justice to the parties entitled thereto, but the justice should in all cases take the written receipt of each person to whom any part of such costs are paid. The justice is the only one entitled to receive such fine and costs before commitment, and the sheriff is the only one who can receive such money thereafter."

I may add that if the sheriff receives the money after commitment he must pay it over to the county treasurer, and then all the fees in justice courts should be billed to the county and paid as other bills.

Yours truly,
JOHN O. NETHAWAY,
Assistant Attorney General.

July 21, 1915.

420

JUSTICE OF THE PEACE—Term of office—Holding over.

Frank Cojune, Justice of the Peace.

Dear Sir: Under the Constitution the term of office of a justice of the peace is limited to two years and therefore a justice of the peace does not hold by constitutional right beyond the time for which he was elected. It has, however, been held by the courts that a justice of the peace "holding over" and attempting to exercise the functions of the office would be

acting as a de facto officer and not as a de jure one. In other words, the acts of the person so acting as justice of the peace could not be attacked collaterally

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

January 5, 1915.

421

JUSTICE OF THE PEACE—Filling vacancy.

G. A. Youngquist, County Attorney.

Dear Sir: You inquire how a vacancy in the office of township justice of the peace may be filled and call attention to section 10, article 6, State Constitution and Sections 1162 and 1174, General Statutes 1913.

I am of the opinion that a vacancy in the office of justice of the peace is to be filled by an appointment to be made by the town board; such appointee to hold his office until the next annual town meeting. The constitutional provision to which you refer being to the effect that if the office of any judge becomes vacant before the expiration of the regular term for which he was elected, the vacancy shall be filled by the appointment of the governor, does not apply to the office of justice of the peace, but only to the other judges referred to in Article 6.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

May 4, 1916

422

LABOR—Employment laws—Hours of labor.

William F. Houk, Commisioner of Labor.

Dear Sir: You inquire whether Chapter 499, Laws 1909, limiting the hours of labor for women in mercantile establishments in the state to fifty-eight hours a week and in manufacturing and mechanical establishments to ten hours a day, has been repealed by Chapter 581, Laws 1913.

The act last referred to by its terms relates exclusively to employment in mercantile establishments, restaurants, lunch rooms and eating houses and the kitchens connected therewith and to mechanical and manufacturing establishments in cities of the first and second class. By Section 7 of the last mentioned act all previous legislation inconsistent therewith is repealed. It is my opinion that the previous enactment, so far as it relates to the hours of employment for women in cities of the first and second class, is repealed, but that as to the remainder of the state, the previous enactment stands and is in force.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

May 23, 1916.

423

MARRIAGE—Licenses—Not issued to nearer of kin than second cousin.

C. K. Semling, Clerk of the District Court.

Dear Sir: I state that this office agrees with you as to the distinction between a second cousin and first cousin once removed. We consider that a marriage license cannot be issued in Minnesota to a person to marry the daughter of his first cousin for they are nearer of kin than second cousins.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

July 6, 1915.

424

MARRIAGE—License—who may obtain.

Frank C. Goss, Clerk of District Court.

Dear Sir: I have to say that either the prospective bride or groom may obtain a license for a contemplated marriage.

Yours truly,
LYNDON A. SMITH,
General Attorney.

January 5, 1916.

425

MILITIA—Adjutant General—Authority to pay interstate rates.

F. B. Wood, Adjutant General.

Dear Sir: Your inquiry is as follows:

"In a number of cases, state orders for transportation have been honored by roads for transportation between two points in Minnesota, but in going from the leaving point to the destination they passed through another state, thus making the transportation interstate. Have I the authority to pay such bills?"

I understand from your inquiry that you desire to know whether you can pay from available military funds for transportation of troops on an interstate trip, the passenger fare permitted to be charged by the Interstate Commerce Commission, such fare, however, being in excess of the Minnesota Military one cent rate.

In my opinion your inquiry is to be answered in the affirmative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

January 4, 1916.

426

MILITIA—Armories—Absence of troops—Effect on appropriation for maintenance.

Fred B. Wood, Adjutant General.

Dear Sir: You call attention to Items 4 and 5 of Section 28, Chapter 374, G. L. 1915, in which certain money is appropriated for the maintenance of armories, providing cities and villages in which such armories are located appropriate a like amount, to-wit: $250 per year for each battery or company located in such city or village.

You ask whether the fact that the troops are now absent from their home stations will prevent a payment by the state of the moneys as above set forth. In my opinion your inquiry is to be answered in the negative. The armories must be maintained whether the companies and batteries are at their home stations or not.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

September 9, 1916

427

MILITIA—Armories—State aid for.

C. D. Gould, City Attorney.

Dear Sir: You submit the following question:

"If there shall be deposited with the State Treasurer the sum of $1,000 for each unit of the National Guard stationed in Minneapolis that has not already been provided for under Section 2464, G. S. 1913, and a suitable site shall have been conveyed to the state of Minnesota for armory purposes upon which to erect a new armory, will there be automatically available from the state treasury the sum of $15,000 for each of said units not already provided for?"

Your inquiry is answered in the negative. It may be noted that the question as to whether in any event $15,000 is to be paid from the state treasury for each such unit of the National Guard for the purpose of erecting an armory, is one resting in the discretion of the State Armory Board of Supervisors, the law among other things explicitly providing that this shall be done.

"If the State Board of Armory Supervisors shall deem it expedient."

Attention has been called to the 1915 amendment of Section 2464, G. S. 1913, found in the second proviso in the 1915 law. This proviso is to the effect that in case two or more organizations entitled thereto have heretofore received an appropriation for armory purposes and "any additional organization is or additional organizations are regularly formed and stationed in any city * * * wherein any organization has so joined in such common site and armory and it shall be desirable and practicable, **and said board shall deem it expedient** to have such **new** organization join

in such common armory, said board may allow such **new** organization to join with such other organizations in such common armory on such common site, and may allow an additional appropriation for such armory * * *".

There is a grave question as to whether this proviso covers any organization except such as have been organized since the appropriation was first made for National Guard units in the city in question.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

October 5, 1916.

428

MILITIA—Compensation of officers.

Fred B. Wood, Adjutant General.

Dear Sir: Under the facts stated by you, I am of the opinion that it would be permissible for you to pay the officers of the Minnesota National Guard the difference in pay between the amount received by them from the federal government and that to which their rank entitled them during the time lapsing between the date of the commission of such officers by the governor and the date of the mustering in of such officers to the rank in question by the federal government.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

September 15, 1916.

429

MILITIA—National Guard—Cavalry organization not permitted.

Fred B. Wood, Adjutant General.

Dear Sir: At the request of Governor Hammond you submit the inquiry as to whether a "Troop of Cavalry" independent or as a part of the Minnesota National Guard can be organized in the State of Minnesota and permitted to bear arms, all without expense to the State of Minnesota.

In my opinion your inquiry must be answered in the negative. Section 9029, G. S. 1913, reads as follows:

"It shall not be lawful for any body of men other than the National Guard, troop of the United States, and with the consent of the governor, Sons of Veterans and cadets of educational institutions where military science is taught, to associate themselves together as a military company with arms, but members of social and benevolent organizations are not prohibited from wearing swords. Any violation of this act shall be a misdemeanor."

The foregoing quoted provision of law expressly prohibits the maintenance of a private organization such as you refer to in the State of Minnesota.

The legislature has provided for the National Guard of the State and has defined what organizations shall constitute the same. Section 2361, G. S. 1913, among other things provides that:

"In time of peace it (Minnesota National Guard) shall consist of three regiments of infantry, organized into a brigade, and one regiment of field artillery which may be attached to the brigade for the purpose of administration and instruction; also the several staff corps and departments, similar to the staff corps and departments prescribed for the regular army of the United States, which are hereby authorized to the extent that the same may be necessary to provide proper staff officers and enlisted men for the National Guard as herein established. The term 'National Guard' shall apply only to the militia organized as a land force."

It will be noted that no provision is made for a cavalry organization.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

August 4, 1915.

430

MILITIA—National Guard—Distinctive branches of service.

Fred B. Wood, Adjutant General.

Dear Sir: It appears that in Minneapolis there is situated the First Infantry (less five companies) M. N. G. and the Second Batallion First F. A. M. N. G.; that Colonel Luce commanding the First Infantry and whose headquarters are in Minneapolis, issued an order in regular form from his headquarters ordering all of the above named troops to participate in a parade and review in the Minneapolis Armory on the date mentioned; that Battery "E" of said Second Battalion First F. A. M. N. G. disobeyed the order.

Section 2361, G. S. 1913, provides that the Field Artillery may be attached to a brigade of infantry **for the purpose of administration and instruction.**

Section 2393, G. S. 1913, provides, among other things as follows:

"Except as otherwise provided in this chapter, all officers of the guard shall have the same powers and perform the same duties as officers of similar rank and position in the army of the United States."

The inquiry is submitted as to whether under the conditions above recited and the law applicable to the National Guard of the State of Minnesota, the Colonel of the First Infantry has the right to issue an order requiring a battalion or battery of the Field Artillery stationed at Minneapolis to participate in a parade and review. In my opinion your inquiry is to be answered in the negative. Generally speaking the senior officer of any branch of the service may by order control the action of all the branches of the service when troops are in service in the field, and the same rule

I think is applicable at regular army posts. A clear distinction can be drawn, however, between the two situations last above referred to and a situation where two branches of the service of the Minnesota National Guard are located in one municipality under the conditions maintaining at Minneapolis.

I am of the opinion that in the absence of an order from general headquarters placing the senior officer of the National Guard at a station in command of all branches of the service there located, the authority of each officer is confined to his own branch of the service.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

June 1, 1915.

431

MILITIA—Governor's staff not entitled to wear uniforms U. S. Army.

Fred B. Wood, Adjutannt General.

Dear Sir: You inquire at the request of the governor, as to the present status of the Governor's Staff and call attention to Sections 60, 61, 66, 73, 74, 77, 78 and 125, of the National Defense Act, approved June 3, 1916. You further state that the members of the Governer's Staff, as constituted prior to the enactment of that law (except the Adjutant General, one Adjutant General, Assistant Surgeon General and Military Store-keeper) were not recognized by the federal government as officers of the organized militia.

I do not quote the sections above referred to, but note that Section 60 of the act provides:

"Except as otherwise specifically provided herein, the organization of the National Guard, including the composition of all units thereof, shall be the same as that which is or may hereafter be prescribed for the Regular Army, subject in time of peace to such general exceptions as may be authorized by the Secretary of War."

You state that the Secretary of War has not authorized any exceptions since the passage of the act.

Section 61 above referred to is to the effect that:

"No state shall maintain troops in time of peace other than as authorized in accordance with the organization prescribed under this act, provided, that nothing contained in this Act shall be construed as limiting the rights of the States and Territories in the use of the National Guard within their respective borders in time of peace, provided further that nothing contained in this Act shall prevent the organization and maintenance of state police or constabulary."

Section 125 makes it unlawful for any one, other than those therein named, to wear the prescribed uniform of the United States Army.

I am of the opinion that since the passage of the act in question, which among other things in effect federalizes the National Guard, there is no

such recognized National Guard unit as the Governor's Staff and none of the members of that staff, other than those above referred to, who appear to be excepted, are now members of the National Guard or entitled to wear the uniform of the United States Army.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

September 18, 1916.

432

MILITIA—Pay of enlisted men of the National Guard.

Fred B. Wood, Adjutant General.

Dear Sir: You inquire as to the amount that shall be paid to the enlisted men of the National Guard of the State of Minnesota from the time of their assembling at company rendezvous and until their muster into the United States service.

You are advised that in my opinion members of the National Guard are entitled to receive from the state $1.50 per day from the time of their assembling at their respective company rendezvous and until they are sworn into the service of the United States.

Yours truly,

LYNDON A. SMITH,
Attorney General.

June 29, 1916.

433

MOTHERS' PENSION—May be paid to alien.

Patrick J. Ryan, Assistant County Attorney.

Dear Sir: I am of the opinion that county aid can lawfully be paid to a mother who is an alien where it is shown to the satisfaction of the court that the child is a dependent or neglected child within the meaning of those words as used in Chapter 285, Laws 1905, and the circumstances and conditions precedent prescribed by Chapter 130, Laws 1913, are shown to exist. In other words, a proceeding may be instituted under the provisions of Chapter 285, Laws 1905, to have the child of an alien adjudged to be a dependent or neglected child. Under the provisions of Chapter 130, "whenever **any child** under the age of fourteen years shall be found to be dependent or neglected within the meaning of Chapter 285, Laws 1905, * * * the court may in its discretion, etc."

You will of course note that under the provisions of Section 2 "no such county aid shall be paid towards the support of any child who has arrived at the age of fourteen years, nor to any mother who has not resided in said county one year and in the state two years continuously next preceding the making of such order."

Yours truly,

C. LOUIS WEEKS,
Assistant Attorney General.

April 25, 1916.

434

MOTHERS' PENSION—Law construed.

George P. Craig, Judge of Probate.

Dear Sir: You ask our opinion on the hereinafter stated questions:

1. "If a mother receiving such county aid should leave this state intending to establish a permanent residence in another state, would the county in which such aid was granted still continue such payments?"

I am of the opinion that the order directing the payment of county aid should be revoked when the mother ceases to be a resident of the county. You will note that Section 3, Chapter 130, Laws 1913, provides that the Court may "revoke or modify any order previously made." Section 2 provides:

"No such county aid shall be paid to any mother who has not resided in any county one year and in the state two years continuously next preceding the making of such order."

It is evident that the latter section was intended to guard against the payment of county aid to mothers who are not bona fide residents of the county.

You further ask:

2. "If the mother receiving such aid should remove from the county in which such aid had been granted, what would be the result of such removal?"

I am of the opinion that the order should be revoked.

Your third question reads as follows:

"Would a mother receiving such aid be entitled to receive the same in case she remarried?"

This question is not susceptible of a categorical answer. You will note that Section 1 of Chapter 130, Laws 1913, authorizes the payment of county aid to a mother **only** when the dependent or neglected condition of the child "is due wholly or in part to the poverty of the mother and want of adequate means to properly care for such child."

"A stepfather is, of course, not bound to maintain the child of his wife by a former husband. But if he voluntarily assumes the parental relation and receives it into his family under circumstances such as raise the presumption that he has undertaken to support it gratuitiously, he cannot afterwards claim compensation for its support." In re Bensondy, 32 Minn. 387, Unke vs. Dahlmier, 78 Minn. 321, Eiken vs. Eiken, 79 Minn. 360.

It is to be noted that all of the foregoing cases are instances where the child had property of its own. If the stepfather **does** receive the child into his family under such circumstances as gives rise to the presumption that he will support it, or does actually support the child, then of course the county aid order should be revoked.

Whenever the status of a child changes, whenever the circumstances surrounding the child become such as it is no longer a dependent or neglected child within the meaning of those words as used in Chapter 285, Laws 1905, or Chapter 232, Laws 1909, as amended by Chapter 260, Laws 1913, the order for county aid should be revoked. So too, the order

should be revoked if, although the child continued to be a dependent or neglected child, such dependent or neglected condition of such child ceases to be due wholly or in part to the poverty of the mother. The neglected or dependent condition of a child might arise from some cause other than the poverty of the mother, as where for instance, the child has not proper parental care. In such case the Court should appoint a suitable guardian for such child. See Section 6, Chapter 260, Laws 1913.

You further ask:

4. "In case the mother receiving such county aid should die, what would be the result as affecting the county aid to such children?"

I am of the opinion that in such case the payment of county aid would necessarily cease. The warrant of the Auditor is payable to the mother. Chapter 130 does not authorize the payment of county aid to any person other than the mother, although such other person may have charge of the children with respect to whom the county aid has been ordered paid.

Yours truly,

C. LOUIS WEEKS,
Assistant Attorney General.

April 24, 1916.

435

MOTHERS' PENSION—Payable to adoptive mother of an adopted child.

C. G. Dosland, County Attorney.

Dear Sir: It has been held that the word "mother" when used in a statute does not under all circumstances include the adoptive mother.

Mount vs. Lumber Co., 121 La. 64; 126 Am. St. Rep. 312.

In view, however, of the provisions of Section 7156, Statutes 1913, I am of the opinion, when the other circumstances and conditions precedent, prescribed by law exist, the Court may lawfully direct the payment of county aid to the adoptive mother of an adopted child. Section 7156 provides inter alia as follows:

"Upon adoption such child shall become the legal child of the persons adopting him and they shall become the legal parents with all the rights and duties between them of natural parents and legitimate child."

It cannot be said, however, that a mother, whether natural or by adoption, is "entitled" to the benefits provided by said section; nor can a mother "avail" herself of the benefits of said section. The making of an order directing the payment of county aid is a matter resting entirely in the discretion of the Judge—"the Court may, in its discretion, make and file an order, etc." (See Section 1 of Chapter 130, Laws 1913). If the Court does find a child to be dependent and neglected, it **may** commit the child to the guardianship of any state institution or any association willing to receive it embracing in its objects the purpose of caring for or obtaining homes for dependent and neglected children, etc. (See Section 6, Chapter 260, Laws 1913).

So too, the order for county aid can be made only in a proceeding to have a child adjudged to be dependent or neglected. In my opinion the circumstances set forth in your letter are matters to be considered by the Probate Judge in determining whether he will make an order for the payment of county aid and leave the child in the custody of its adoptive mother or order the child committed to guardianship as provided for by Section 6, Chapter 260, Laws 1913.

Yours truly,

C. LOUIS WEEKS,
Assistant Attorney General.

April 25, 1916.

436

MOTOR VEHICLES—Identification tags—Use of cardboard facsimile.

Julius A. Schmahl, Secretary of State.

Dear Sir: The law requires that all motor vehicles shall be registered and that the Secretary of State shall assign to each a duplicate number and deliver to the owner a set of two tags of registration, on each of which shall be displayed a distinctive number in size and form prescribed by law.

The law further provides as to manufacturers and dealers in motor vehicles that instead of registering each vehicle there may be issued a general distinctive number for all motor vehicles owned or controlled by such manufacturer or dealer. Therewith there shall be assigned and issued to such manufacturer or dealer a general distinctive number and duplicate tags of registration similar to those required of other owners, "duplicates of which shall be carried or displayed on every motor vehicle so registered when the same is driven or operated on the public highways."

The statute further provides that:

"Such manufacturers or dealers may obtain as many duplicate sets of such tags of registration as may be desired upon the payment to the Secretary of State of $1.00 for each set of duplicates."

In view of the provisions of the statute to which your attention is directed, you are advised that the use of cardboard tags or any other tags than those issued by your department, is illegal and that a person driving a motor vehicle upon the public highways without actually displaying thereon a duplicate tag issued and delivered by your department is guilty of a violation of the law.

Yours truly,

JAMES E. MARKHAM,
Assistant Attorney General.

August 1, 1916.

437

MOTOR VEHICLES—Keep to the right—General regulations.

Otto Baudler, County Attorney.

Dear Sir: Your inquiry concerns the requirements of Chapter 365 Laws 1911, commonly known as the "Motor Vehicle Act", as applied to the duty of the driver of such vehicle to keep to the right when traveling upon public streets and highways of the state. The only provision found in the act is this:

"Every person shall, at the intersection of public highways, keep to the right of the intersection of the centers of such highways when turning to the right, and pass to the right of such intersection when turning to the left."

This does not prohibit the driver of a motor vehicle, or any other vehicle from turning about in a public highway or street at a point other than a street or highway intersection. In the larger cities the obvious danger of making a left hand turn other than at street intersections is avoided by the passage of a general traffic ordinance relating to all vehicles. Although the general statute prohibits the municipalities of the state from legislating in reference to the operating of motor vehicles, it is taken for granted that this inhibition was not intended to deprive the cities and villages of the state of the power to adopt and enforce proper ordinances regulating all kinds of street traffic. In the exercise of the usual power conferred upon cities and villages, I think an ordinance providing that no vehicle driven upon the streets should turn about or cross to the other side of the street, except at a street intersection, and that at such intersection should keep to the right until it had passed the intersection of the centers of the two streets or highways, would be a proper exercise of general municipal authority.

Yours truly,

JAMES E. MARKHAM,
Assistant Attorney General.

July 12, 1916.

438

MOTOR VEHICLES——Licensed drivers.

Wm. B. Joyce & Co.

Gentlemen: You call attention to the provisions found in Sections 2619 and 2638, relating to licensed drivers of motor vehicles and inquire whether, in the case of a business house having one or more automobiles for the use of its salesmen in the conduct of its business, it is necessary that the salesmen using these machines secure a chauffeur's license to operate them.

The provisions of statute to which you refer were amended by Chapter 38, G. L. 1915, and the term "chauffeur" as therein defined, is stated to mean,

"Any person operating or driving a motor vehicle as an employe, but shall not include automobile salesmen or mechanics while demonstrating or testing automobiles."

You will see at once that this definition includes all persons who drive a motor vehicle upon any of the public streets or highways as the employe of another, whether such driving is the principal, incidental or occasional duty of such employe.

Yours truly,

JAMES E. MARKHAM,
Assistant Attorney General.

April 10, 1916.

439

MOTOR VEHICLES—License for city owned cars.

Albert E. Bickford, City Clerk.

Dear Sir: The statutory provisions regarding license applies to all,

"Motor vehicles, except traction engines, road rollers, fire wagons, engines, police patrol wagons, ambulances and such vehicles as run only upon rails and tracks."

This, as you will observe, does not exempt motor vehicles owned by the city and used in other lines of municipal enterprise, and you are advised therefore that under the law, the automobiles employed by the city in connection with its street, light, and gas departments, are subject to the regulation license provided for.

Yours truly,

JAMES E. MARKHAM,
Assistant Attorney General.

May 20, 1916.

440

MOTOR VEHICLES—Term of license of.

A. H. Vernon, City Attorney.

Dear Sir: You make inquiry relative to the Automobile license law, and ask whether licenses issued are good for three years from the date of the license, or only for the triennial period during which they are issued.

You are advised that such licenses are only good for the triennial period and are not good for three years from the date of issuance, unless such does in effect constitute the triennial period.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

March 20, 1915.

441

MOTOR VEHICLES—Municipal ordinances.

J. Sheehan, Justice of the Peace.

Dear Sir: It is provided by Section 2637, G. S. 1913, that:

"No city, town, village, or other municipality shall make or pass any ordinance, rule or regulation limiting or restricting the speed of motor vehicles and no ordinance, rule, or regulation heretofore or hereafter made by any city, town, village or other municipality in respect to or limiting the use or speed of motor vehicles, shall have any force, effect or validity."

You will see at once that the village council could not adopt and enforce any ordinance or village regulation pertaining to the subject.

The people of the village, however, are not without remedy for the obvious violations of the law pertaining to speed limits and open mufflers referred to in your letter. The statute limits the rate of speed of a motor vehicle passing through the closely built up portion of a city, town or village to 10 miles per hour, and through the residence portions thereof to 15 miles per hour and any person violating these provisions is guilty of a misdemeanor and may be arrested by the village marshal or any constable and taken before the nearest magistrate for immediate hearing.

It is the policy of the law to make the regulations concerning the use of motor vehicles uniform throughout the state and this policy has resulted in withdrawing from villages and boroughs the right to adopt and enforce local ordinances upon the subject.

Yours truly,

JAMES E. MARKHAM,
Assistant Attorney General.

April 10, 1916.

442

NEWSPAPERS—Destruction by elements—Effect on qualifications as a medium of legal notices.

Godfrey G. Goodwin, County Attorney.

Dear Sir: Relative to the status of the newspaper which has been burned out, I have to say that in my judgment the last clause of Section 9413, G. S. 1913, covers the question you have asked. It says:

"Suspension of publication for a period of not more than four months within said year, resulting from the destruction of its office by the elements, shall not affect the qualifications of such newspaper after it shall have resumed."

Paragraph 2 of the same section provides that the press work of a newspaper may be done elsewhere than at the place of publication. My judgment is that if the newspaper to which you refer is to remain a legal newspaper during a time when its regular publication is suspended, it

must be mailed from the place of its publication, although the press work be done some where else.

Yours truly,

LYDON H. SMITH,
Assistant Attorney General.

June 16, 1915.

443

NOTARY PUBLIC—Commission cannot be paid from state funds.

G. H. Hayes, Comptroller.

Dear Sir: I have to say that this office some time ago came to the conclusion that it could not pay for a notary public's commission. A notary public is a state officer holding an office entirely independent of any department of state government and in law of equal rank with most of such departments. Of course you can reimburse your clerks by paying them the fees which they earn as notaries public in taking acknowledgments or administering oaths, so that there is no reason why the notary public should not be reimbursed for the amount that he puts into his commission. Notaries are entitled to fees as state officers and there can be no objection ordinarily to such state officers being paid their fees by the persons who need their services.

In dealing with the question of paying notaries their fees, Section 116, G. S. 1913 should be carefully observed, and the State Auditor will not look with any favor upon the payment of notary's fees to any notary who is regularly in the employment of the state in any manner in excess of the amount required to reimburse such notary for the expenses due to the obtaining of the commission and the bond.

Yours truly,

LYNDON A. SMITH,
Attorney General.

June 22, 1916.

444

NOTARY PUBLIC—Non-citizen of Minnesota cannot be.

Hon. W. S. Hammond, Governor.

Dear Sir: As to the right of a person who has not his second papers, to obtain a commission as notary and what the penalty would be if he had acted as a notary before obtaining second papers, I have to say:

First: That no person not a citizen of the State of Minnesota can be appointed a notary public, and

Second: That if through ignorance, and accidentally, a person who had not obtained his second papers should have been appointed a notary and acted as such, no penalty would be imposed and his acts would be treated as the acts of a de facto officer.

A person might so act as a notary public as to render himself subject to prosecution under General Statutes 1913, Section 8542, which reads, so far as here material, as follows:

"Every person who shall wilfully intrude himself into a public office to which he has not been duly elected or appointed * * * shall be guilty of a gross misdemeanor."

Yours truly,

LYNDON A. SMITH,
Attorney General.

February 27, 1915.

445

PAUPERS—Granting of aid to.

Olin C. Myron, County Attorney.

Dear Sir: You submit the following inquiry:

"Can an applicant seeking aid from the Board of County Commissioners on the ground that he is poor and not able to do manual labor, be compelled to submit to a physical examination conducted by the county physician, in order to ascertain if the applicant can perform manual labor?"

You state that a person residing in your county, which I understand is operating under the county system of caring for the poor, applied to one of the county commissioners for aid, claiming that he was not able to perform manual labor. The applicant appears to be able to do manual labor and does not look physically incompetent, and the county commissioner desires to know if he can call the county physician and have him examine applicant, so that if the physician found that the man in question was able to perform manual labor, then no relief would be furnished.

I think it is competent for proper county officers to take such reasonable steps as they think necessary, in order to ascertain whether the applicant for relief under the poor law is really entitled to such relief. As the granting of such relief is a matter resting in the sound discretion of the officer empowered to grant it, I am of the opinion that such a physical examination, if deemed by such officer necessary in order to secure the information needed, would be justified and can be required before relief is granted. Of course the applicant could not be compelled or forced to submit to such an examination, but I think that the official might insist upon the information, to be obtained from such examination, before he granted the relief.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

January 27, 1915.

446

PAUPERS—Duty of county to care for—Wife not liable.

Godfrey G. Goodwin, County Attorney.

Dear Sir: I am inclined to think that under the provisions of Section 3067, G. S. 1913, a wife cannot be held for the support of her husband who is poor and indigent and unable to provide for himself. If Mr. A. is a

poor person requiring public aid and your county is under the law bound to care for such a poor person, then that care must be furnished irrespective of whether there is an opportunity for recovery from a relative or not. If this be the situation and the county must furnish care and support, then the county has everything to gain and nothing to lose by making the attempt.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

December 13, 1915.

447

PAUPERS—Limit of county aid.

Franz Jevne, County Attorney.

Dear Sir: You refer to Section 3081, G. S. 1913, and ask whether under the provisions thereof, $200 may be given each year to each member of a family, in the discretion of the county board.

In my opinion your inquiry is to be answered in the affirmative. The $200 limitation does not apply only to an entire family.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

December 20, 1916.

448

PAUPERS—Non-resident—Relief awarded by town—County may reimburse town though no notice given.

George H. Tyler, County Attorney.

Dear Sir: You state that in your county a certain town board expended money in the case of a non-resident pauper and gave no notice to the county auditor as required by sub-division 2 of Section 3096, G. S. 1913. The first notice that the county had of the expenditure in question was received when the bill was presented by the town to the county board. You inquire whether the giving of notice, under the circumstances, was a condition precedent to recover from the county of the expenditure made. You call attention to the case of Town of Highland Grove vs. County of Clay, 101 Minn. 11, in which case it was held that the: "service of this notice within five days was not a condition precedent to recovery for the services rendered in this case." In the Highland Grove case a verbal notice was given to the proper county officers, but not until seven or eight days after first services were furnished.

I am of the opinion that, notwithstanding the failure to give notice, the county board may properly allow claim of the township, in a just and reasonable amount, for the services rendered such non-resident pauper.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

December 20, 1915.

449

PAUPERS—Power of county to pay for transportation of.

F. R. Allen, City Attorney.

Dear Sir: You state that your city has been caring for a man whose home is in Bridgeport, Conn.; that he was taken sick at your place and unable to go further and is entirely destitute. You ask whether your city can transport him to his place of residence under the terms of Section 3096, General Statutes 1913.

I am of the opinion that your inquiry should be answered in the negative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

February 5, 1915.

450

PEDDLERS—Exchanging tin for junk.

Henry J. Frundt, County Attorney.

Dear Sir: You direct attention to a ruling of the public examiner to the effect that a license fee should be collected from persons engaged in traveling about the county collecting old iron, copper, brass and other junk, paying cash therefor in some instances and in others trading tinware therefor, the tinware being carried about by the dealer for the purpose of such barter.

You express the view that these dealers in effect are collecting junk and incidently paying therefor in tinware instead of making payments in cash and that under these circumstances they are not peddlers. The public examiner evidently takes the view that the persons referred to are engaged in peddling tinware and, as occasion requires, take pay therefor in junk instead of cash.

I take it that it is not necessary to pass upon the question as to which view of the character of the trade is the correct one, as I am of the opinion that a person who travels about the country carrying with him a supply of tinware to be delivered to such purchasers as may be found therefor, are peddlers whether they receive pay in cash or in some other commodity.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

September 19, 1916.

451

PEDDLERS—Who are—Sales to consumer for future delivery.

Hon. George M. Peterson.

Dear Sir: You transmit a communication from * * * directing attention to the prevailing practice of outside transients soliciting merchandise sales from house to house in the village. Attention is directed to the

circumstance that the city adopted an ordinance compelling people engaged in this line of business to secure a license and pay a prescribed license fee and fixing a penalty for the violation of the ordinance. The * * * communication further states that a certain dealer therein mentioned, having its place of business outside of the state, proposes to continue the business of soliciting the sale of merchandise to consumers in the village of * * * in violation of the terms of the ordinance. The communication calls attention to the consequent annoyance and disturbance of the home and domestic tranquillity by the operations of these solicitors, and incidently refers to the circumstance that the practice complained of results in unfair competition with the merchants having an established place of business in the village and paying taxes for the support of the municipality.

There are four elements required to constitute a peddler: First, that he should have no fixed place of dealing but should travel around from place to place; second, that he should carry with him the wares he offers for sale, not merely samples thereof; third, that he should sell them at the time he offers them, not merely enter into an executory contract for future sale; fourth, that he should deliver them then and there, not merely contract to deliver them in the future. Our court adds the fifth element, that the sales made by him should be to consumers and not confined exclusively to dealers in the articles sold. The court adds:

"One who solicits orders from dealers for future delivery, or sells by sample, whether in his own behalf or as the agent of a dealer, can be held to be a peddler. There can be no difference in principle between a person who solicits orders from dealers and subsequently delivers the goods ordered, and a person who makes the sale and delivery one transaction. The fact that the sales are to dealers and not to consumers is the distinguished feature."

Within the rules approved by the court in this decision, it would seem to follow that a person who solocits orders for the sale of merchandise to consumers, the transaction to be consummated by the delivery of the marchandise at a subsequent date, is not a peddler and is not subject to the provisions contained in the ordinance to which the * * * communication refers. It would follow, also, that he is not within the definition of a peddler as contained in Chapter 121, Laws 1911, defining hawkers and peddlers, and imposing a license fee for the conduct of their business.

Yours truly,

JAMES E. MARKHAM,
Assistant Attorney General.

July 25, 1916.

452

PHYSICIANS—"Chiropractics" not violation of medical law.

Dr. Thos. McDavitt, Secretary Minnesota State Board of Medical Examiners.

Dear Sir: You inquire whether members of the cult known as "Chiropractics" are violating the Minnesota Medical Practice Act.

The Attorney General of South Dakota reached the conclusion that under the South Dakota statute the practicing of chiropractics was a viola-

tion of the law of that state. I am not at all inclined to disagree with the conclusions reached by him, but do not think that such practice in this state would be a violation of our law.

The South Dakota law in defining what shall constitute the practice under the medical act, among other things, uses this language:

"Who shall recommend, prescribe or direct for the use of any person any drug, medicine, apparatus or other agency for the cure, relief or palliation of any ailment or disease of the mind or body * * *."

The language used in the statute of Minnesota defining the practice of medicine is, in part, as follows:

"For a fee prescribed, direct or recommend for the use of any person any drug or medicine or other agency for the treatment or relief of any wound, fracture or bodily injury, infirmity or disease."

It will be noted that the word "apparatus" is used in the South Dakota law and is not found in the Minnesota law, and the Attorney General of that state reached the conclusion that the use of the term "apparatus" clearly indicated the legislative intent that the statute should apply to agencies that are not at all related to drugs and medicines and hence the principle **noacitur a sociis** did not apply.

I call your attention to the case of State vs. Gallagher 143 S. W. Rep. 98-38 L. R. A. N. S. 328, in which the supreme court of the state of Arkansas construing a law in which was contained words the same as in the Minnesota statute, "any drug or medicine or other agency * * *," and in which the supreme court of that state held that the practice of "Chiropractics" was not a violation of the law.

Also see the case of State vs. Liffring 46 L. R. A. 334 in which the supreme court of the state of Ohio, construing similar language to that found in the Minnesota statute held that the system of rubbing and kneading the body, commonly known as osteopathy was not an agency within the meaning of the statute.

It seems to me that the reasoning of the decisions of the supreme court of the two states above named is applicable to the situation in Minnesota. I therefore am of the opinion that your inquiry is to be answered in the negative.

It is to be understood that this opinion is written upon the assumption that the practice of chiropractics does not include the prescribing or use of drugs or medicines or anything of a similar nature or the performing of surgical operations. You will understand, of course, that if a chiropractor does not confine his treatments to means other than drugs or medicines or agencies of a similar nature, he would be a violator of the medical act. Under such circumstances the question would be one of fact to be determined under all the evidence in the case.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

December 24, 1915.

453

POOL ROOMS—Public place—What is.

Dr. A. J. D. Haupt.

Dear Sir: The word "public" as applied to pool or billiard rooms and the like means a place where it is not unlawful for persons to go. If a man in his private house has a pool table, no one could for that reason enter that private house, but pool and billiard rooms are not kept for the purpose of the exclusion of people but for the purpose of furnishing them amusement for a consideration. No such place has any method of making money except by inviting the public to it. One definition of "public place" in connection with gaming is this:

"Any house to which all who wish can go, night or day, and indulge in gaming."

Another court says:

"The term 'public place' in the statute prohibiting gaming at a public place, is not to be construed as meaning a place which is always public, as a place may be public at some times and private at others, and a private place becomes public by being put to public use."

There are a multitude of definitions of "public" but the meaning of the word will be plain to you when you consider what the difference is between a place where the public may go without doing anything unlawful and the place where the public may not enter without trespassing. There have been many cases involving the question of whether or not club rooms were public or private. I think I may safely say that the courts of this state are inclined towards considering the ordinary club a public place. See State vs. Minnesota Club, 106 Minn. 515, 520. The question of whether or not a pool or billiard room is a public place is largely a question of fact.

Yours truly,

LYNDON A. SMITH,
Attorney General.

September 25, 1916.

454

POOL ROOMS—License.

Ray B. Osborn, Esq.

Dear Sir: It appears that an owner and an operator of a pool table in your village is required to pay a license fee of thirty dollars; that he is operating a pool table and that the village of Glyndon is indebted to him in a sum in excess of thirty dollars. You inquire whether the village council is not obliged to issue him the license in question and accept in payment therefor his claims against the village.

In my opinion, your inquiry is to be answered in the negative. Such person as a creditor of the village, cannot be shown preference over other creditors by having his claims paid in the manner stated, while other cred-

itors, not in the same position, may have to wait for their money. The village has no right to issue licenses unless there is paid into its treasury in cash the required fee.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

January 13, 1915.

455

POOL ROOMS—Open on Sunday.

Clayton C. Cooper, County Attorney.

Dear Sir: You inquire whether the keeping open of a pool hall and and playing of pool on Sunday would come within the provisions of Sections 8752 and 8753, General Statutes 1913, and constitute Sabbath breaking. Assuming that there is no disturbance or noise connected with the same which would affect the peace and quiet of the day, your inqquiry is answered in the negative.

You further inquire whether under Section 1269, General Statutes 1913, it would be competent for a village council to pass an ordinance prohibiting the opening and operating of a pool room on Sunday, whether the playing of pool was permitted or not, as well as prohibiting the playing of pool on said day.

In my opinion, this inquiry is to be answered in the affirmative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

July 21, 1916.

456

POSSE COMITATUS—County not liable for injuries sustained by private individual.

W. F. Odell, County Attorney.

Dear Sir: You state that a warrant was issued for the apprehension of an alleged insane person; that in endeavoring to apprehend the person named in the warrant, the sheriff called to his assistance a citizen of your county and that such citizen was injured by the insane person, blood poison set in and the services of a physician were necessary. You inquire whether the person so injured is entitled to reimbursement from the county for the amount he paid the physician for treating the wound.

In my opinion your inquiry is to be answered in the negative, the claim not being a proper county charge. You call attention to Section 758, General Statutes 1913, which reads as follows:

"Whenever any sheriff, deputy sheriff, constable or other peace officer of this state shall hereafter receive physical injury while in the discharge of his official duty as such peace officer, the county board, wherein such

officer resides, may audit and allow bills for physicians' services, nurse and hospital expenses rendered necessary because of such injury, and may appropriate money out of the revenue fund of the county for the payment thereof."

I agree with you that this section is not authority for the county paying the claim referred to. The person assisting the sheriff does not thereby become a "sheriff, deputy sheriff, constable or other peace officer," within the meaning of this statute.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

June 1, 1916.

457

PROBATE COURT—Descent and distribution—Illegitimate—Who heir of.

W. H. Goetzinger, Judge of Probate.

Dear Sir: The common law rule is that an illegitimate is not the heir of any person and does not even inherit from its mother. This rule is changed by statute in many states. In Minnesota, Section 7240 makes such child the heir of its mother, but in my opinion, that section does not mean to grant such child any further rights of descent. It means that the child inherits from its mother and only from its mother. The fact that it is the heir of its mother would not result in it being the heir of its half-brother in the case proposed by you.

While the question is not entirely free from doubt, I answer your inquiry in the negative.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

February 2, 1916.

458

PROBATE COURT—Detention of insane persons—Board of examiners—How constituted.

Olof P. Victorien, Judge of Probate.

Dear Sir: In my opinion all persons found to be insane, except those criminally insane, are to be committed to the detention hospital instead of to the hospitals for the insane. (Section 1 of Chapter 224, Laws 1909.)

Further, Chapter 224, Laws 1909, does not cover the entire field which is the subject of the legislation found in Sections 3852 to 3860, Revised Laws 1905, nor is it so inconsistent therewith as to constitute a repeal thereof, except as to the provisions of Section 3860, so far as the latter provides for the commitment of a person found to be insane to the hospital instead of to the detention hospital for the insane.

It is to be noted that Section 3852 provides that:

"Upon filing in the probate court a verified petition setting forth that a person in the county is insane and in need of care and treatment, or that it is dangerous for him to remain at large, and also stating therein the petitioner's relationship, if any, to such alleged insane person" the court shall proceed as provided in the subsequent sections.

When proceeding upon an information filed under this section, the court is authorized to issue a warrant for the bringing of the alleged insane person before him, and the board of examiners appointed by the court must consist of two reputable persons, at least one of whom shall be a duly qualified physician, and such persons with the judge of probate, shall constitute the board of examiners.

Under the provisions of Section 4 of Chapter 224, certain specified relatives "may apply to the judge of probate of the county in which such proposed patient is a resident, for the appointment of a board of three physicians to determine whether the proposed patient is mentally disturbed and in need of treatment at the detention hospital."

Section 5 provides:

"When information is filed with any judge of probate that a resident of his county is in need of treatment at such detention hospital, he shall make proper investigation and if the investigation so made shall substantiate the information filed, he shall at once appoint a board as provided in section 4 hereof."

If I am correct in my opinion that it was not the legislative intent that Chapter 224, Laws 1909, should supersede the provisions of the revised laws above referred to, in all cases, then it follows that the board of examiners is to consist of two reputable persons, one of whom must be a physician, and the judge of probate, when an information is filed alleging a person to be insane. When an information is filed **"that a resident of his county is in need of treatment at the detention hospital,"** the judge of probate is to investigate the allegations of the information and if the investigation so made substantiates the allegations of the information he is to appoint a board of examiners consisting of three physicians, one of whom shall be the family physician, "if there be such."

Yours truly,

C. LOUIS WEEKS,

Assistant Attorney General.

March 3, 1915.

459

PROBATE COURT—Duty of judge to serve in neighboring county under facts stated.

S. W. Gilpin, Judge of Probate.

Dear Sir: I state that Attorney General Young, in 1905, held that judges of probate were not entitled to any compensation for their services while acting for a judge of an adjoining county. The statute does not seem to have been changed since that ruling and I do not find that any subsequent opinion of this office has reversed or modified General Young's holding.

The theory of the statute seems to be that when a judge is requested by the judge of an adjoining county, and unless the duties of his own office preclude his complying, that he is in duty bound to serve in the requested county. This is because judges of probate are state officials and it is their duty to serve the state not only in their own county but in adjoining counties. I think a judge so requested to serve could be compelled to comply with the request of his neighboring judge.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

November 15, 1915.

460

PROBATE COURT—Judge of—Right to practice law of probate courts of other counties.

Mr. Wilhelm Michelet, Judge of Probate.

Dear Sir: I am of the opinion that a judge of probate of one county can practice in the probate courts of other counties. I have been trying for some time to get an authority on the subject but have not yet found one.

The objection that would be made, if any objection were raised, would be that the probate courts have concurrent jurisdiction and that the judge of one can be called by the judge of another to preside over his court in certain cases. I hardly think that this creates such an obligation on the part of any judge of probate that he must sacrifice probate practice in other counties because of the bare possibility that some judge might ask him to sit in his place. This requirement does not make one judge, strictly speaking, the judge of another court. Of course you cannot be asked to sit in any probate matters in which you are interested and this is a limitation upon power and opportunity of the other judge, but the other judge has several counties to call a judge from and rarely, if ever, would find all of the judges disqualified or otherwise not available.

Yours truly,
LYNDON A. SMITH,
Attorney General.

May 15, 1915.

461

PROBATE COURT—Jurisdiction to make supplemental decree.

W. E. Kenyon, Judge of Probate.

Dear Sir: I state that it has always been my opinion that the probate court still has the jurisdiction and the authority to correct its final decree or make a supplementary one where property that really was within the jurisdiction of the court has been inadvertently omitted.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

September 1, 1915.

462

PROBATE COURT—Sale of homestead of decedent.

Martin M. Shields, Judge of Probate Court.

Dear Sir: I state that it is my opinion that the homestead of a decedent is not subject to sale by the probate court if its character as a homestead continues. I presume that in a partition proceeding in your court the homestead might be sold the same as any other property is sold, but under no circumstances could the proceeds of the homestead be used for the payment of debts of decedent.

Yours truly,

WILLIAM J. STEVENSON,
Assistant Attorney General.

December 13, 1915.

463

PUBLIC OFFICERS—Accepting employment with conflicting interest.

S. C. Murphy, County Attorney.

Dear Sir: You state:

"The register of deeds of this county contemplates organizing a land and abstract company. The principal business of this company, if organized, will be the making of abstracts in this county."

You then ask:

"Is it permissible under the law for a person holding the office of register of deeds to act as officer of such abstract company and as such company officer to certify to abstracts made by it?"

After consideration of this inquiry, we have concluded that it must be answered in the negative. If a register of deeds is permitted to participate in the work of a corporation that is making abstracts, and the practice in the county is that all fees for abstracts made by the register of deeds should be placed in the county treasury, you can readily see that the register of deeds would be working against the interests of the county, while at the same time he is an officer of the county. No rule can be made that would apply to a case where the register of deeds receives the fees and another rule where the county receives the fees for making abstracts. It is against public policy for an official, while holding a public office, to engage in any business conflicting with the interests of the county in which he is holding office, and upon this principle is rested the conclusion that your inquiry must be answered in the negative.

Yours truly,

JOHN C. NETHAWAY,
Assistant Attorney General.

August 16, 1915.

464

PUBLIC OFFICERS—Bonds—Liability of surety on bonds of state officers.

A. H. Turrittin, Superintendent of Banks.

Dear Sir: You state that the officers and employes of your department are bonded in different surety companies, the state paying the premiums. You inquire whether upon the resignation of such officers or employes, when asking for a refund on the premiums you can state to the insurance company that it is released from liability from the date of the resignation. You also inquire whether there is any objection to making such a statement when an officer or employe of your department changes his position in the department, and a new surety bond is issued therefor.

The liability of a surety company upon the bonds of such officers and employes does not terminate with their resignations. It continues for all acts done before the resignation is accepted until terminated by the statutes of limitations. I am of the opinion, therefore, that both of your inquiries should be answered in the negative.

Yours truly,
HENRY C. FLANNERY,
Assistant Attorney General.

May 15, 1916.

465

PUBLIC OFFICERS—Ceasing to be resident, vacates office.

Ray Brown, Town Clerk.

Dear Sir: Ordinary absence from the meeting of the board of supervisors is not sufficient to justify the removal of such member from his office. The removal of a residence of such a man from the town in which he is elected is sufficient to vacate his office.

Yours truly,
LYNDON A. SMITH,
Attorney General.

April 6, 1916.

466

PUBLIC OFFICERS—Coroner—Contracts with county.

George T. Olsen, County Attorney.

Dear Sir: It is the opinion of this office that the coroner, being a county official, cannot be a party to a contract with the county and that he cannot care for the pauper sick and obtain compensation from the county.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

February 1, 1916.

467

PUBLIC OFFICERS—Drawing more than one salary from state.

William F. Houk, Labor Commissioner.

Dear Sir: You call attention to Chapter 238, General Laws 1913, which provides that the commissioner of labor shall appoint a competent man to take charge of the division for the deaf who shall devote his time to the special work of labor for the deaf. That the legislature only appropriated $1,000 for the maintenance of that division and that you are having difficulty in finding a man willing to give his entire time to the duties of that office for the compensation fixed. You desire to know whether Section 2 of that act requires the superintendent of the division for the deaf to devote his entire time to the work, or can he carry on the work in connection with other duties outside of his department and you would like to have the opinion of this department as to whether a person can draw more than one salary from the state, provided said person holds two positions and devotes part of his time to each position.

It seems to us that by the adoption of Chapter 293 it was intended by the legislature that the person appointed to that position should be so situated as to give his entire time to the duties of the office and it is rather doubful whether a person holding one official position can be appointed to another that might be created by the legislature and draw the two salaries. It must be taken as the intention of the legislature that for the $1,000, the whole time and attention of the superintendent was to be devoted to the work, and while the compensation may be insufficient, it is no fault of your department, but the remedy rests with the legislature.

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

June 7, 1915.

Note: See Chapter 467 Session Laws 1917.

468

PUBLIC OFFICERS—Elective state officers—Removal of for malfeasance.

Hon. J. A. A. Burnquist, Governor.

Dear Sir: You ask whether the Governor of Minnesota has authority to remove or suspend an elected state official for nonfeasance or malfeasance in office. I assume that you have reference to the elective state officers provided for in the constitution of the state of Minnesota and have to advise you that your inquiry is to be answered in the negative, except as to clerk of supreme court.

I call your attention to Section 5724, General Statutes 1913, in which the legislature enumerated certain officers that may be removed by the Governor. See also Sections 1, 2, 3, 4 and 5 of Article 13 and Section 14 of Article 4, state constitution.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

September 22, 1916.

469

PUBLIC OFFICERS—Fees—Commissioners of deeds.

Hon. W. S. Hammond, Governor.

Dear Sir: I have to say that in my opinion it would be improper to make a charge in connection with the appointment of commissioners of deeds for Minnesota, in the absence of any statute authorizing the taking of such a fee. I base this largely upon the doctrine stated in State vs. Smith, 84 Minn. 295, page 297, as follows:

"It is settled law that public officers entitled to fees or salaries take their offices cum onere, and are not entitled to compensation for services performed unless the law expressly so provides."

A specific case very much in point is that of In re Readon which came up in Illinois a few years ago and is reported in the Northeastern Reporter, Volume 89, page 169.

Yours truly,
LYNDON A. SMITH,
Attorney General.

November 24, 1915.

470

PUBLIC OFFICERS—May not charge for use of automobile.

C. G. Dosland, County Attorney.

Dear Sir: As you requested, I took up with the Attorney General the matter of the legality of superintendent of schools charging for use of his automobile when visiting schools.

While the Attorney General appreciates fully the saving that will be realized by such an arrangement, still in view of the statutes of this state, section 1089, he directs me to say that he does not think that such an arrangement would be legal, and that the superintendent could not charge for the use of his automobile.

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

December 22, 1915.

471

PUBLIC OFFICERS—Must be citizens.

C. K. Semling, Clerk of the District Court.

Dear Sir: A deputy clerk of court must be a citizen of the state of Minnesota. Such deputies are public officers and must have the qualifications of a voter except that the state allows women to be deputies in certain cases. If a woman is a deputy, she must be a citizen even though she is a voter in only a limited sense.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

January 4, 1916.

472

PUBLIC OFFICERS—Payment of fees for bonding employes.

J. A. O. Preus, State Auditor.

Dear Sir: Relative to the adoption of a general rule as to the bonding of an employe, I have to say that I am of the opinion that when an officer of this state deems it necessary that any person employed by him shall be bonded, such employe may be bonded at the expense of the state and the premium therefor paid by the person requiring such employe to be bonded.

No person can pay such a charge unless he has a contingent fund at his disposal, or a direct and specific appropriation for that purpose.

Yours truly,

LYNDON A. SMITH,

Attorney General.

January 25, 1915.

473

PUBLIC OFFICERS—Quo warranto—Procedure outlined.

Charles E. Houston, County Attorney.

Dear Sir: I have to say that I think that the relator should, in quo-warranto proceedings to test the right to an office in which he wishes the aid of the Attorney General, have the petition or information prepared and submitted to the Attorney General with the request to him to consent to the use of his name in connection with the preparing and filing of the information.

The case of State vs. Kent, 96 Minn. 255, goes over all the learning that there is on the subject of procedure in the filing of information in the nature of quo warranto, and on page 271 sums up its conclusion as follows:

"The granting or withholding of leave to file an information at the instance of a privator relator, or of a private relator with the consent of the Attorney General, to test the right to an office or franchise, rests in the sound discretion of the court to which application is made."

Yours truly,

LYNDON A. SMITH,

Attorney General.

September 16, 1916.

474

PUBLIC OFFICERS—Removal of officers—Commissioner to take testimony—Compensation.

Honorable J. A. A. Burnquist.

Dear Sir: You inquire if the payment of a larger sum than $5.00 a day to a commissioner to take testimony in a removal case, out of the Governor's contingent fund, is authorized. I have to say that in my opinion it is.

Yours truly,

LYNDON A. SMITH,

Attorney General.

September 18, 1916.

475

PUBLIC OFFICERS—Right to charge fees to county.

Andrew E. Fritz, Public Examiner.

Dear Sir: You are advised that in my opinion Section 5766, G. S. 1913, which provides that "no police officer of any city shall receive any fee in a suit or prosecution brought in the name of the state, but any county may reimburse him for expenses actually incurred therein" has the effect of prohibiting the city marshal or other police officer of Lake City from charging fees to the county in criminal actions brought in the name of the state, such as the fees indicated in your letter.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

March 1, 1916.

476

PUBLIC OFFICERS—Vacancy in—Infamous crime.

C. Rosenmier, County Attorney.

Dear Sir: You call our attention to the language of subdivision 5 of Section 5723, statutes 1913, which provides that an office shall become vacant when the holder thereof is convicted of an "infamous" crime.

You state that a member of a village council was convicted in a United State court of the crime of selling liquor to an Indian while such Indian was a ward of the government, contrary to the U. S. statute in such case made and provided. For such offense he was sentenced to imprisonment in the county jail for 4 months. I find that under the federal law he might have been imprisoned in a federal peniteniary for more than a year. The question is whether he is to be deemed to have been convicted of an "infamous crime" within the meaning of those words as found in Section 5723 above referred to.

I am of the opinion the question is to be answered in the negative. Subd. 3 of Section 9412, Statutes 1913, provides that the "pharse 'infamous crime' **shall include** every offense punishable with death or imprisonment in the state prison." The crime of which the council man was convicted was not "infamous" at common law, and is to be regarded as "malum prohibitum."

"The authorities generally, though not with entire uniformity, hold that the infamous nature of a crime was determined at common law by the character of the act itself and not by the penalty inflicted for its commission. The crimes which the common law regarded as infamous because of their moral turpitude were treason, felony, perjury, forgery, and those other offenses, classified generally as crimen falsi, which impressed upon their perpetrator such a moral taint that to permit him to testify in legal proceedings would injuriously affect the public administration of justice":

Cit. Garitee vs. Bond 111, Amer, State Rep. 388. Neither is the act which is declared to be a crime by the federal statute one which is punishable by our state statute by imprisonment in the penitentiary.

Section 3148, Statutes 1913, makes it a gross misdemeanor to sell intoxicating liquor to an Indian, but a gross misdemeanor is not punishable by imprisonment in the state prison, but only by imprisonment in a county jail. (Statutes 1913, Section 8483). It follows that the act constituting the offence is not an "infamous crime" within the meaning of those words as known to the common law, nor is such act, so far as our statute is concerned, one that is to be deemed an "infamous crime." When the legislature provided that an office should be deemed vacant on the conviction of the incumbent of an "infamous crime" it must be held to have meant the conviction of the officer of a crime infamous at common law or which is to be "included" with the common law crimes considered infamous under the provisions of subdivision 3 of Section 9412, by reason of the fact that the punishment prescribed by the statute of **this** state for the act constituting the crime is imprisonment in the state prison. In other words the fact that some other jurisdiction prescribes a punishment, which, were the punishment prescribed by our statute, would include the crime within the class known as "infamous" does not make is so for the purposes of our statutes.

Garitee vs. Bond, 102 Md. 379, 62 Atl. 631, 111 Am. St. R. 385.

Yours truly,

C. LOUIS WEEKS,
Assistant Attorney General.

August 10, 1916.

477

PUBLIC OFFICERS—Vacating office by removal—When village separates from town resident of village ceases to be resident of town.

James O'Donnell, Town Clerk.

Dear Sir: It appears from your statement that at the annual town meeting held in the town of Clontarf, March 14, 1916, the question of separating the village of Clontarf from the town of Clontarf was duly voted upon and upon the proposition for such separation there were cast 71 votes of which 45 were for separation and 25 against it. You state that all the legal prerequisites were complied with.

It appears that one of the township supervisors who had one year more to serve is a resident of the village of Clontarf and you inquire whether the office held by him has now become vacant. In my opinion your inquiry is to be answered in the affirmative. Section 5723, G. S. 1913, among other things provides as follows:

"Every office shall become vacant upon the happening of either of the following events before the expiration of the term of such office: * * *.

4. Ceases to be an inhabitant of the state, or if the office is local, of the district, county, city or village for which he was elected or appointed, or within which the duties of his office are required to be discharged."

By the separation of the village from the township the person in question has ceased to be an inhabitant of the township.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

April 17, 1916.

478

RAILROADS—Depots—Selling papers at.

E. F. Purtzer.

Dear Sir: Regarding the authority of station agents to prevent news boys from peddling papers, I have to say that this depends upon the authority given to the station agent by his employer, but ordinarily they cannot prevent a news boy from calling his papers and selling the same at the depot.

"However, it is settled in this state that a railroad company may grant the exclusive privilege of selling books, refreshments, etc., on its trains, grounds and depots."

Godbout vs. Saint Paul Union Depot Co. 79 Minn. 188, 198.

Yours truly,
LYNDON A. SMITH,
Attorney General.

August 10, 1016.

479

RAILROADS—Mileage books—Power of commission to order issuance of.

Railroad and Warehouse Commission.

Gentlemen: You ask for the opinion of this office on the following questions:

1. "Has the commission power to order a railroad company to issue mileage books covering possenger travel over its own line good in Minnesota only?"

2. "Has the commission the power to order railroad companies to issue interchangeable mileage with other railroads covering passenger travel over their joint lines good in Minnesota only?"

If the commission has been vested with the power to make such orders, it must be contained in Section 4178, G. S. 1913, the pertinent provisions of which are as follows:

"Whenever, in the judgment of the commission * * * any change in the mode of operating its road or conducting its business, will promote * * * convenience of the public, the commission, by a written order * * * shall require compliance with such change."

Such an order would therefore of necessity have to be based upon a finding that the convenience of the public would be promoted by such change.

In the case of Lake Shore, etc. Ry. Co., vs. Smith, 173 U. S. 684, the supreme court of the United States passed upon the constitutionality of a law of the state of Michigan, under the provisions of which railroad companies were compelled to issue mileage tickets, and on page 679 of its opinion said:

"But in this case it is not a question of convenience at all within the proper meaning of that term. Aside from the rate at which the ticket may be purchased, the convenience of purchasing this kind of a ticket is so small that the right to enact the law cannot be founded upon it."

I am therefore of the opinion that both of the above questions should be answered in the negative.

Yours truly,
HENRY C. FLANNERY,
Assistant Attorney General.

May 18, 1916.

480

RAILROADS—Reciprocal demurrage law of this state void.

T. A. McGrath, Esq.

Dear Sir: You inquire as to the status of the reciprocal demurrage law of 1907, which was held unconstitutional by the supreme court of the United States (226 U. S. 426).

To me there is not the slightest hope that there is anything whatever left of this law. The supreme court of this state specifically held that "by its terms it applies to both intrastate and interstate commerce." (110 Minn. 53). The supreme court of our state also stated that it was "in aid of commerce of both kinds." The supreme court has established beyond question the doctrine that when a state statute is general in its character and relates to commerce, it relates to both interstate commerce and intrastate commerce. In the case of State vs. Chicago Great Western R. R. Co., 125 Minn 332, the court held that a statute general in its terms applies to both intrastate and interstate commerce. In discussing a state law of this character the court said:

"It is not limited to shipments originating and terminating within the state, but to any shipment, wherever it may have originated, which extends into or through the state for the prohibited distance. It thus prohibits a shipment of cream originating in an adjoining state which extends the prohibited distance in this state. It also applies to all shipments originating in this state to points in other states where the distance of transportation in this state exceeds 65 miles. It further applies to all railroads having lines leading from points in this state to Duluth, which extend into and pass through the adjoining state of Wisconsin, thus preventing the shipment of cream to Duluth, if the point of shipment originated 65 miles from the state boundary. The statute will bear no other construction and as so construed is an interference with interstate commerce. It cannot without violence to its language be construed as applicable only to shipments originating and terminating within this state."

"Where a statute appears on its face to apply to all commerce, and is single and indivisible, it is invalid as to all commerce if it is invalid as to interstate commerce."

Illinois Central R. Co. vs. McKendree, 203 U. S. 514.

Poindexer vs. Greenhow, 114 U. S. 270, 305.

The settled doctrine of our supreme court, and the action as to this particular law by the supreme court, leaves it settled beyond peradventure that the only way to have a valid demurrage law in this state is to enact another law than the one which has been condemned by the supreme court, basing its condemnation on the construction of the law by the supreme court of this state.

I do not take it that the supreme court meant to say, when it used the following language—

"When, however, the state in dealing with its internal commerce undertakes to regulate instrumentalities which are also used in interstate commerce, its action is necessarily subject to the exercise by congress of its authority to control such instrumentalities so far as may be necessary for the purpose of enabling it to discharge its constitutional function," that there may not be a reciprocal demurrage law so drawn as to be applicable to intrastate commerce alone, and valid as to such commerce. Some of the following cases would indicate perhaps that it is impossible to have a state reciprocal demurrage law, though I am not convinced that the legislature is prevented by the underlying principle of the following cases from passing such a law.

Yazoo & Mississippi Valley R. Co. vs. Greenwood Grocery Co., 227 U. S. 1; Texas & New Orleans R. Co., vs. Sabine Tram Co., 227 U. S. 111; New York Central R. R. Co. vs. Hudson County, 227 U. S. 248; St. Louis, I. M. & Southern Ry. Co. vs. Edwards, 227 U. S. 265; Pedersen vs. Delaware, L. & W. R. R. Co., 229 U. S. 146; Louisiana, S. F. & T. Ry. Co. vs Seale, 229 U. S. 156, 233 U. S. 671, 147 N. W. 109.

It seems to me that if anything was ever settled solidly and beyond question, it is that the demurrage law of this state that was involved in the Hardwick case is removed root and branch from our legislation.

Yours truly,

LYNDON A. SMITH,
Attorney General.

April 18, 1916.

481

RAILROADS—Routing shipments—Duty to follow shippers instructions.

Railroad and Warehouse Commission.

Gentlemen: Your inquiry relates to the right of a carrier to forward shipments via such routes as best suit the carrier's own convenience, regardless of the wishes of the shipper.

The general rule is this regard is stated in Redfield on Carriers, Section 34, as follows:

"Carriers are required to follow the instructions given by the owner of property concerning its transportation, unless reasonably impractical.

This rule is adopted in the case of Express Company vs. Kountze, 75 U. S. 342, and applied in Texas Railway vs. Eastin, 92 S. W. 838; and Gulf Railway vs. Irvine, 73 S. W. 540."

The interstate commerce commission has repeatedly held, "That carriers are bound to route shipments delivered to them as directed by the shipper, and are liable for damages due to their failure to follow instructions." Lathrop, etc., vs. Lehigh Valley Railroad Company, 24 I. C. C. 622. It should be noted in this connection that Section XV of the commerce act expressly provides that a shipper shall have his right to designate his route. The question as to what instructions as to routing are so impracticable as to relieve the carrier of its duty to transport over it, is one of fact, in the determination of which the interests of the shipper, as well as the convenience of the carrier, must be considered.

Yours truly,

LYNDON A. SMITH,
Attorney General.

January 29, 1916.

Note—See Solum vs. N. P. Ry. 157 N. W. 996.

482

RAILROADS—Sale of transportation by persons not authorized as agents.

G. F. Thomas, Esq.

Dear Sir: In reply inquiring whether the United States Mileage Company, incorporated, can legally buy railway transportation at two cents per mile and sell it to the merchants at three cents per mile, I have to say that it can not.

My reason for this is that the statute requires any person selling transportation tickets shall be selected and certified by some transportation company as its agent and the secretary of state must license said agent upon presentation of such certificate, and—

"any person not so licensed, who shall sell, barter or otherwise transfer any such ticket or other evidence of right to passenger transportation, or any part thereof, shall be guilty of a gross misdemeanor." (Section 4428 G. S. 1913).

This law has been upheld by the supreme court in two cases:

1. State vs. Corbett, 57 Minn. 345.
2. State vs. Manford, 97 Minn. 173.

The only answer to the foregoing would be that the mileage company is an agent of the railway company whose mileage it sells. If so, it could not sell for higher than the statutory rate permitted to be charged for transportation.

Yours truly,

LYNDON A. SMITH,
Attorney General.

June 5, 1915.

483

RAILROADS—Short and long haul statute not repealed.

Railroad and Warehouse Commission.

Gentlemen: You ask whether or not Section 4347, G. S. 1913, was repealed by chapter 90, G. L. 1913 and chapter 344, G. L. 1913.

Section 4337, G. S. 1913, contains the following provisions:

"No carrier shall charge or receive any greater compensation for the transporation of **passengers** or of like kind or class and quantity of property, for a shorter than for a longer distance over the same line, **the shorter being included within the longer distance.** * * *.

"No carrier shall charge or receive any greater compensation per ton per mile for contemporaneous transportation of the same class of freight for a longer than for a shorter distance over the same line in the same general direction, or from the same original point of departure, or to the same point of arrival."

Chapter 90, G. L. 1913, is much more comprehensive. It contains a number of prohibitions. The first one is as follows:

"If any railway corporation shall charge, collect or receive for the transportation of freight of any description upon its railroad for any distance within this state, a greater amount of freight, toll or compensation than is at the same time charged, collected or received for the transportation of like quantity of freight of the same class over a greater distance of the same railway, * * * such railway company shall be deemed guilty of unjust discrimination which is hereby prohibited and declared to be unlawful."

Section 4347, G. S. 1913, was not expressly repealed by chapter 90, G. L. 1913. Was it then repealed by implication? Clearly the prohibition against charging more for a longer than for a shorter distance was enlarged by chapter 90, because thereafter it was not necessary that the shorter be included within the longer distance as was provided in section 4347.

It should be noted, however, that section 4347 relates to the transportation of both **passenger and property,** while chapter 90 only applies to the transportation of **property.** Furthermore, there is no provision in chapter 90 relating to the charge per ton per mile, which was one of the subjects covered in section 4347.

Repeals by implication are not favored. The rule adopted by the supreme court of Minnesota in the case of Lien vs. Board of County Commissioners, 80 Minn. 58, is therein stated as follows:

"Where two acts are not in express terms repugnant, **but the latter act covers the whole subject matter of the earlier,** not purporting to amend it, and plainly shows that it was intended as a substitute for the earlier, it will operate as a repeal thereof, though all of the provisions of the two may not be repugnant. But there must be **unmistakable intent manifest on the part of the legislature to make the new act a substitute for the old and to contain all the law on the subject;** for mere similarity in the provisions of the two statutes is not enough to effect a repeal, even though the similarity may be such as to cause confusion or inconvenience."

Inasmuch as chapter 90 does not cover the transportation of passengers, nor the subject of rates per ton per mile, it cannot be said that it covers the whole subject matter of section 4347, nor that it contains all of the law on the subject. I am therefore of the opinion that section 4347, G. S. 1913, was not repealed by chapter 90, G. L. 1913. Chapter 344, G. L. 1913, relates chiefly to joint freight rates and in my opinion did not repeal section 4347.

In your second question you ask whether, if section 4347, G. S. 1913, was not repealed by chapter 90, G. L. 1913, a carrier is required by the former section to construct its rates from two different points of origin to the same destination, so that no greater rate per ton per mile shall be charged for the longer than for the shorter distance. As an illustration you state that the Soo line publishes a rate on lumber of 12 cents for one hundred pounds from Thief River Falls to Minneapolis, a distance of three hundred and twelve miles, which produces a rate per ton per mile of 7.69 mills. At the same time it carries a rate in its tariffs of 7 cents per hundred pounds from Vergas to Minneapolis, a distance of two hundred and six miles, which produces a rate per ton per mile of 6.79 mills.

The two stations mentioned in the illustration are on the same line, the transportation is in the same direction and to the same point of arrival. I am therefore of the opinion that the charges mentioned are in contravention of the provisions of section 4347. As to the general question, it should, in my opinion, be answered in the affirmative.

Third: You also ask whether, in cases where rates have been filed with the commission and charged by the carrier, at a greater rate per ton per mile for the long than for the short haul, as stated in the second question, the commission can require the carrier to refund to the shipper the amount of the overcharge or whether the remedy of the shipper is limited to asking the commission to correct the carrier's tariff.

While the question as to whether the commission is possessed of the power to require carriers to refund to shippers excess charges collected in contravention of said law is not entirely free from doubt, I am of the opinion that in view of the provisions of the statutes and of previous rulings of this department, it should be answered in the affirmative. I am also of the opinion that the commission can require carriers to correct their tariffs so that they will comply with section 4347. It can do this, I believe, either upon its own motion or upon the application of persons injuriously affected by said rates.

Respectfully yours,
HENRY C. FLANNERY,
Assistant Attorney General.

June 20, 1916.

484

RAILROADS—Statute compelling installation stock scales abrogated by decision in Bertha case.

Railroad and Warehouse Commission.

Dear Sirs: I have to say that it my opinion that all of chapter 252 General Laws 1913 was dependent upon the clause therein which was held

unconstitutional by the supreme court of the United States, and the entire statute fell with the part thereof so held unconstitutional.

Yours truly,

LYNDON A. SMITH,

Attorney General.

October 26, 1915.

485

STATE—Board of Barbers—Law construed—Suggested practices considered.

Minnesota State Barbers' Board.

Gentlemen: A few days since you presented to the Attorney General certain questions relative to the law of this state found as sections 5055-5062 both inclusive, G. S. 1913, being the law relative to your board, barber schools, the occupation of barbers, etc.

You inquire whether barber schools may be kept open from seven-thirty A. M. to ten or eleven P. M., or whether they were limited in the hours of operation to the hours in which public schools are usually conducted to-wit: Nine o'clock A. M. to four o'clock P. M.

I find no provision of law in any way limiting the hours which barber schools may be kept open for the purpose of instruction or other proper purposes and it would therefore follow that such schools may be operated at such hours as may be deemed advisable by the parties operating the same.

You further inquire whether barber schools may charge customers for barber work done or materials used in the doing of such barber work—that is, where the work is done and the materials are used by students or other unlicensed persons. Your inquiry further embodies the question as to whether it would be permissible for students or other unlicensed persons connected with the barber schools to cut hair, trim beards or shave for a compensation, either to be paid directly or indirectly to the proprietor of the school or any other person. This inquiry is answered in the negative. Section 5056, G. S. 1913, expressly provides:

"Shaving or trimming the beard or cutting the hair of any person for **hire** shall constitute the occupation of a barber."

It is further provided that any person following such occupation will be committing an offense against the law of the state, unless he is a licensed barber.

You further inquire whether such students or other unlicensed person connected with such barber school might perform any of the work constituting the occupation of a barber and being as above defined (shaving, hair cutting or beard trimming) without charge for such service, but have a charge made for supplies used in connection with such work, as for instance, for use of towels, the use of razors, the use of shears, use of clippers, use of chair, use of soap or other necessary things of a similar nature.

In my opinion this inquiry is to be answered in the negative. It would seem that this would be attempting to do indirectly what the

statute expressly prohibits being done directly, to-wit: Making a charge for the doing of the things which constitute the occupation of a barber. A person cannot well be shaved without the use of soap, nor his hair cut without shears or clippers and it would seem to me to be the merest subterfuge to claim that no charge was being made for hair cutting, shaving or beard trimming, but that the charge was being made for the use of supplies, tools or instrumentalities necessary in order to do the work.

You further inquire what penalty might be imposed upon a person who violates the provisions of the barber school law.

I call your attention to section 5062, G. S. 1913, which reads as follows:

"Every person who shall follow the occupation of a barber without having obtained a certificate, or falsely pretend to be legally qualified to follow such occpuation, every person who shall violate any provisions of this subdivision and every employing barber who shall wilfully engage an assistant not a certificate holder hereunder, shall be guilty of a misdemeanor. But nothing herein shall prohibit any person from serving as an apprentice under a barber holding such certificate, or as a student in a legally conducted school of barbering. In no barber shop, however, shall there be more than one apprentice to each two holding certificates."

I think that a violation of the provisions of law relative to barber schools would come within this section and the offense would be misdemeanor and punishable as such.

Section 8482, G. L. 1913, provides the penalty for misdemeanors generally and reads as follows:

"Whoever is convicted of a misdemeanor for which no punishment is prescribed by any statute in force at the time of conviction and sentence shall be punished by imprisonment in the county jail for not more than three months or by a fine of not more than one hundred dollars."

You further inquire whether the Minnesota state barbers board may employ at the expense of the board (not out of state funds) an attorney to prosecute violators of the barber law. The law relative to barber schools expressly provides that the county attorney shall prosecute a person charged with a violation thereof and as a general proposition, prosecutions for offenses are conducted by the county attorney, although as to misdemeanors generally it is questionable whether a county attorney is obliged to prosecute them unless the statute expressly so provides. Be that as it may, however, I am of the opinion that the state barbers board may employ outside counsel to conduct prosecutions generally, but as to violations of the barber school law, such outside counsel should not be employed without the consent or approval of the county attorney. I would recommend that in any prosecution under the barber law the county attorney be consulted and his advice taken and his services secured in prosecution.

You inquire further whether an attorney that is regularly employed by the Master Barbers Association might be secured, either with or without pay from your board, for the conduct of such prosecutions. The answer to your previous question seems to answer this question. The fact that the

attorney in question is also under regular employment by some organization would not preclude his being secured for the conduct of your prosecutions, of course within the limitations above set forth.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

May 12, 1916.

486

STATE—Board of electricity—Law construed.

John W. Helm, Secretary State Board of Electricity.

Dear Sir: You make the following statement:

"The situation arises as follows: A is a journeyman electrician holding a license as such from the state. He makes application to our board for a master's license, claiming to be entitled to one under section 5084, G. S. 1913, under the provision which says, 'A journeyman electrician holding a state license shall, without further examination, be issued upon application to the state board of electricity, a master electrician's license, providing that he give bond as provided in this section.'"

You call attention to section 5086, G. S. 1913, which seems to conflict with the above quoted provision, and is in the following language:

"Every applicant for a master electrician's license shall pay a fee of $5, and take oath that he has had three years' experience in the occupation, or if a corporation apply, an officer or manager thereof shall take such oath after being duly examined as master."

You inquire:

"Are we not then to require any electrician holding a journeyman's license to take an examination as master before he would be entitled to a master's license?"

The portion of the statute above referred to first quoted by you appears as new matter in the electrician law, and is found in section 3 of chapter 544, general laws of 1913, as an amendment to section 2359, general laws 1905.

An amendment to section 2361, revised laws 1905, appears in section of chapter 544, general laws 1913, and the words:

"After being duly examined as master" appear therein.

I am of the opinion that the words last above quoted have reference only to the language immediately preceding such words:

"Or if a corporation apply, an officer or manager thereof shall take such oath."

It was evidently the intention of the legislature to provide that if a corporation should apply for a master's license, then an officer or manager of such corporation, in addition to taking oath, should be examined as a master.

In section 2 of said 1913 law, which is an amendment to section 2358, R. L. 1905, there is a provision calling for an examination of all applicants for licenses as electricians, but this particular provision was in the original electrician's law, as found in said section 2358.

I am not considering the question submitted by you as to whether or not it was desirable (you indicating that it was not) that journeyman electricians should be granted a master's license without an exmination and only upon the giving of a bond. I am of the opinion that the legislature has so provided, and am inclined to think that it was within the power of the legislature to so provide. It would seem that the question as to the necessity of a journeyman electrician taking an examination as a master was one for the legislature to determine, and it evidently determined that there was no necessity.

You think that the provisions of the statute to which you refer are in conflict. It is a rule of statutory construction that apparent conflicting provisions of a statute shall be reconciled if possible so as to give force and effect to all provisions of such statute. I am of the opinion that under the electrician law as it now stands, a journeyman electrician upon making an application and giving the proper bond, is entitled to receive from the board a master electrician's license; that only a corporation applies for a license, a bond must be given and an officer or manager thereof must take an examination for a master's license; that when a person applies for a master's license who is not a journeyman, he must, in addition to giving the bond, pass an examination as a master electrician.

It would seem that the conclusions reached by me, as above indicated, give force and effect to the various provisions of the statute.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

May 28, 1915.

487

STATE—Board grain appeals—Duties of—Grading and docking grain.

Board of Grain Appeals.

Gentlemen: You inquire as to the limits of your duties in the matter of grading and docking grain. The principal clause of the statute bearing upon your duties in such matter is this:

"Each of said boards (of grain appeals) shall determine the grade and dockage, if any, of all grain in all cases where appeals from the decisions of the chief deputy inspectors have been taken * * *."

Section 4452 general statutes 1913.

In section 4457 there is a provision which reads literally "any owner, consignee or shipper of grain, or any warehouseman who is dissatisfied with the inspection of grain by any chief or deputy inspector may appeal from his decision, etc." I am inclined, in view of the previous section later passed, to hold that the word "or" between the words "chief" and "deputy" should be eliminated from consideration. This makes the process of grading grain and appealing from inspection clear and systematic. In other words, grain is to be inspected by deputy inspectors and may be reinspected by chief deputy inspectors, and regarded, upon appeal, by the state board of grain appeals. This would make a uniform, practicable

and consistent rule with regard to the inspection of grain and the review by reinspection and appeal so far as desired of the inspection of any particular grain.

Assuming then that the above is a correct interpretation of the law, your boards have only the authority to determine the grading and dockage in cases of appeal from the decisions of the chief deputy inspectors, as provided in the clause of the statute first above quoted. When the powers of any state board are defined and limited, their duties end with the limits of such powers. Anything done by a board beyond the powers and duties conferred upon it or vested in it by the legislature, or implied as necessary to the performance of such prescribed duties is outside of its official action. I do not find any duty imposed upon the boards of grain appeals of this state to pass upon any questions brought before them by others than the chief inspector as to the grading of grain, unless such questions are brought by an appeal from a decision of a chief deputy inspector. When a chief deputy inspector has passed upon the grade and dockage, if any, of specified grain, and acted within the sphere of his duty, then you must pass upon the appeal and determine whether or not the decision of the chief deputy inspector has been correct, and if not correct, you should make a new determination of the questions raised by the appeal.

There is a presumption that every public official does his duty and this presumption should as a rule be entertained by you as to the work of the chief deputy inspectors. When an appeal comes to you regularly from the decision of a chief deputy inspector, it is to be deemed, in the absence of satisfactory proof to the contrary, that such inspector has passed upon the question involved in the regular course of duty prescribed by statute.

The board of grain appeals is not primarily a judicial but a ministerial body and it has been held that "a ministerial officer * * * has no authority to pause in the execution of his duty on the suggestion of errors or mistakes in the proceedings. If the facts upon which he is to act are properly certified to him he has no discretion." See Mechem on Public Officers, section 523.

Permit me also to say that there is little doubt but that the mass of people in this state expect of you, not a mere performance of the technical duties of your office, as indicated by this letter, but practical helpfulness as individuals in the work of grading and marketing the grain products of this state.

Yours truly,
LYNDON A. SMITH,
Attorney General.

November 19, 1915.

488

STATE—Board of grain appeals—Who may appeal.

A. G. Chambers, Secretary Board of Grain Appeals.

Dear Sir: It seems to me that the statute is plain in the matter of which you write. The probable trouble is that certain customs and habits have grown up outside of the statute and very likely are justified

by the brevity and uncertainty of its provisions. A main provision of the statute is as follows:

"Each of said boards shall determine the grade and dockage, if any, of all grain in all cases where appeals from the decisions of the chief deputy inspectors have been taken and for such purpose they may request fresh samples of such grain to be furnished direct to the board having the case under consideration." (Section 4452, G. S. 1913).

The decision of your board fixing the grade of grain considered by it on appeal is made by statute final. There is, however, a maxim of law to the effect that "fraud vitiates everything." Whether such a fraud has been perpetrated that you cannot discover and remedy it by requesting "fresh samples of such grain to be furnished direct to the board," is a matter concerning which I have not sufficient information to advise. Ordinarily your board must proceed with its work without giving up its jurisdiction to pass on grain when once that jurisdiction had been acquired.

It would seem very proper for you to hear both sides of any matter, including matters involving fraud, and determine at such hearing whether or not the fraud claimed was such as to render entirely useless any decision you might render either upon the inspection of the carload of grain itself, or the consideration of samples, whether original or additional, taken from the carload of wheat under inspection. The law seems to make the proper parties before you in such a controversy, the owner, consignee or shipper of the grain, or any warehouseman taking such appeal, and on the other side, the state represented by a deputy inspector, a chief deputy inspector, the chief inspector, or lastly, the railroad and warehouse commission itself.

Proceeding taken on an appeal in form of a person not bearing one of these four relations to the grain under inspection are void.

Yours truly,

LYNDON A. SMITH,
Attorney General.

September 1, 1916.

489

STATE—Board medical examiners—Secretary of—Entitled to per diem in addition to salary.

J. A. O. Preus, State Auditor.

Dear Sir: You refer to section 4, chapter 139, general laws 1913, which section fixes the compensation of the secretary of the state board of medical examiners and provides for the expenses of the board members and maintenance of the office, etc. The question which you submit is whether the secretary, as one of the members of said the board, is entitled to the per diem allowed to members of the board for "each day * * * in actual attendance at regular and special meetings" in addition to his salary, which is fixed by the above cited law at $1,800 per annum.

The state board of medical examiners consists of nine qualified resident physicians, appointed by the Governor. The board elects from its

number a president, secretary and treasurer, but being selected as secretary the person so chosen does not cease to be a member of the board and although compensation is provided for the secretary of the board, presumably for performing the duties devolving upon the secretary, in my opinion it does not preclude him from receiving a per diem compensation for each day he is in actual attendance at regular and special meetings of the board. It will be noted that the law referred to also provides that the secretary and other members of the board shall receive all expenses actually and necessarily incurred by them in attending such meetings.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

April 20, 1915.

490

STATE—Board Optometry—"Year" as referring to attendance at college.

Albert Myer, Secretary.

Dear Sir: You state that section 6 of the new optometry law requires a candidate for examination to be one—

"Having served an apprenticeship of not less than two years under a practicing optometrist acceptable to the board, or shall to be a graduate of an optometry school or college approved by this board, **requiring an attendance of not less than one year's course.**"

You ask for an interpretation to be placed upon the portion of said section above underlined and ask:

"If the usual school year of approximately nine months continuous work or the calendar year is to be understood?"

I am of the opinion that the calendar year is not meant but that the course referred to is the one usually had by colleges generally during a school year. If a college has nine months of continuous work during a school year, I think that a student attending such college during such time, and that was a requirement of such college as a condition precedent of the granting of a diploma to a graduate, it would be a sujcient compliance with section 6 supra. Of course if a college only requires a course of one or two months of a student before graduating him and such period of time constituted a one year course of the college, it would strictly speaking, come within the language of the section, but it would not be necessary for your board to approve of such a college.

It has been held by the courts:

"The period of time intended to be designated by the term 'year' is to be determined by the subject matter and context and that signification is to be given to it which accords with the intention of the party using it."

Thornton vs. Boyd, 25 Minn. 598.

"The term 'year' is usally a calendar year, but not always, since its meaning is often determined in contracts by the intention of the parties. It may mean the growing of the crops with farm operations or of the fruits among horticulturists and in like manner may be longer or shorter than twelve months, according to the connection in which it is used."

Cases cited.

Ruesch vs. City of Lincoln, 112 N. W. Rep. (Neb.) 377.

It is true paragraph 19 of section 9412, G. S. 1913, among other things provides:

"The words 'month' and 'year' shall mean a calendar month or year unless otherwise expressed."

I am, however, of the opinion as above indicated that construing the language of section 6 supra, reference is not had to a calendar year.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

May 8, 1915.

491

STATE—Optometry board—Law construed.

Albert Myer, State Board of Examiners.

Dear Sir: By reference to the 1915 law, and in the first part of section 6 thereof, certain qualifications are enumerated for persons who become licensed to practice optometry in the state of Minnesota, such qualifications however, applying to those "who are not already registered." I infer from this that it was not the purpose of the 1915 law to in any way effect persons who are already registered as optometrists, except of course insofar as the refiling of certificates upon removal to another county is concerned, and the payment of the annual fee of $2, etc.

I therefore do not think that a person who has been licensed and registered as an optometrist before the passage of the 1915 law is now required again to record his certificate before the payment to the board of the $2 annual fee.

A man who takes the examination and receives a certificate under the new law must of course record his certificate in the county in which he lives, within six months after the issuance of such certificate.

Where a man was issued a certificate under the old law and failed for six months after such issuance to have such certificate recorded in the county of his residence, in my opinion, forfeited the certificate in question, and it would therefore not be competent for your board to issue a continuance of his license, or a new certificate, or to accept the annual fee from such previous license or certificate holder.

I am of the opinion that the words: "Upon removal to another county," as found in section 7, contemplate a change of residence, and not merely a temporary going from one county to another.

Although the law does not seem to be explicit upon the proposition, I do not think it would be necessary for the board to issue a new license to a man whose license was revoked prior to the passage of the 1915 law, for any or all of the reasons enumerated in section 5024, general statutes 1913 (section 2322, R. L. 1905), simply upon the application of such position as though no license had ever been issued to him, and if so, then he must show himself qualified under the provisions of section 6 of the 1915 law, and among other things, must establish his good moral character.

It may, further be noted that he must pass an examination satisfactory to the board as to his qualifications for the practice of optometry, and if it be shown that he is of such a character or is in condition such as to warrant the board in revoking his license, then he could not well be said to be a person found by the board to have satisfactorily shown his qualifications for the practice of optometry.

I am of the opinion that it will not be competent for the board to designate one of its members to collect evidence in case of alleged violations of the law and pay such member compensation therefor.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

June 11, 1915.

492

STATE—Board soldiers' home—Quorum present—Minority vote—Effect.

C. F. MacDonald, Esq.

Dear Sir: You state that "the 'soldiers home board' is composed of seven members. At the annual meeting on August 8, in the election of a member of the executive committee, three votes were cast for one candidate; two for another; and two trustees declined to vote."

You inquire if the candidate receiving three votes—a minority of the board present—was duly elected.

An examination of the statute discloses that the Minnesota soldiers home shall be maintained under the management of seven trustees appointed by the Governor. That the seven trustees constitute a board known as the soldiers home board, which board is required to elect an executive committee of three and which board is also required to adopt proper by-laws for the conduct of its business. The statute directs that the annual meeting of the soldiers' home board be held on the second Tuesday in August.

In rendering an opinion herein I assume that the meeting of the board in question was a legal one and not an informal coming together of the members thereof, and that the by-laws adopted by the board are silent as to the votes required to elect a member of the executive committee. Under such assumptions and the facts as stated by you, I am of the opinion that the candidate who received three votes was duly elected. The mere presence of inactive members or members who decline to vote, did not impair the right of the quorum to proceed with the business of the board. If the two members present and not voting desired to defeat any candidate, they should have voted against him for inaction did not accomplish their purpose. Their refusal to vote was in effect a declaration that they consented that the majority of the quorum act for board of

which they were members. The candidate who received three votes had a majority of those actually voting and the five voting constituted a quorum.

Yours truly,
EGBERT S. OAKLEY,
Assistant Attorney General.

September 5, 1916.

493

STATE—Board of parole—Powers as to discharge of prisoners.

Charles E. Vasaly, Chairman Board of Parole.

Dear Sir: Relative to the power of the board of parole in the matter of discharging prisoners.

The first question is whom you may parole. Inasmuch as somewhat different rules apply as to prisoners imprisoned for crimes committed prior to April 20, 1911, from those applicable to prisoners imprisoned for crimes committed subsequent to that date, I will divide same by classes.

A. Persons committed to the state prison for crimes committed prior to April 20, 1911.

(1) Persons sentenced to imprisonment in the state prison on the reformatory plan for crimes committed prior to April 20, 1911, may be paroled at any time.

(2) A person committed to the state prison for a definite term, other than life, if he has never been previously convicted of a felony, may be paroled after he has served one half his full term "not reckoning good time."

(3) A person committed to the state prison and serving a life sentence, who has not been previously convicted of a felony, either in this state or elsewhere, and who has served 35 years less the diminution which would have been allowed for good conduct had his sentence been for 35 years, may be paroled provided the board of pardons gives its unanimous consent thereto in writing.

B. Persons committed to the reformatory for crimes committed prior to April 20, 1911, may be paroled at any time.

C. Persons committed to the reformatory for crimes committed subsequent to April 20, 1911, except persons committed for life, if any such there be, may be paroled at any time. Any person committed to the reformatory for life, for a crime committed subsequent to April 20, 1911, if any such there be, cannot be paroled until he has served 35 years, less the diminution which would have been allowed for good conduct had his sentence been for 35 years, and then only with the unanimous consent, in writing, of the board of pardons.

D. Persons committed to the state prison for crimes committed subsequent to April 20, 1911.

(1) Persons committed to the prison for crimes committed subsequent to April 20, 1911, except such persons as are serving life sentence, may be paroled at any time.

(2) A person serving a life sentence can be paroled after he has served 35 years, less the diminution which would have been allowed for good conduct had his sentence been for 35 years, provided the board of pardons unanimously consents thereto in writing.

The second question is to whom a final discharge may be given. My opinion is that a final discharge may be given to those persons who have been paroled and upon parole have kept the conditions thereof in such manner and for such period of time as shall satisfy the board that they are reliable and trustworthy and that they will remain at liberty without violating the law, and that their final release is not incompatible with the welfare of society.

The one exception to the foregoing rule is that all persons imprisoned for offenses committed prior to April 20, 1911, are subject to release by your board upon the terms and in the manner provided by the laws in force prior to that date. This expression refers not to law in general but to statutes duly adopted. These laws are found in sections 9318 and 9323 G. S. 1913. These two statutes provide for the releasing of persons sentenced to state's prison or to the reformatory for the first time without specified limit as to time of service. This release may be at any time after the expiration of the minimum term and before the expiration of the maximum term provided by law for the crime. The fitness of persons committed on the reformatory plan, prior to April 20, 1911, may be determined by their conduct while in prison and their apparent reformation.

I might add that a definite time sentence, imposed because of an offense committed prior to April 20, 1911, would have to be treated as the maximum time for holding any person so sentenced in imprisonment, as it is not within the power of the legislature to increase but only to mitigate or lessen a sentence

I am of the opinion that the statutes of this state, considered in the light of the constitution, do not delegate to he board of parole any right to discharge a person except under the conditions above referred to. The legislature cannot pass laws which vest in any board either judicial or executive powers. The pardoning power is vested in the executive department; judicial powers are vested in the courts. When a court passes a sentence it passes a sentence which includes in it the right of a convict to shorten his time by good behavior, and the right of the board of parole to test out the prisoners by paroling them, and, when finding by the statutory tests that they are fitted for citizenship, to give them final discharge.

I do not think that the legislature intended to, or did, grant any other power of final discharge than that indicated. If it did grant, in form, a power of final discharge, at the uncontrolled discretion of the board of parole, such power would be unconstitutional as a delegation of either a judicial power, or an executive power, or a legislature discretion. The legislature itself could not exercise such a power in individual cases because of the clause in the constitution which says that no special law shall be passed "remitting fines, penalties or forfeitures." The legislature could pass a general law providing for a method of shortening sentences, provided it fixed the standard for such shortening and entrusted to a board the ascertaining of whether that standard has been complied with.

Your board is entrusted with the duty of ascertaining, by the ways heretofore indicated, whether or not inmates of either the state prison or the state reformatory have met the prerequisites and become fitted for release or final discharge.

Yours truly,

LYNDON A. SMITH,

Attorney General.

June 10, 1916.

494

STATE—Board of parole—Power to discharge prisoner before expiration of minimum term.

Charles E. Vasaly, Chairman State Board of Parole.

Dear Sir: I have to say that it is my understanding that the board of parole has power to discharge a man before his minimum term of sentence expires. There are certain conditions which must be complied with before discharge, but the expiration of the minimum term is not one of those conditions, so far as I am able to find.

Yours truly,

LYNDON A. SMITH,

Attorney General.

August 12, 1915.

495

STATE—Boiler inspection—Boiler under facts stated not subject to inspection.

George J. Allen, County Attorney.

Dear Sir: You inquire whether a boiler attached to and a part of a steam heating plant used for heating a three story building, the first floor of which is used for a barber shop and the second and third floors for rooming house purposes, and the boiler not being used for machinery or generating power purposes of any kind should be inspected by a state boiler inspector.

Construing the statute relative to the inspection of boilers in the light of State vs. Justus, 94 Minn. 207, I have to say that in my opinion such boiler is not subject to inspection.

Yours truly,

CLIFFORD L. HILTON,

Assistant Attorney General.

November 1, 1915.

496

STATE—Boiler inspection—Fees for inspecting state buildings.

J. A. O. Preus, State Auditor.

Dear Sir: I have to say that I think the state is under obligation to pay the inspector's fees for the inspection of the boiler in the building at Hibbing, owned by the state and used for the purpose of housing its official force of mining inspectors, engineers, etc.

The system of the state paying fees to its own servants is not to be commended, but it now exists to some extent.

Yours truly,

LYNDON A. SMITH,
Attorney General.

November 17, 1915.

497

STATE—Boiler inspection—Low pressure boilers in residences.

Hon. W. S. Hammond, Governor.

Dear Sir: You ask:

Whether a boiler inspector should inspect low pressure boilers used for steam heating purposes in private residences, or in buildings used partly for residence and partly for business purposes, and charge the customary fee for such examination, and also whether such plants should be operated only by a person having an engineer's license, I have to say that the law appears to be such that low pressure boilers in private residences are not to be examined by a state boiler inspector, nor does the law require that a person operating such plants have an engineer's license.

This question was decided by our supreme court in the case of State vs. Justus, 94 Minn. 207, to the above effect. The only question arising is whether or not this decision is now in force under the law as it now stands. A decision was rendered February 19, 1905, and interpreted the law as then existing. The revised laws of 1905 have governed in the matter since March 1, 1906. No amendments to the law relative to the inspection of boilers have been passed affecting the question contained in your letter since March 1, 1906. The code commission that prepared the revised laws 1905 said in its report of the chapter relative to the inspection of steam vessels and boilers. (Chapter 31).

"This chapter is written with only such changes as seemed necessary to clearness, and to reconcile apparent inconsistencies."

Report of the statute revision committee, page 18.

The code prepared by this commission was submitted to the legislature and adopted with certain changes by the legislature. The house changed but one word in said chapter 31, to-wit: "may" to "shall" in line seven. See journal of house, 1905 session, page 487. The senate changed only four words and those not material to the substance of the law. See journal of senate, session 1905, page 726.

After this careful investigation of the text and amendments of this chapter, there can be no doubt that the legislature intended to retain the old law in all its essential respects. The wording was changed but the exemption of boilers in private residence remained and is embodied in section 4737, general statutes 1913, in which it is provided that the boiler inspectors shall inspect all steam boilers in use in the state and not subject to federal inspection nor specifically excepted and grant licenses to those operating them "except those in heating plants in private residences."

The conclusion seems inevitable that in private residences, boilers cannot be inspected, and whether they can be inspected in buildings which are used partly for residence and partly for business purposes depends upon the amount of use for residence and for business. Under the circumstances existing in the case in 94 Minnesota, above referred to, the premises are to be treated as a private residence rather than a business block.

It is only low pressure boilers in buildings other than those constituting private residences which the boiler inspector can examine.

Yours truly,

LYNDON A. SMITH,
Attorney General.

October 8, 1915.

498

STATE—Boiler inspection—Low pressure boilers—Round house boiler.

Hon. W. S. Hammond, Governor.

Sir: The questions submitted are as follows:

(1) "Should a low-pressure steam heating plant, located in a hotel, be inspected, such plant not being used to operate machinery, and simply being used for the purpose of heating the hotel in question?"

In my opinion, construing the statute of this state relating to the inspection of boilers, in the light of State ex rel. vs. Justus, 94 Minn. 207, such boiler need not be inspected.

(2) "Is a stationary engineer in a railroad round-house exempt from taking out an engineer's license?"

In my opinion, this inquiry should be answered in the negative.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

October 30, 1915.

499

STATE—Boiler inspection—Right of inspectors to charge additional fees.

Hon. W. S. Hammond, Governor.

Dear Sir: I have to say that no persons holding office are warranted in charging fees in additional to those fixed by law. The principle which seems to apply in the case referred to in your said letter is stated as follows in State vs. Smith, 84 Minn. 295:

"The rule is that where services to be rendered the public are required of an officer and no compensation is prescribed, he must be considered as fully paid by fees or compensation already provided for."

The inspection of a boiler implies the investigation and critical observation of every part thereof to such an extent that the person inspecting can say that the boiler and all parts thereof are in such a condition as to be safely used.

Yours truly,
LYNDON A. SMITH,
Attorney General.

September 21, 1915.

500

STATE—Steam boilers—State inspection of federal agency.

R. E. Miller, State Boiler Inspector.

Dear Sir: You inquire as to the charges for the inspection of eight steam boilers used in the goverment buildings of the Red Lake Indian agency.

The general rule is, that federal officers who are discharging their duties in a state and are engaged in superintending the government and management of a federal institution under the direction of one of the departments of the federal government are not subject to the jurisdiction of the state in regard to matters arising in the usual course of the discharge of their duties as such officers.

With this rule in view, this department in an opinion rendered under date of July 13, 1912, held that an engineer employed in the government post office could not be required to comply with the provisions of the state law requiring him to procure an engineer's license as a condition to the operation by him of a steam boiler used in the post office building.

I think it equally clear that the duty of inspecting the boilers in the agency buildings referred to by you, rests exclusively upon the officers and employees of the general government and that the state officers are without authority to interfere with the performance of that duty.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

August 10, 1916.

501

STATE—Inspection steam boilers—Vessels navigating international waters.

R. E. Miller, State Boiler Inspector.

Dear Sir: You call attention to the fact that there are several steam boilers on boats operated on Rainy river and Rainy lake, owned by residents of Minnesota, that have not been inspected by the government nor by any insuring casualty company and you ask as to your duty in the premises.

The statute providing for the appointment of steam boiler inspectors makes it the duty of the persons appointed "to inspect all steam boilers in use in the state not subject to inspection under the laws of the United States * * * and to examine and license all masters and pilots on inland waters of the state as nearly as may be according to the regulations provided by the laws of the United States."

Rainy lake and Rainy river are international waters and steam boats operated thereon are subject to government inspection and hence exempt from state inspection.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

June 12, 1916.

502

STATE—Boiler inspection—School houses.

H. M. Way, Esq.

Dear Sir: You are advised that this office on November 10, 1913, held that the law does not require that the boiler (steam heating plant) located in the school house should be inspected by the state boiler inspector. We also think that although such inspection is not required by law it would be permissible, in the interests of public safety for the district to have its boilers inspected as often as might be deemed necessary. It is not necessary that a person should have a license to run such a heating plant where no inspection is required by law.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

November 18, 1916.

503

STATE—Governor—In re consultation with chief executive officers re budget.

Hon. J. A. A. Burnquist, Governor.

Dear Sir: As to the construction of the term "in consultation with chief executive officers" as used in section 5 of chapter 356 of the session laws of Minn. for 1915. I have to say that it is my opinion that this term refers to the other officers who with the governor constitute the executive department of the state. The heads of boards, commissions and the like are spoken of elsewhere in this chapter in other language. (See sections 2, 4, 8 and 9). Strictly speaking, there is but one chief executive and that is the governor, but the language of the act under consideration extends that word further than to the governor himself and the next class to the governor, and those to whom the term "chief executive" can most naturally and fittingly be applied are those who, with him, constitute the executive department. They have no control over the matter of the budget

and no vote; they do not constitute a board; they are enumerated in section 1 of article V of the constitution; they have a different status from any other officers of the state. See Cook vs. Iverson, 108 Minn. 388, 390; constitution, article XIII, section 1.

The "consultation" as to character and extent would be largely within the discretion of the governor who alone makes the final revision of the estimates presented. Neither does the law limit in any way the consultation of the governor with those officers and heads of boards and commissioners who submit to him estimates of the expenses necessary for the proper conduct of the work over the financial features of which they have supervision.

Yours truly,
LYNDON A. SMITH,
Attorney General.

December 23, 1916.

504

STATE—Governor—Rewards for criminals—From what fund paid.

Hon. Winfield S. Hammond, Governor.

Dear Sir: I am of the opinion that both by precedent and by reasonable interpretation you may offer a reward for the detection, arrest and conviction of persons who have committed serious crimes, and the reward may legitimately be paid from the appropriation "for payment of expenses of requisitions for fugitives from justice and for detecting criminals." This appropriation is now found as paragraph 10, section 52, chapter 401, general laws of Minnesota 1913. (Page 584).

Yours truly,
LYNDON A. SMITH,
Attorney General.

March 13, 1915.

505

STATE INSTITUTIONS—Jurisdiction over lands of.

Secretary State Board of Control.

Dear Sir: You ask:

1. "Has a city (or county), within the limits of which a state institution is situated, any legal authority over the state domain?"

I beg to advise you that, in my opinion, this question is to be answered in the affirmative.

I cannot, at this time, think of any legislative power vested in a county board which would permit it to make any rules and regulations which would be operative in or on the premises owned by the state and used for the purposes of a state institution. Of course the penal laws of the state are operative over such territory, and the sheriff, coronor and peace officers of the county, would have authority to go thereon, if the proper

performance of their duties required it. Whether all of the ordinances of a city in which the state institution is situated would be operative on the state owned land, is too broad a question to be answered at this time. We prefer not to pass upon such a question until a specific instance arises.

It seems clear that, as a general rule, the ordinances of a city in which the state institution is situated would be applicable to such land, and the conduct of persons thereon. To illustrate: An ordinance prohibiting the discharge of firearms in the city would be violated thought the person discharging the gun were standing on the state owned land; so too, an ordinance prohibiting drunkenness or lewd behavior would be violated by such conduct on state owned land. (28 Cyc. 391).

2. The second question is answered by the foregoing.

3. The third question is:

"Is the state entitled to police protection from the city police force when necessary?"

Answering this question, I beg to advise you that, in my opinion, the persons of the state employes and property of the state, within the territorial limits of a city, are entitled to police protection, the same as are the persons and property of other residents. For the proper performance of their duties in this respect, the city police officers have the same rights on state owned property as they would have on privately owned property.

4. The fourth question is as follows:

"Are not the roads and grounds within the limits of the state's domain, to all intents and purposes, private grounds set aside for a specific purpose?"

In my opinion, this question is to be answered in the negative. A private owner of lands has the right to exclude all persons therefrom, irrespective of what motive they have in going upon such lands, except of course, public officials, in the proper discharge of their official duties.

Persons having business with the superintendent and officers of a state institution have a lawful right to go upon the state owned premises for that purpose; but in so doing they must observe reasonable rules and regulations, made by the authority in charge of such premises, as to the time and manner in which they exercise their rights.

Roads and paths on state owned lands, used for institutional purposes, are subject to the same regulatory power on the part of the person or body in charge of the state owned lands, as are those parts of such land not so utilized. If, however, state owned lands happen to be located on two sides of a public highway, the state and its officers have no more authority over such road than would the private owner of lands situated on two sides of a public road.

The person, or body, in charge of state owned lands which are used for institutional purposes, have a right to exclude the general public from using such lands for recreation purposes, especially if such use is inimical to the welfare of the inmates of the institution.

The lands must be used for the purposes for which they were acquired, and a use which is subversive of that purpose should not be permitted.

I do not attempt to pass upon the the question of whether any public highway which formerly extended through the grounds at Fergus Falls has been vacated as such, so as to be divested of its character as a public highway.

Section 4082, general statutes 1913, provides inter alia:

"That the state hospital for the insane at Fergus Falls shall be maintained under the general management of the board of control."

Yours truly,
C. LOUIS WEEKS,
Assistant Attorney General.

July 8, 1915.

506

STATE LANDS—Contracts—Rate interest—Right of holder to pay contract before maturity.

J. A. O. Preus, State Auditor.

Dear Sir: Relative to chapter 13, general laws 1915, I have to say that this chapter amends section 5210 of the general stautes 1913 so that four per cent becomes the universal rate of interest on contracts outstanding for the sale of school lands without regard to the date when they were made.

I have also to say that in my judgment if any person wishes to pay up on any contract for the sale of land by the state, he may do so at any time by paying the principal with the interest in full. Interest does not now become due "in advance" but as annual interest on ordinary obligations becomes due.

Yours truly,
LYNDON A. SMITH,
Attorney General.

March 3, 1915.

507

STATE LANDS—Leases for sale of dirt from land under mineral lease.

J. A. O. Preus, State Auditor.

Dear Sir: I am of the opinion that the auditor may execute leases for the sale of sand, gravel, and black dirt from the lands which are under mineral lease, provided the later lease now made does not in any way interfere with any of the rights granted to the lessee under the former lease.

Yours truly,
LYNDON A. SMITH,
Attorney General.

May 20, 1915.

508

STATE LANDS—Mineral lease—Forfeiture for non-payment of royalties.

J. A. O. Preus, State Auditor.

Dear Sir: You call attention to the language in the statutory form of mineral lease which relates to the cancelling of the lease by the state auditor for failure to pay royalties or taxes "first having given to the party of the second part at least twenty (20) days' notice in writing" and you ask whether such delinquent taxes or royalties could be paid during the twenty-day period, thereby defeating the attempt to cancel the lease.

The above quoted language is somewhat indefinite as to the purpose of such notice, but in my opinion it can be given no other consistent meaning than that the state through its auditor must give such notice of its intention to claim a forfeiture and cancellation of the lease as a condition precedent to its re-entry or to the commencement of court proceeding to terminate the relation of the parties and give to the state the possession of the property. It is the nature of that many more days of grace after the state has decided to apply the remedy of forfeiture for the breach of the covenant to pay money. It therefore necessarily follows that the lessee, during said twenty-day period, could perform its convenant to pay royalties or taxes due and thereby prevent the proposed cancellation.

The right to forfeit a lease for non-payment of rent is intended merely as security for the payment of the rent, and it is a well-established rule that even after an action has been instituted by the landlord to recover possession for breach of a covenant to pay money that the tenant, upon payment of arrears with interest and the costs of the proceedings, if any are instituted, is entitled to be relieved from the forfeiture. So that even under the old form of mineral lease used prior to the amendment of 1895, which did not provide for this preliminary twenty-day notice, the lessee can tender his money payment before the state had actually taken possession after a judgment of court decreeing the lease cancelled and the rights of the lessee forfeited, and be thereby entitled to continue under the lease

You also ask whether you could declare a cancellation and take possession of the premises without giving such twenty-day notice. This is answered in the negative if the lease contains a provision for notice such as above quoted.

Yours truly,

WILLIAM J. STEVENSON,

Assistant Attorney General.

September 8, 1915.

509

STATE LANDS—Mineral leases—Right of state to compel washing of ore.

J. A. O. Preus, State Auditor.

Dear Sir: You present several problems concerning the washing or concentrating of iron ore on state lands, which lands are covered by the ordinary statutory mineral lease. I advise you thereon as follows:

1. The question of whether the state can compel its lessees to mine iron ore at any given time during the term of the lease has been considered many times by the state auditor and by this office without any definite conclusion being reached. I prefer not to express one at this time. I think, however, that if the washing or otherwise concentrating of iron ore becomes general in the mining region in which the state's ore deposits are situate, so that such concentrating is considered a customary and approved practical method of mining operations, that the state will have the same right to compel the lessee to so treat the low grade ore that it has to compel the lessee to remove, ship and pay for the deposits of merchantable ore.

2. If such treating of low grade ores becomes an approved, practical and customary method of mining operation, the state auditor, in my opinion, has the legal right to determine that the low grade state ores may be so treated, and through the state mining inspector, may arrange the details thereof. If it is impracticable to so concentrate such ores upon the premises covered by the lease, and the treating of them in the vicinity by some central concentrator plant appears to be for the best interests of the state, I see no legal objection to the state auditor reaching such conclusion and arranging the details of inspection, weighing and other control in the best practical manner.

3. If the process of concentration ceases at the point where the ore contains the lowest percentage of iron, which makes ore of that particular structure, and of that particular combination with other ingredients merchantable, the royalty should be computed upon such concentrate. The state should get its royalty upon the iron ore as it is taken from the ground, or as it may be cleaned or concentrated, to the extent of and for the sole purpose of making it merchantable, and no more.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

March 1, 1916.

510

STATE LANDS—Trespass upon, after sale.

J. A. O. Preus, State Auditor.

Dear Sir: You state that this summer the party named by you purchased a tract of state swamp land in St. Louis county at public auction, paid fifteen per cent of the purchase price as required by law, and con-

tracted to pay the balance sometime within forty years at the rate of four per cent interest. It now appears that certain mining companies by maintaining dams are flooding the land in question. You then submit the following inquiry:

"Inasmuch as * * * interest appears to be 15 per cent of the selling price of the land and the state's financial interest 85 per cent of the same, I desire to be advised what, if any, action can be taken by the state to abate the trepass upon the described property."

Our supreme court in the case of White & Street Townsite Co. vs. Neils Lumber Company, 100 Minn. 16 (22) held as follows:

"The owner of a state certificate of sale of school or swamp lands is entitled to possession of the land and its rents and profits, and as against all the world, except the state, he is to be treated as owner of the land. He may maintain ejectment for its possession and trepass against a wrongdoer. When the patent for such land issues, it relates back to the date of the sale."

In my opinion it would therefore follow that the state cannot maintain an action to abate the dams in question. It is barely possible, however, that if the injury being done to the land is of a permanent nature and of such a nature and to an extent that seriously impairs the security of the state for the balance that is to be paid to it, proceedings may be maintained by the state.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

October 15, 1915.

511

STATE LEGISLATURE—Adjournment after one day's session.

Hon. H. H. Flowers.

Dear Sir: I am of the opinion that there is no legal objection to the legislature adjourning this day. The rule with regard to the proving of the journal is statutory and therefore the legislature is not obliged to regard it. Each house of the legislature should however, read and correct its journal as kept today before adjourning.

The section of the constitution which created some doubt is section 22 of article 4 which prescribes that "No bill shall be passed by either house of the legislature upon the day prescribed for the adjournment of the two houses." This provision relates to the prohibition of the passage of acts upon either the ninetieth day of a legislative session or the day which has been fixed by some previous resolution or act as the time of adjournment.

This is my best judgment and that of others familiar with the matter. The records of the constitutional convention show that no discussion whatever of this section was had prior to its adoption.

Yours truly,
LYNDON A. SMITH,
Attorney General.

October 28, 1916.

512

STATE LEGISLATURE—Bills lost after passage.

Hon. J. D. Sullivan.

Dear Sir: The rules of the senate require every bill to be engrossed before being transmitted to the house of represntatives for concurrence. Rule 47 requires that all bills should be enrolled, but does not state at what exact time in the course of the work of the legislature upon the bill the enrollment shall take place. The house rules say that when the bills are reported correctly enrolled and presented to the presiding officers of the two houses for their signatures, they are to be presented to the Governor for his approval. The constitution says:

"Every bill having passed both houses shall be carefully enrolled and shall be signed by the presiding officer of each house."

Our supreme court has commented on what constitutes the meaning of the word "passed" in the case of Burns vs. Sewall, 48 Minn. 425, 430. In that case appears the following:

"Section 21 of the article (4) provides: 'Every bill having passed both houses shall be carefully enrolled and shall be signed by the presiding officer of each house.' When that is done the bill is in condition to be sent to the Governor for his action upon it. It is then to be deemed as 'passed' for that purpose."

If the bill was lost in the engrossing clerk's office, rather than in the enrolling clerk's office, it would seem that it never was presented to the Governor for his approval. No bill can be considered as passed completely until it not only has been presented to the Governor but signed by him.

Section 11 of rule 4 says:

"Every bill which shall have passed the senate and house of representatives in conformity to the rules of each house, and the joint rules of the two houses, shall, before it becomes a law, be presented to the Governor of the state."

This bill was in existence on April 21, which was the last day for passage of bills, consequently, it was one of that class of bills which the Governor had three days after the adjournment of the legislature within which to sign. That class of bills did not become laws unless the Governor signed them, because of the adjournment of the legislature.

I cannot see any way in which this lost bill can be legally considered a law, or be made a law.

Yours truly,
LYNDON A. SMITH,
Attorney General.

May 15, 1915.

513

STATE LEGISLATURE—Enrolling clerk—Salary—Powers—Committee legislature expense.

Hon. H. W. Haislet.

Dear Sir: You inquire:

First—As to the construction of the law which fixes the amount of salary of the enrolling clerk of the house, and,

Second—As to the limit of the power of the legislative expense committee, under section 21 of chapter 3, general statutes 1913, I have to say:

First: The salary of the enrolling clerk of the house seems to be fixed at $5.00 a day by the statute of this state. The statute does not specifically state that the enrolling clerk shall be paid $5.00 a day, but it does say that "all other employes" are to be paid $5.00 each, unless fixed at a less sum by resolution of the appointing body. The only doubt as to the correctness of this answer is created by paragraph 4 of section 33, general statutes 1913, which says "the assistant secretaries and assistant clerks $7.00 each." When this is read in connection with that which precedes, it would seem plain that the persons who are to receive this $7.00 each per day were the assistants of the secretary of the senate and the assistants of the clerk of the house. The statute provides (section 30) that there shall be "a first and second assistant secretary" of the senate and "a first and second assistant clerk" of the house, and it is to these specific offices that the statute refers when it fixes their salary at $7.00 per day.

Second: The statute says (section 31):

"Each house, after its organization, may appoint, and at pleasure remove, such necessary door keepers, cloakroom keepers, clerks, messengers, and other employes as are provided for by its permanent rules, or recommended by its committee on legislative expenses."

This means that neither house of the legislature can appoint employes of the kind above mentioned except when such employes have been either (1) provided for by its permanent rules, or (2) recommended by its committee on legislative expenses.

The committee on legislative expenses of either house has a check on its expenses which cannot be evaded by such single house except by the adoption of permanent rules.

Yours truly,

LYNDON A. SMITH,
Attorney General.

January 25, 1915.

514

STATE LEGISLATURE—Contested seats in—Evidence to be considered.

Hon. G. B. Bjornson.

Dear Sir: As to what extent sections 525, 526, 527 and 528 of chapter 6, general statutes 1913, are binding upon the house of representatives in the matter of receiving, accepting, acting upon and determining election contests and evidence furnished by contestants, I have to say that these sections are valid for the purpose for which they were enacted and to the extent to which the legislature had the right and power to enact them. They were enacted by virtue of a special power given to the legislature by a clause found in section 17 of article IV of the state constitution. This section contains the following paragraph:

"The legislature shall prescribe by law the manner in which evidence in cases of contested seats in either house shall be taken."

This evidence can only be used in the determination of contests as to election to one or the other of the houses of the legislature. Such contest is before the house, a seat in which is being contested. The constitution provides that "each house shall be the judge of the election returns and eligibility of its own members." (Section 3 article IV).

The two clauses of the constitution already quoted do not conflict with each other. One clause relates to the determination of the question as to who is elected and qualified as a member of the house to which he claims to have been elected. The other, so far as it is a constitutional law, provides the manner in which evidence in such cases is to be taken. The statutes which do prescribe rules as to the taking of evidence apply to time prior to the meeting of the legislature, and evidence taken pursuant to those laws, by or in behalf of contestant, should be presented to the legislature, and the legislature should receive it and consider it. The exact relation of evidence so taken to the work of the legislature in deciding as to contested seats, has been stated by the supreme court as follows:

"The whole matter is still with the legislature, who can receive or reject the evidence secured by the inspection and examination of the ballots, and if they receive it, give it only such weight as they see fit. It is merely a convenient method of preparing or securing evidence in advance of the meeting of the legislature, instead of waiting until that body convenes; and it no more interferes with its constitutional right to judge of the election of its own members than does the law requiring the board of canvassers to give a certificate of election to the candidate receiving the highest number of votes. See O'Ferrall vs. Colby, 2 Minn. 180, (Gil. 148). There is nothing in State ex rel vs. Peers, 33 Minn. 81, (21 N. W. 860) in conflict with this view. This law as we have construed it, is a provision enacted by the legislature itself for securing or preparing evidence to be used on the trial of the contest; and, as said in the case last cited, the house may reject it altogether, and provide, if they see fit, for the re-examination of the ballots in some other way."

State vs. Searle, 59 Minn. 489, 492.

I am of the opinion that the foregoing decision of the supreme court states the law as it now exists, that it is an interpretation of the sections of the statute involved in your question in substance, and that it should be deemed the guiding rule of the legislature. I am further of the opinion that the legislature may obtain further information upon the questions involved in any contest before it in such way as it deems most conducive to a fair and intelligent decision of the question involved. The legislature does not seem to have provided a method strictly and wholly applicable to the securing of evidence in election cases after the convening of the legislature. Under such circumstances the legislature should take the evidence in ways as nearly like the manner prescribed by the statute as possible, but should supplement it by such investigation as will satisfy

it most fully as to the merits of the case. Ultimately the house of representatives must do the work assigned it by the constitution of being "the judge of the election returns and eligibility of its own members."

Yours truly,

LYNDON A. SMITH,
Attorney General.

January 28, 1915.

515

STATE LEGISLATURE—Expenses of contest in—Cannot be paid out of legislative expense fund.

Hon. G. B. Bjornson.

Dear Sir: Relative to the payment of expenses incurred by contestants and contestees in court procedures in aid of their contests, I have to say that it has been the custom in this state for the legislature to appropriate, or to refuse to appropriate, money for the payment of such expenses. Taking into consideration this custom, and decisions which permit a legislature to ratify that which it might have done in the first instance, and the further extensive powers which a legislature has in the regulation of all election matters, including contests, I have to say that I am of the opinion that if the legislature in its wisdom should see fit to pay the expenditures of contestants and contestees in a house of the legislature, it could do so. I am further of the opinion that such payment cannot be made out of the fund provided by the appropriation of the legislature for ordinary legislative expenses.

It would follow, from the above, that a concurrent resolution of the house and senate would have no bearing upon the question except as an expression of the opinion of the two houses. The expenses could not be paid except by a bill passed by the legislature, appropriating the amount of the same for the specific purpose of their payment.

Yours truly,

LYNDON A. SMITH,
Attorney General.

January 28, 1915.

516

STATE LEGISLATURE—Members of, as witnesses—Procedure.

Hon. C. L. Sawyer.

Dear Sir: In reply to your inquiry whether a committee of the house of representatives can require the attendance of a member of that house or of the senate, as a witness in an investigation, I have to say that this matter is one for the determination of the respective houses. According to all the precedents that I can find, members of the house of representatives of the United States have always attended as witnesses the meetings of any investigating committee, though once a member did so under a most emphatic protest. See Hinds Precedents, volume 3, sections 1777 and 1778.

I do not feel that I have yet examined into the matter sufficiently to give a final opinion, but my judgment is that if any member of the house should not attend when summoned, the matter should be reported by the committee to the house for its action. If he should attend and refuse to testify, the same course should be pursued. If a senator is desired by a house committee, I would think it proper to issue a summons for him and send it to the senate with a request that it be served by the sergeant-at-arms of the senate and that the senate give the senator leave to appear before the house committee and testify.

Yours truly,

LYNDON A. SMITH,
Attorney General.

March 24, 1915.

517

STATE LOANS—Applications for—Ditches.

James H. Hall, County Attorney.

Dear Sir: In the matter of applying for state loans, I came some time ago to the following conclusion and still adhere to that conclusion:

"If sufficient evidence is furnished to the attorney general that the county is in good faith borrowing for the purpose of paying for the construction of a ditch, the payment for which it cannot escape, the county has shown all that it is necessary to show in making an application for a loan to obtain money to use or to replace money used in the construction of any ditch."

Yours truly,

LYNDON A. SMITH,
Attorney General.

March 20, 1916.

518

STATE LOANS—Bonds—Extending maturity of

L. J. Hauge, District Clerk.

Dear Sir: Relative to changing the date of maturity of certain bonds, for the sale of which to the state you are making application, I have to say that in the case of Sorenson vs. School District, (122 Minn. 59), some two and one-half years ago, the supreme court said that when the due date of bonds to be offered to the state was changed by subsequent resolution, so as to make each bond come a year later, and then was done by resolution of the board, the fundamental proposition had not been changed and the application was still good. The court said:

"The practical proposition presented to the electors concerned the advisability of the action for the purpose stated. No question can be raised of inherent invalidity, and the results of the change effected by the postponement in the dates of maturity are inconsequential."

Therefore, answering distinctly your question, I have to say that in my opinion you do not have to pass a resolution, post notices or hold meeting, but only to meet as a board and pass a resolution changing the due dates sufficiently so that no bond becomes due before July 1, 1921.

Yours truly,
LYNDON A. SMITH,
Attorney General.

December 15, 1915.

519

STATE LOANS—Change of form of organization in bonded district.

E. O. Melby, Esq.

Dear Sir: Where two or more districts are consolidated, such consolidation does not change the obligations relative to the payment of bonded indebtedness; in other words, if district A has outstanding bonds and is regularly consolidated with other districts, such consolidation does not relieve said district A from the bonded obligation, and does not place the bonded obligation upon the new consolidated district.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

October 29, 1915.

520

STATE LOANS—Change of territory in bonded district.

J. A. O. Preus, State Auditor.

Dear Sir: I have to say that where an application is made to the state for a loan by a school district and the loan is granted, that all the territory included in the school district at the time any portion of the money is turned over by the state to the school district becomes chargeable with the repayment of such money and the taking of certain territory out of the school district after the turning over of such money does not relieve such land so taken out of the obligation of the loan. If a loan is made to a school district and the school district boundaries are changed by the taking of territory therefrom, prior to the payment to the school district of money under the loan, then such territory is relieved from the obligation of repayment of such portion of the money as may have been turned over to the school district after such detachment of territory. In the instant case it appears that a loan was made to a certain school district, the application therefor having been approved by the Attorney General and the loan authorized by the state board of investment, a portion of the money covered by the bond issue was turned over to the school district and a few days after the county commissioners detached certain territory from the school district. Such detached territory, together with the other territory within the school district at the ime he application was made, is held for the amount of money so paid over. Upon the payment

to the school district of the balance of the loan, such payment being made after the detachment of the territory aforesaid, the obligation of the bond, insofar as such after paid money is concerned, rests upon the remaining territory of the school district. The condition of the municipality as regards territory and financial condition and the fact as to whether the area of the municipality has been changed since the application was made, should be ascertained before any money is paid over to such municipality. This is particularly true when a consideration is had of the limitations contained both in the law and the constitution upon the amount that can be loaned to a municipality which amount is as you know, limited to fifteen per cent of the assessed valuation of the real estate in such municipality.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

October 28, 1915.

521

STATE LOANS—Indebtedness of applicant.

C. J. Dodge, Village Attorney.

Dear Sir: I am of the opinion that section 1877 general statutes 1913 does not prevent your procuring a loan from the state of Minnesota, although the term "all other indebtedness" does not mean net indebtedness but gross indebtedness, or as you put it, "indebtedness of every nature."

I am of the opinion that there is no other limitation upon your village, under the facts stated by you in your letter of October 19, 1915, than the constitutional limit, to-wit: That the bonded indebtedness of a municipality to which the state is loaning money shall not (including the amount so loaned) exceed fifteen per cent of the assessed real estate valuation. The exact wording of the clause as found in section 6, article VIII of the constitution is:

"Nor shall such loan or investment be made when the bonds to be issued or purchased would make the entire bonded indebtedness exceed 15 per cent of the assessed valuation of the taxable real property of the county, school district, city, town or village issuing such bonds."

I do not think that section 1877, general statutes 1913, applies to your village at the present time, particularly because by your letter it appears that you had, at the time of the passage of chapter 320, general laws of Minnesota 1915, a floating indebtedness exceeding $5,000, and therefore your village comes within the provisions of that act. If you did not have a floating indebtedness in excess of $5,000 on April 24, then you would not come under that law. You have not distinctly stated the amount of your indebtedness at that time, but I take it inferentially that it did exceed $5,000.

The act has been questioned somewhat as being class legislation, but this office does not presume unconstitutionality, nor act upon any suspicion where there is not a practical certainty on the face of a statute that it is unconstitutional.

Yours truly,
LYNDON A. SMITH,
Attorney General.

November 12, 1915.

522

STATE—Oil inspection—Duties of inspector.

A. J. Rush, State Inspector of Oils.

Dear Sir: You ask whether your department should now furnish to oil companies stencils to enable such companies to brand their barrels or other containers in compliance with the present oil inspection laws, I state that it is my opinion that your inquiry is to be answered in the negative. Prior to the amendments of 1915, the law provided—

"The inspectors shall brand without extra charge one such barrel for each fifty-five (55) gallons thereof,"

which was previously inspected in tank cars. This provision was omitted in the 1915 amendments, and your department and its inspectors were by such amendments relieved of the duty of branding the barrels, but the owners are still required to brand the barrels to correspond with the result of your inspection. Therefore, the duty of furnishing the stencils as well as the labor in complying with this law rests upon the companies whose duty it is to so comply. It is no more your duty to furnish the stencils than it is to furnish the form of certificate which the selling company is required to give to purchasers.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

July 2, 1915.

523

STATE—Permanent trust funds—Loans to municipalities—Defects in proceedings.

Eric L. Thornton, County Attorney.

Dear Sir: I have to say that every election at which the question of borrowing money from the state upon the bonds of the municipality or school district is passed upon, must be called by the board or other governing body of the municipality. If the board calls a meeting, the state does not question whether or not there was a sufficient petition to compel the board to act. If the board calls an election and properly submits to the voters the question of issuing bonds, the state will not question whether there was a petition of the board for the calling of such an election or not, nor whether that petition, if one, was sufficient to com-

pel the action of the board. The board does not have to act without a sufficient petition, but when it does act, its action is its own action and sufficient. The only question that can arise as to a defective petition is one as to whether or not the board to whom the petition is directed, insists on a petition so drawn as to compel its action.

Yours truly,

LYNDON A. SMITH,

Attorney General.

January 13, 1915.

524

STATE—Permanent trust funds—Manner of investing.

To the State Board of Investment:

In respones to the resolution adopted January 16th, I have to report that the funds which are now being invested under the supervision of this board are known as the permanent school fund, the permanent university fund, the internal improvement land fund, and the swamp land fund.

There are different requirements as to the investment of some of these different funds. The permanent school fund was the first fund, the investment of which was regulated by the constitution. In 1875 it was provided that "suitable laws shall be enacted by the legislature for the safe investment of the principal of all funds which have heretofore arisen, or may hereafter arise from the sale or other disposition of such lands or the income from such lands accruing in any way before the sale or disposition thereof, any interest bearing bonds of the United States or of the state of Minnesota issued after the year 1860, or of such other state as the legislature may, by law, from time to time direct." In 1886 it was provided by an amendment of the constitution that "the permanent school funds of the state may be loaned upon interest at the rate of five per cent per annum to the several counties or school districts of the state, to be used in the erection of county or school buildings. No such loan shall be made until approved by the board consisting of the Governor, the state auditor and the state treasurer, who are hereby constituted an investment board for the purpose of the loans hereby authorized, nor shall any such loan be for an amount exceeding three per cent of the last preceding assessed valuation of the real estate of the county or school district receiving the same."

A section was added to article VIII of the constitution in 1896, permitting the permanent school and university fund of this state to be invested in the bonds of any county, school district, city, town or village of this state by the board of commissioners designated by law to regulate such investment.

There does not appear to be any statute of this state regulating specifically the securities in which other funds of the state than the permanent school fund and the university fund may be invested.

Chapter 122 of the laws of 1907 is an act regulating the procedure of making loans rather than the investments in which the money may be placed. Assuming that the foregoing is correct, then the permanent school

fund can only be invested in municipal bonds and in United States and state bonds, and in the latter only when directed by the legislature. The university fund, by implication it would seem, should be invested only in municipal and school bonds of the various subdivisions of this state. The swamp land fund may be invested in such way as may be provided by statute and the same appears to be true of the small amount coming into the internal improvement fund.

The certificates of indebtedness which have been issued by the state at different times within the last twenty years, do not constitute bonds within the ordinary and accepted definition of that word, and therefore, in my judgment, the permanent school and university funds of the state should not be invested in them. I see no reason why a law may not be passed permitting the investment of the other two funds in such certificates of indebtedness, except that it is not considered exactly the right thing to do for a trustee to invest trust funds in its own enterprises. However, the elements which are common to certificates of indebtedness and bonds are such as to make them substantially a similar investment to actual state bonds. Both bonds and certificates of indebtedness have behind them the honor of the state, and the probability, amounting to a practical certainty that the state will pay its obligations. Further, those obligations are based on a specific promise to pay, or at least the implied promise which exists in a tax commanded to be levied for the purpose of paying the certificates of indebtedness. I am of the opinion that it would be well to pass a law which does not purport to be an amendment to any law now on the statute books and providing that the present board of investment shall be known as the board of commissioners required by section 6, article VIII of the constitution; that said board shall regulate the investment of all the trust funds of the state except as otherwise provided by the constitution; that the other trust funds of the state than the permanent school and university funds may be invested in certificates of indebtedness as may seem desirable to said board of commissioners, and that the funds of the internal improvement fund and of the swamp land fund shall be invested as they accrue for investment, in the certificates of indebtedness now held by the other funds of the state, until there shall be no certificates of indebtedness held as a part of the investments of the permanent school and university funds.

Respectfully,

LYNDON A. SMITH,
Attorney General

February 1, 1915.

525

STATE—Statutes—Constitutionality—Improper classification.

W. F. Odell, County Attorney.

Dear Sir: I have to advise you that the provisions of the first paragraph of section 2325, general statutes 1913, attempting to withdraw from the valuation for certain salary purposes "moneys and credits" and making

a different rule as regards counties having an area of more than five hundred square miles and an assessed valuation of more than nine million dollars was held by this office to be unconstitutional.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

February 16, 1915.

526

STATE—Treasurer—Refund of moneys paid into treasury through mistake.

J. A. O. Preus, State Auditor.

Dear Sir: You inquire:

Whether you have authority to refund payments made to the state and credited to the proper funds, when such payments have been excessive and made through mistake or error. I have to say that the constitution of the state prevents you from making such payments.

When moneys are paid to the state and credited to the proper funds they are deemed to be in the treasury of the state and therefore are controlled by section 9 of article IX of the constitution, which says:

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

Such erroneous payments are to be returned by appropriation by the legislature of a proper amount to reimburse the person losing by such erroneous payment.

Yours truly,
LYNDON A. SMITH,
Attorney General.

May 17, 1916.

527

STATE—Treasurer—Right of to receive delayed payments without interest.

A. C. Gooding, State Treasurer.

Dear Sir: In reply to your letter inquiring substantially whether the state treasurer is warranted in receiving, without interest thereon, moneys due the state July 1 of each year but transmitted to the state at some later date, I have to say that all of the moneys belonging to the state, and held by either debtors to the state or the collecting agents of the state, should be paid to the state at the time fixed by law for the transmission of such moneys to the state, or in case there is no law on the subject, then within a reasonable time after receiving such moneys. If the agents of the state do not remit to the state according to law the moneys collected by them for the state, then interest accrues on such moneys in favor of the state.

The rule as stated by Mechem on Agency is that an agent will be chargeable with interest upon all moneys in his possession which he has

neglected to pay over when he should, or to apply seasonably to the purpose for which he received them. Such interest will be computed from the time of such neglect.

"Interest in these cases is allowed upon the ground that the agent has retained in his possession money of which it was his duty to make some other disposition."

See Anderson vs. State, 2 Ga. 370.

A possible doubt in the matter arises from a long continued custom tolerated by the state heretofore, for county treasurers who are particularly busy immediately after the collection of taxes in large amount, to hold such moneys due the state until a convenient time occurs for the transmission of the same to the state treasury. The law seems plain as to their duty to remit and therefore cannot be held inapplicable because of a contrary custom. The statute as to the remitting of moneys received by county treasurers, paid to them as principal, interest or penalties due on certificates of sale of public lands, is that "during March, June and October of each year, and at other times when requested by the state treasurer, he (the county treasurer) shall pay into the state treasury all such moneys received since the last payment made." (Section 5240, General Statutes 1913).

Yours truly,
LYNDON A. SMITH,
Attorney General.

July 20, 1916.

528

STATE—Veterinary board—Examination of applicants for license.

Secretary, Veterinary Examining Board.

Dear Sir: Section 2 of chapter 419, laws 1907, reads as follows:

"Every graduate * * * shall be entitled to an examination by the board upon the payment in advance of a fee of $25."

Under this statutory provision the board has a large discretion in determining what constitutes an examination. The law does not require that the examination shall be held continuously—the fact that there is an interval between the dates when various proceedings in an examination are had does not necessarily make the proceedings of the last day a separate examination. I should say that the board could give an applicant a rehearing in a major subject in which he had not previously satisfied the board, as to his knowledge, **without being required by law to charge a** new fee.

The object of the examination is to determine an applicant's fitness to practice as a veterinarian; the fee is required to defray the expense of conducting the examination. A procedure which in itself results approximately in the accomplishment of those ends would be lawful. If a person "passes" in several major subjects and is given a rehearing in one or two subjects, it would seem that the rehearing in the one or two subjects should be considered a part of the examination for which a fee has been paid, rather than a new examination.

On the other hand, if an applicant is rejected and again comes before the board for examination in such a way that the board in passing on his qualifications does not have regard to the examination already had and for which a fee has been paid, then the board can lawfully require the payment of a new fee as a condition precedent to such second examination.

Yours truly,
C. LOUIS WEEKS,
Assistant Attorney General.

March 15, 1916.

529

TAXATION—County board equalization—Power to equalize assessments in odd years.

Minnesota Tax Commission.

Gentlemen: As to the authority of an assessor or county board of equalization to change the assessed valuation of real estate in the odd numbered years, where such valuation does not result from the erection, damage or destruction of structures, I state that the case of State vs. Atwood Lumber Company, 96 Minn. 392, to which you refer, appears to be undoubted authority to the effect that under section 2041, G. S. 1913, the county board of equalization may in the odd numbered year equalize the assessed value of real property. The question seems to have been fully and frankly presented to the court in the briefs of both parties in this case as to the authority of the county board of equalization.

The rule in the odd numbered year must necessarily be that only where an affirmative showing of a material change in value is made before that board should the assesed valuation of any tract of real property be changed. I do not think the opinion of the court can be construed to mean that the tax payer should apply for a reduction in the assessed valuation to the county board as such, for in every instance the court calls it the "county board of equalization."

The reasoning used by the court in reaching this conclusion as to the board of equalization is not applicable to that of an assessor, and in my opinion the assessor can not in the first instance in odd numbered years change the assessed valuation of any tract of real estate the value of which has materially changed without reference to erection or destruction of buildings or other structures.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

December 18, 1915.

530

TAXATION—Delinquent personal property tax—Collection of.

G. A. Youngquist, County Attorney.

Dear Sir: You make certain inquiries relative to the collection of delinquent personal property taxes.

In my opinion, a personal property tax is not a debt or liability within the meaning of section 12, article 1 of the state constitution, and accordingly no property is exempt from seizure under the provisions of either of said sections. The sheriff, however, must exercise a sound discretion as to the property to be seized. He is bound to select such articles as will best facilitate the satisfaction of the tax with the least expense and inconvenience to the tax-payer.

As to the seizure under said sections, of property covered by a chattel mortgage, in this state personal property taxes are imposed on the person rather than on the property, which is resorted to merely for the purpose of ascertaining the amount. Such being true, the only property which is subject to seizure and levy under said sections is the property of the delinquent personal property tax-payer. The rights and interest of a chattel mortgagor may be seized, levied upon and sold under execution, and for procedure in such a case, see Barber vs. Amundson, 52 Minn. 358.

Yours truly,
EGBERT S. OAKLEY,
Assistant Attorney General.

April 22, 1916.

531

TAXATION—Delinquent realty tax—Successive bids by state.

George T. Olsen, County Attorney.

Dear Sir: You state that the 1905 taxes on a certain piece of land became delinquent, and such parcel was bid in by the state in May, 1907; that the 1906 taxes on said land likewise became delinquent, and in May, 1908, said land was again bid in by the state; and that an application has been made for a state assignment certificate of the 1906 taxes.

You inquire if the county auditor can legally make a state assignment certificate for the 1906 taxes.

You are advised that as such parcel was bid in by the state in May, 1907, for the 1905 taxes, and as such land has not been redeemed or assigned by the state, it was contrary to law for the county auditor to offer the same for sale in 1908 for the 1906 taxes.

If any person desires to purchase a state assignment certificate for the 1905 and subsequent taxes, the auditor can legally make such an assignment, ignoring the erroneous action taken in 1908.

Yours truly,
EGBERT S. OAKLEY,
Assistant Attorney General.

May 26, 1916.

532

TAXATION—Ditch liens on state and federal land.

Minnesota Tax Commission.

Gentlemen: I return the application of ———— for refundment of certain ditch assessment liens bought by him at tax sales.

This application is made upon the ground that the real estate was exempt from such taxation. The right to a refundment under such circumstances is purely statutory and the applicant must clearly bring himself within the statute.

Part of the land involved was owned by the federal government and part of it was owned by the state. The land owned by the United States was not exempt from ditch assessments either at the time the assessment was levied or at the time————————bought the liens. Section 1 of the so-called "Volstead drainage act" of congress provides:

"All land in the United States when subject to entry and all entered lands for which no final certificates have been issued are hereby made and declared subject to all the provisions of the laws of the state relating to the drainage of swamp or over-flowed lands for agricultural purposes to the same extent and in the same manner in which lands of a like character held in private ownership are or may be subject to said liens."

Congress having thus specifically provided that these lands may be so assessed has taken them out of the exempt class for such form of taxation, and the purchaser of such liens obtains substantial advantage in being able to buy said lands from the United States under the terms and conditions set forth in said "Volstead" law.

As to the state lands, the question is more difficult. Our statutes specifically provide that such state lands may be assessed and while the legislature has from time to time made appropriations of public funds with which to pay the accrued interest on such assessments, the character or nature of such assessments has not been determined by the courts.

The underlying theory, though not fully developed by legislation, is that these assessments are unenforcible against the state, but when the land is sold by the state the liens attach and are no longer dormant.

The legislature has consented that these public lands should be subjected to these assessment charges, but of course the state cannot be deprived of its land if it does not pay the ditch assessments.

It would seem that prior to the sale of the land by the state that the assessment lien, though in existence, is suspended so far as the state is concerned. Under such circumstances, it can hardly be said that the land is exempt from assessment so as to entitle this applicant to a refundment under the statute, which gives the right of refundment in case the land is exempt from taxation.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

June 8, 1915.

533

TAXATION—Exemptions—Personal property belonging to individual but located in federal building.

P. J. Johnson, Postmaster.

Dear Sir: You inquire if postoffice furniture and fixtures **owned** by you and used in a postoffice in connection with the reception, handling and distribution of U. S. mail is exempt from taxation.

You are advised that such property is taxable as it does not fall within any of the exemption provisions of our law. If the property was public property, and not owned by you, as stated, it would be exempt.

Yours truly,
EGBERT S. OAKLEY,
Assistant Attorney General.

May 19, 1916.

534

TAXATION—Foreign bonds—Money and credits.

Roy M. Watkins, Esq.

Dear Sir: I inform you that this state since 1911 has attempted to tax all moneys and credits owned by residents of this state by imposing a flat annual tax of 3 mills on each dollar of the fair, cash value thereof. This includes foreign municipal bonds, as well as all other kinds of promises to pay. The place of the residence of the debtor is of no consequence. We also have a statute which exempts bonds of Minnesota municipalities issued after April 18, 1911.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

August 24, 1915.

535

TAXATION—Governmental utilities not taxable.

J. Burr Ludlow, President Village Council.

Dear Sir: You are advised that the general rule is that an electric light plant owned by a village and used primarily for the purpose of lighting the streets and public highways is a utility devoted to governmental purposes and therefore not taxable.

I cannot well answer the question of whether any particular light plant is taxable, not knowing all the facts in connection therewith. If taxable at all, it is to be assessed by the local assessor.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

March 12, 1915.

536

TAXATION—Governor without power to issue certified copies of tax deeds.

Hon. Winfield S. Hammond, Governor.

Dear Sir: Answering your inquiry as to whether it is your duty to issue, upon request, a certified copy of tax deeds formerly issued by your

office, and if so, what your fee should be therefor, you are advised that in my opinion you cannot legally certify to any such copy. I am unable to find any statute which authorizes or countenances the making by the Governor of a duplicate of a tax deed issued by him or the recording of such deeds upon their issuance. The copies of such deeds which you have retained can therefore be considered nothing more than office copies. The deed that is executed and delivered to the person entitled thereto is the official document. The office copy is not.

The statute under which certified copies are made by public officials is section 8423, G. S. 1913, but this gives authority to certify only to a copy of—

"The original record made by any public officer in the performance of his official * * * or of any document which is made evidence by law and is preserved in the office or place where the same was required or is permitted to be filed or kept, or a copy of any authorized record of such document so preserved."

Since your copy is not an "authorized record" you cannot well certify that any copy that you make make thereof is a copy of an authorized record.

If any person desires to have you make a copy of your office copy, you might charge him such reasonable sum as would pay for the clerical work necessary to prepare the copy for him. This would be in the nature of compensation rather than a fee of a public officer.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

July 21, 1915.

537

TAXATION—Gross earnings tax—Co-operative telephone companies.

L. Palm, Esq.

Dear Sir: I state that the taxing officials of the state consider that a co-operative telephone company must pay a gross earnings tax on all moneys collected from its members during the year with which to meet the ordinary running expenses, including connecting fees, as such contributions are the only means of determining the assessed value of the property. If they were not taxed on this basis, the property would escape taxation altogether. Contributions made by the members expressly for the purpose of building a new line would probably not be considered gross earnings, but if the money so used is gradually accumulated from the contributions that are made from time to time by the members for running expenses and really constitute the savings of the company, they would be considered gross earnings and therefore taxable. It would only be such contributions as were made expressly for the purpose of building a new line and not replacing or repairing an old one that might not be taxable.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

February 14, 1916.

538

TAXATION—Gross earnings—Refundment of taxes to railroad company.

Minnesota Tax Commission.

Gentlemen: Concerning the right of the Northern Pacific Railway Company to a refundment of taxes in accordance with their petition of December 22, 1914, I advise you as follows:

1. It is my opinion that moneys charged on the books of the company for transporting its own men and materials used in construction, addition and betterment work upon its own railway cannot well be considered gross earnings derived from the operation of the railroad. While the company may have a book-keeping account of such transaction, I do not see how it can be said that the railroad has earned anything for itself. It is no more an earning than if it should keep a bookkeeping account of the transportation of its traincrews used in the operation of the railroad. I therefor conclude that the company is legally entitled to refundment of the taxes paid resulting from the reporting of such amounts as earnings.

2. The amount charged to subsidiary companies for transporting men and material to be used in construction work upon subsidiary or proprietary lines, where such lines were not then being operated by the Northern Pacific Railway Company, must on the other hand, in my opinion, be treated as earnings; and I do not think a refund of the taxes paid thereon would be lawful or otherwise proper.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

March 6, 1915.

539

TAXATION—Inheritance taxes—Duties probate judge.

W. H. Goetzinger, Judge of Probate.

Dear Sir: The interitance tax cannot well be determined in any estate until after the claims have been allowed and the administrator has either filed his final account or in a petition for the determination of the tax states what the facts are with reference to the incurred and estimated future expenses of administration in the probate court.

I think the statute contemplates that all estates should be entered in the inheritance tax record book. At the same time, it is the general practice throughout the state for the judge to enter in that book only such estates as appear from the general inventory as being likely or possible to yield an inheritance tax.

Under the statute, an order cannot be entered allowing the final account until the inheritance tax has been paid. This does not prevent the court from hearing the final account and delaying the entry of the order until the tax is paid. The original tax receipt, countersigned by the state auditor and filed in your office, constitutes the best evidence of the payment of the tax and the freeing of all inventoried property from any

possible inheritance tax lien. I think this is the evidence or assurance that the statute contemplates should be relied upon by an examiner of a title rather than upon any recital that the court might insert in the final decree.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

October 5, 1915.

540

TAXATION—Interitance tax—Gifts where donor reserves life interest—Subject to.

Messrs. Catherwood & Nicholson.

Gentlemen: I am sending you herewith authorities and citations showing that in transfers of either real or personal property in the nature of a gift, in which the donor reserves to himself the beneficial enjoyment of the property during his life, such gift is subject to an inheritance tax upon the death of the donor.

Ross on Inheritance Taxation, which is one of the latest text books, says at section 121, (omitting citations not pertinent to the present inquiry):

"One of the first devices that suggests itself to accomplish an evasion of inheritance taxation in the making of trusts or other conveyances whereby the grantor or donor reserves to himself the beneficial enjoyment of his estate during life, and in order to lay such transfers under tribute and add to the public revenue, inheritance tax laws provide that transfers of property to take effect in possession or enjoyment after the death of the donor or grantor shall be liable to taxation. Statutes singling out such transfer are, as already pointed out, free from constitutional objections; and they have frequently been applied, both to transfers of real estate and to transfers of corporate stock and other personalty. They are not given a retrospective operation, unless the legislative intent to that effect is clear.

"The owner of property cannot defeat the tax upon it at his death by any device securing to himself for life the income, profit, or enjoyment thereof; the transfer, in order to be without the inheritance tax law, must be such as passes the possession, the title, and the enjoyment of the property in the grantor's lifetime. (People vs. Estate of Moir, 207 Ill. 180; 99 Am. St. Rep. 205, 69 N. E. 905; Lamb's Estate vs. Morrow, 140 Iowa, 89, 18 L. R. A., N S., 226, 117 N W. 1118). Exemption from the tax depends upon the passing of the property, with all the attributes of ownership, independently of the death of the transferrer.(State Street Trust Co. vs Stevens, 209 Mass. 373, 95 N. E. 851). The intention of the parties as to when the gift is to take effect is the test of taxability. (Estate of Patterson, 127 N. Y. Supp. 284).

"The statutes imposing the tax relate to estates granted in deeds or conveyances which in some way make the estate granted dependent on th grantor's death; that is, to interests in property, the possession or enjoyment of which is postponed until the death of the grantor. (Estate of Bell, 150 Iowa, 725; 130 N. W. 798)."

At section 112, the same author says:

"It is not necessary, in order that a transfer in contemplation of death be liable to the inheritance tax, that it should be made with fraudulent intent to evade taxation; it is enough that the gift is made in contemplation of death (Rosenthal vs. People, 211 Ill. 306, 71 N. E. 1121). But the fact that a conveyance is made with the intention of evading the tax does not defeat the tax nor invalidate the transfer, as the fund or property is liable to taxation in the possession of the grantee or donee. The intention to evade may be apparent in the instrument of transfer, or it may be found when all the circumstances attending the transaction are disclosed. (State Street Trust Co. vs. Stevens, 209 Mass. 373, 95 N. E. 851)."

In People vs. Moir 99 Am. St. Rep. 206, it was held:

"In Reish vs. Commonwealth, 106 Pa. St. 527, a deed in fee simple was executed and a bond taken for the payment to the grantor, during his life-time, of one-half of the net income, and it was held the deed was intended to take effect in possession or enjoyment after death of the grantor, and the estate was subject to an inheritance tax."

"An owner of property cannot defeat an inheritance tax upon it on his death, by any device securing to him for life the income profits or enjoyment thereof; it being required, to defeat the tax, that the conveyance pass possession and title in his lifetime."

Lamb's Estate vs. Morrow, 117 N. W. 1118.

There are innumerable other authorities to this same general effect, but I think the foregoing will give you a fair idea of the way the courts view such transactions.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

March 15, 1915.

541

TAXATION—Inheritance tax—Paid out of distributive share of each heir.

W. H. Goetzinger, Judge of Probate.

Dear Sir: You are advised that the representative of the estate is supposed to pay the inheritance tax out of the distributive share or legacy of each heir or legatee that is taxed, charging such payment to such heir or legatee by deducting it from the distributive share.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.
In Charge of Inheritance Tax Matters.

November 22, 1915.

542

TAXATION—Listing for, of property held by agents of the state prison industries.

State Board of Control.

Gentlemen: I am of the opinion that an agent of the state who has possession of property of the state, for sale under an agency contract, does not have to list the same as being his property, for taxation purposes, nor is he required to list it in the name of the state for taxation purposes. Subdivision 2 of section 816, R. L. 1905, which provides in effect that every person resident in this state, shall on the first of May, list separately and in the name of his principal, all personal property controlled by him as the agent of any other person, company or corporation does not apply, to an agent of the state having possession, as agent of the state, of farm machinery manufactured at the state prison and held for sale by such agent, since such property of the state is not subject to taxation.

Yours tuly,
C. LOUIS WEEKS,
Assistant Attorney General.

March 28, 1916.

543

TAXATION—Mortgage registry tax—Contracts for deed—Money and credits.

C. R. Wollthan, County Auditor.

Dear Sir: You are advised, in answer to the letter you submitted from the assessor of the town of Hodges, that if a resident of that town holds an ordinary land contract under which some one has agreed to make him future payments, and the mortgage registry tax in Minnesota has not been paid on such contract, the money due and to become due under such contract is taxable as moneys and credits. The amount that such owner may be owing some one else, either on a similar land contract or any other form of obligation, cannot be offset against the money due him. The supreme court definitely settled this matter in the case of State ex rel vs. Minnesota Tax Commission, 117 Minn. 159.

Yours tuly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

June 29, 1915.

544

TAXATION—Mortgage registry tax—Computation of.

John M. Rees, County Attorney.

Dear Sir: In my opinion the mortgage registry tax is to be computed upon the time that will elapse between the date of the mortgage and the due date of the debt secured. The supreme court has said that it

is **the security which is evidenced by the mortgage or other similar instrument that is the subject of such taxation.** Therefore, strictly speaking, the debt is not taxed although the amount of the debt and the time that will elapse between the date of the instrument and the maturity of the debt are both elements that enter into the calculation of the amount of the tax.

Where notes have been made and dated long prior to the date and execution of a mortgage, neither the notes nor the debt evidenced thereby are subject to a mortgage registry tax until the notes are secured by a mortgage on real estate. It is then the security that is taxed and not the notes.

If the treasurer has reason to believe that old notes now being secured by a new mortgage have been previously secured by some other instrument upon which no mortgage tax has been paid, such facts should be reported to the county auditor so that he might cause such notes to be taxed as omitted property for the previous years under "moneys and credits." This remedy is available only if the holder of the notes is a resident of Minnesota.

I must therefore conclude that under the facts stated in the correspondence you submit I would consider the mortgage subject to the tax of 15 cents per hundred dollars instead of 25 cents.

Yours tuly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

June 30, 1915.

545

TAXATION—Mortgage registry tax—Computation of—Land contracts.

J. J. Stennes, County Auditor.

Dear Sir: Concerning a mortgage registry tax on land contracts, I state that it is difficult to advise you definitely without examining the contracts under consideration. I can say generally that in a contract for a deed under which the vendee is entitled to possession, or takes possession, the aggregate of the reserved or deferred payments which upon the face of the instrument the vendee agrees to make to the vendor (which payments are secured by the vendor reserving the legal title to the land), is the amount secured by the lien and the amount upon which the tax is to be computed.

If, however, an existing mortgage is mentioned in the contract which the vendee assumes or as to which the contract is made subject, then the amount of such existing mortgage is to be deducted from the total consideration in ascertaining the amount for which the contract is security and upon which amount the registry tax is to be computed.

Where the contracting parties do not mention an existing mortgage in either of these ways, the taxing officials should not take such mortgage into consideration in determining the tax due on the contract. The

amount subject to the tax must be determined from the instrument presented for record, as it alone shows the amount for which the instrument furnishes real estate security.

Yours tuly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

March 30, 1915.

546

TAXATION—Mortgage registry tax—Extension agreements.

Burt I. Weld, State Capitol.

Dear Sir: In the decision of the supreme court in Mutual Benefit Life Insurance Company vs. Martin County, 104 Minn., mortgage agreements are construed as being instruments evidencing a lien upon real estate, and therefore to be treated the same as mortgages. The 1913 law, changing the rate of the mortgage registry tax, puts mortgages into two classes, viz: Those where the maturity of the debt is five years or less from the date of the mortgage, and those where the maturity of the debt is more than five years from the date of the mortgage. This being so, the tax which is payable on an extension agreement must be based upon the time between the date of the agreement and the maturity of the debt therein described. I do not well see how any other conclusion can be reached as to the meaning of the language of the present statute.

Yours tuly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

February 4, 1915.

547

TAXATION—Mortgage registry tax—Mortgage owned by cemetery association not exempt.

E. N. Round, Register of Deeds.

Dear Sir: You desire to know if a mortgage on real estate is subject to a mortgage registry tax where the mortgagee is a cemetery association and the money so loaned consists of funds of said association acquired from the sale of lots and the interest on the mortgage is used for the up-keep of the cemetery.

Section 2303, G. S. 1913, provides that the mortgage registry law—"shall not apply to mortgages taken in good faith by persons or corporations whose personal property is expressly exempted from taxation by law."

The only exemption from taxation in Minnesota is that provided in section 1 of article IX of the constitution. It is there provided that public burying grounds shall be exempt from taxation, but I know of no provision anywhere that exempts the personal property of a cemetery

association or other owner of public burying grounds. The fact that the burying ground is exempt from taxation cannot be construed to mean that the money or other property which accures to the cemetery owner through the sale or maintenance of the cemetery is likewise exempt. The people might well have so provided in the constitution, but I am satisfied that they have not done so.

My conclusion is that a mortgage so owned by a cemetery association is subject to the same mortgage registry tax as if owned by an individual.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General,

September 14, 1915.

548

TAXATION—Mortgage registry tax—Two mortgages securing same indebtedness—Where tax paid.

A. H. Sturges, Register of Deeds.

Dear Sir: Concerning the mortgage registry tax to be executed where two mortgages are given to secure the same indebtedness, each mortgage relating to property in a different county, I state that if the mortgages were executed simultaneously as part of one transaction, they should be treated as one mortgage for registry tax purposes, and the entire tax paid in which ever county the instruments are first presented for record. The treasurer collecting the entire tax should transmit the proper portion to the other county.

If the mortgages were not executed simultaneously, then the entire tax should be collected on the mortgage first executed and the other mortgage should be considered "additional security" under the provisions of section 2301, G. S. 1913.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

December 13, 1915.

549

TAXATION—Payment of mortgage registry tax exempts from "moneys and credits" tax.

Minnesota Tax Commission.

Gentlemen: You inquire whether a debt secured by a real estate mortgage or evidenced by contract for the sale of real estate is subject to taxation as moneys and credits if the mortgage registry tax has been paid upon such mortgage or contract, although the instrument has not been recorded.

The mortgage registry tax law (section 2303, G. S. 1913) provides:

"All mortgages upon which such (mortgage registry) tax has been paid with the debts or obligations secured thereby, and the papers evidencing the same, shall be exempt from all other taxes."

At the time this law was enacted in 1907, moneys due upon real estate mortgages or contracts for the sale of land were taxable on general property list as moneys and credits. The mortgage registry tax law taxed such property on a new theory by taxing the real estate security but measuring the amount of such tax by the amount of the debt thus secured. The evident purpose of the above quoted statute was to exempt from the regular form of taxation the debts or obligations secured by mortgage.

Chapter 285, Laws of 1911, which puts moneys and credits in a separate class for taxation, provided,

"But nothing in this act shall apply * * * to any indebtedness on which tax is paid under chapter 238, Laws of 1907."

This law of 1907 is the mortgage registry tax law. Of course as above explained, the mortgage tax is not on the indebtedness, as stated in said 1911 law, but the evident legislative intent was to exempt from the operation of said law the taxing as moneys and credits of any indebtedness on real estate security which has been subjected to a mortgage registry tax.

It has been suggested that the payment of the mortgage tax is not complete until the instrument has been recorded, but I am unable to reach that conclusion. Both the money and credits tax law and the mortgage registry tax law are revenue measures. In considering the latter law, the supreme court in First State Bank vs. Hayden, 121 Minn. 45, 50, said:

"The statute is purely a revenue measure."

This being so, the recording of the instrument is a privilege rather than a duty. The privilege is denied until the tax has been paid. After the tax is paid, it is immaterial to the taxing officials whether the privilege of recording is enjoyed or not.

In the case last above cited, the court on page 52 plainly indicates that instruments which are even unrecordable are properly taxable under the mortgage registry tax law, but that such instruments are dormant and unenforcible until the tax is paid. It is there said:

"We think that the legislature having in mind not only recordable contracts but also unacknowledged, and hence unrecordable instruments, intended to render all contracts within the terms of the act unenforcible in or by any legal proceeding until the tax has been paid, whether the instrument is recordable or otherwise."

I therefore conclude that the payment of the mortgage registry tax does not include the recording of the instrument and that the act of paying the proper mortgage tax to the county treasurer without the subsequent recording of the instrument, exempts the secured indebtedness from the money and credits tax, or from any other tax, save only inheritance taxes.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

June 29, 1915.

550

TAXATION—Personal property—Situs of property on May 1st.

John Anderson, Chairman, Town Board.

Dear Sir: This office has heretofore held that under the statutes of this state a person moving into this state on the first of March is subject to a personal property tax in the taxing district in which he resides on May first, even though the same property may have been taxed in another state for that year prior to his emigrating. The supreme court of the United States and of the state of Minesota have held that this is not double taxation or otherwise constitutionally objectionable.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

May 21, 1915.

551

TAXATIONS—Personal property tax judgments—Clerks not entitled to costs.

J. Gilbert Jelle, County Attorney.

Dear Sir: You inquire if the clerk of the district court is entitled to 25 cents for issuing personal property tax warrants that have been collected by the sheriff, and when citation is issued and judgment entered and paid to the county, if such official is entitled to $1.50 for his services for the same. Each of your questions is answered in the negative.

The salary provided for by section 238, G. S. 1913 (chapter 335, general Laws of 1909 as amended by chapter 511, General Laws of 1913), covers all services rendered to and paid for by the county except in real estate tax proceedings.

The services of the clerk in personal property tax proceedings are rendered for the county and before the salary law was enacted the clerk was not dependent upon the collection of the judgment for his fees but the county paid them.

In view of the fact that there is specific reference allowing the clerk fees in real estate tax proceedings and an omission in the laws covering his services in personal property tax proceedings, I am satisfied that the intention of the legislature was that such services were covered by his salary. In my opinion, however, it is the duty of the clerk to tax his costs and insert them in the judgment, and when the same are paid, they belong to the county. See section 2085, G. S. 1913.

Yours truly,
EGBERT S. OAKLEY,
Assistant Attorney General.

April 24, 1916.

552

TAXATION—Poll tax—Who subject to—Inhabitant.

J. C. Straley, Esq.

Dear Sir: Chapter 189, laws 1909 provides:

"Every male inhabitant in any village in this state * * * shall be assessed not less than one nor more than four days labor in each year."

In my opinion a person is to be deemed an inhabitant in a village when and as soon as he takes up his residence or domicile within the territorial jurisdiction of such village with the intention of making such place of residence his domicile and place of abode One may become an inhabitant of a village immediately upon becoming domiciled therein though he may not be entitled to vote in such village until he has resided within the state six months and within the village thirty days. An alien may be an inhabitant. The liability to perform the road work (poll tax) is not dependent in any way upon the right to vote.

Yours truly,
C. LOUIS WEEKS,
Assistant Attorney General.

November 23, 1916.

553

TAXATION—Sales of delinquent real estate at minimum price.

L. H. Slocum, County Auditor.

Dear Sir: You are advised, that in making tax sales the county auditor has no responsibility placed upon him to determine whether the minimum price fixed by statute is one which he should reject as too small under the particular circumstances. If the minimum price is not paid, the property is bid in by the state, but it cannot be bid in by the state for more than the best bidder is willing to pay. I think the expression I found in section 2128, G. S. 1913, to the effect that the tract "may be disposed of for one-half of the total taxes as originally assessed" is equivalent to saying that it may be purchased for that price. In the absence of any higher bid, I think the county auditor can be compelled to sell to a bidder for the minimum price fixed by statute.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

September 2, 1915.

554

TAXATION—Separation of mineral and surface rights.

H. C. Beecher, County Auditor.

Dear Sir: I state that under the statute as it is at present, where the surface rights and mineral rights are separately owned, the taxing of the ordinary description is presumed to cover only surface rights. See

Washburn vs. Gregory Company, 125 Minnesota, 491. It therefore follows that in such cases the mineral rights should be entered upon the tax rolls and separately assessed. Where they have no known value the assessor will have difficulty in placing more than a nominal value upon such mineral rights. Where the ownership of the surface rights and the mineral rights again merge in the same party, the taxing of the legal description would cover both rights.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

December 13, 1915.

555

TAXATION—Service of notice of expiration of redemption.

Ralph A. Stone, County Attorney.

Dear Sir: You inquire how a notice of expiration of time for redemption from a tax sale should be served where the person in whose name the land is assessed cannot be found and the holder of the tax title is now in possession of the land and has been so in possession for many years.

In my opinion the statute does not provide that the service should be any different in this case than in any other case where the person in whose name it is assessed cannot be found and there is some one in actual possession of the land. The sheriff should make his return of not found and then serve upon the occupant. Some attorneys consider it a safer practice to have the sheriff's return state that there is no one in possession of the land unless it be considered that "A" is in possession thereof and that personal service has been made upon "A," and then the notice is duly published upon the theory that the land may possibly be considered by the court to be vacant.

I have not overlooked the provisions of section 2153, G. S. 1913, but in my opinion they relate only to the cases in which the holder of the tax certificate has caused the land to be assessed in his name so that service might be made upon him and the actual owner thus deprived of all further notice.

I presume that in any case where the court found that the holder of a tax certificate had gone into possession of the land primarily for the purpose of having the notice served upon him that because of such fraud upon the fee owner, the notice would be held void and the property still subject to redemption. Whether fraud has been perpetrated in any case is a matter to be asserted hereafter by the fee owner and does not militate against the view that the service upon the person in whose name the property is assessed, or if he cannot be found, then upon the person in possession, is prima facie valid.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

January 29, 1915.

556

TAXATION—Tax certificate—Notices of expiration—Requirements.

Honorable Winfield S. Hammond, Governor.

Dear Sir: Referring to the tax certificates issued by the auditor of Pope county at the forfeited tax sale held under chapter 543, Laws of 1913, where he used the form of notice of expiration of redemption which fits the requirements of the annual May forfeited sale, I am obliged to conclude that such notice is insufficient to entitle a certicate holder to a state tax deed.

These notices state that the land was bid in for the state on May 7, 1900, pursuant to a tax judgment dated March 21, 1900, for delinquent taxes of 1898; and that on May 11, 1914, under the order and direction of the state auditor, the parcel was sold at public sale. While these statements are not of themselves untrue, the fact is that the tract was sold on that date pursuant to a tax judgment entered March 20, 1914, for taxes delinquent for all of the years from 1898 to 1912, inclusive. While the statute does not expressly provide that this notice must state the date of the judgment and the years for which the taxes were delinquent, it is my opinion that under the authority of Eide vs. Clarke, 57 Minn. 397, it is necessary that the notice give this information. A failure to properly state the date of the judgment pursuant to which the sale was held and the years for which the taxes are delinquent makes the notice invalid.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

March 26, 1915.

557

TAXATION—Tax sales—Blanket notices of expiration of redemption.

Minnesota Tax Commission.

Gentlemen: I state that there is no legal objection to the making of a blanket notice of the time of expiration of redemption from a tax sale and including therein various descriptions of property, which property had been separately assessed and separate judgments entered against it. Of course the notice must show the intending redemptioner the amount necessary to redeem any particular separately assessed tract and the stating of an aggregate amount necessary to redeem all of the tracts is insufficient.

There are sometimes practical obstacles in the way of making a good blanket notice that fulfill the requirements of the statute and give the intending redemptioner complete information. In this connection, see Culligan vs. Cosmopolitan Company, 126 Minn. 218.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

July 6, 1915.

558

TAXATION—Stock in foreign corporation—Taxability of.

Minnesota Tax Commission.

Gentlemen: You ask whether stock in the United States Steel Corporation, owned by a resident of this state, is taxable at the place of his residence.

It appears from the papers accompanying the letter, and from other public records, that the United States Steel Corporation is a foreign corporation, owning no real or personal property in Minnesota, but that several corporations, some of which are domestic and some foreign, own valuable real and personal property in Minnesota, upon which property said various companies pay taxes to Minnesota of about five and one-half million dollars. The greater part of the stock in these operating companies is owned by other corporations; and the greater part of the stock in these other corporations is owned by still other corporations, and eventually the control of the operating companies is held by the United States Steel Corporation, through the medium of these intermediate companies. The United States Steel Corporation itself pays no taxes in Minnesota, but over 40 per cent of all the taxes paid by all of the subsidiary companies is paid in Minnesota. Apparently the only property owned by the United States Steel Corporation which is in any way connected with Minnesota, consists of shares of stock or bonds of other corporations.

Section 1994, G. S. 1913, makes it the duty of every resident of this state to list for taxation with his other personal property,

"Shares of stock of joint stock or other companies or corporations (when the property of such company or corporation is not assessed in this state)."

If it can be said that the property of the United States Steel Corporation is assessed in this state, then a resident stockholder should not be assessed upon his holdings in such corporation.

It can hardly be said that the arrangement briefly described above falls within the scheme discussed by the supreme court in State vs. St. Paul Union Depot Company, 42 Minnesota, 142, where it is said in substance that the forming of the defendant company was but a more convenient and economical method of holding the property and managing the business of railroad terminals, and that the stock of the defendant represents and is the exact equivalent of all the property of that corporation, and that collecting a percentage of the gross earnings of the railroad companies using the depot would be twice taxing of the same thing. There is nothing in the history of the formation, management and existence of the United States Steel Corporation that would justify this conclusion. Its separate existence was not a mere formality. It probably does not even own all of the stock in these subsidiary companies. The sum total of all of the Minnesota property of the subsidiary or operating companies is far short of being the entire property of the United States Steel Corporation. One is not the equivalent of the other. The corporate stock which it owns is not assessed in Minnesota, and it cannot be said that

said corporation pays any taxes in Minnesota. While we realize the apparent injustice of assessing a resident stockholder of this stock where the subsidiary companies, though remotely removed from the ultimate holding company, pay such a substantial tax in this state, we cannot consistently construe the statute above cited as intending to exempt from taxation the stock owned by the resident of this state. It is taxable here. (See Sturges vs. Carter, 114 U. S. 511).

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

June 15, 1915.

559

TELEPHONE COMPANIES—Granting reduced rates to government not discrimination.

Railroad and Warehouse Commission.

Gentlemen: You inquire whether free or reduced rates may be given by telephone companies to the United States, the state, municipalities and persons mentioned in sections 4333 and 4335, G. S. 1913.

Section 11 of chapter 152, G. L. 1915, limits the right of telephone companies to furnish free service or reduced rates to its officers, agents and employes in furtherance of their employment. Chapter 28, R. L. 1905 and its amendments, which include the "free pass act" is made applicable by section 3 of this act "except as otherwise provided in this act." Section 11 of this act specifies the persons entitled to free or reduced rates and is, in my opinion, a modification of the list of persons entitled to free or reduced rates as specified in chapter 28, R. L. 1905.

It is further my opinion that the granting of free or reduced rates to the United States or the state will not constitute an illegal discrimination. As to discriminations in favor of municipalities other than the state, the act specifically recognizes existing contracts. The language is as follows:

"Provided that nothing herein shall release any telephone company from carrying out any contract now existing between it and any municipality for the furnishing of any service free or at reduced rates."

As to future contracts, however, no exception is made. Although the language of the act is not free from doubt, there is a strong inference that discriminations in favor of municipalities are not favored.

Yours truly,
ALONZO J. EDGERTON,
Assistant Attorney General.

August 5, 1915.

560

TELEPHONE COMPANIES—Installing city phone free of charge.

R. C. Franklin, Secretary Alexandria Fire Department.

Dear Si: You inquire whether or not the local telephone company could install a telephone in the fire department headquarters in the city hall in your city, free of charge.

In my opinion, your inquiry is to be answered in the affirmative.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

December 20, 1915.

561

TELEPHONES—Railroad stations—Free service for—Power of commission to order installation of phones.

Railroad and Warshous Commission.

Gentlemen: You state that several of the railway companies have contracts with telephone companies for free telephone service in their depots. You ask for an opinion upon the validity of this practice. I am of the opinion that such a contract provides for free telephone service and is therefore in contravention of section 11, chapter 152 laws 1915.

You also request an opinion upon the question of whether the commission can order a railway company to have a telephone of a local telephone company installed in the depot of the railway company at the prevailing rates where the facts warrant. This question should, in my opinion, be answered in the affirmative.

Yours truly,

HENRY C. FLANNERY,
Assistant Attorney General.

July 6, 1916.

562

TIMBER—Scaling of—Surveyor general—Acting outside of district.

Frank G. Scribner, Surveyor General, Logs and Lumber.

Dear Sir: You are advised that section 5457, G. S. 1913, provides that the surveyor general or his deputies, upon the request of the owner of any logs, timber, lumber, etc.—

"shall survey the same **if within his district** and make and sign a true scale bill thereof."

The only exception to this rule is found in the following section, which provides that where logs or timber have been removed from the district in which they were, and without being surveyed and scaled, the surveyor general of such district upon proper request—

"may follow, inspect and scale the same, and the scale bill and the record thereof made in his office shall have the same effect as in the case of surveys made within his district."

I therefore conclude that the surveyor general of another district has no authority to officially scale timber or logs in your district unless they have been cut in his own district and he follows them under the provisions of the law last above quoted.

Yours truly,

WILLIAM J. STEVENSON,
Assistant Attorney General.

June 14, 1915.

563

TIMBER—Permits—Uncut timber—Charged to purchaser.

J. A. O. Preus, State Auditor.

Dear Sir: You indicate that a certain lumber company purchased timber from the state in the year 1912, that under the terms of the permit the purchaser was allowed two years in which to cut and remove the timber, that two extensions have been granted by the state timber board, that under the statute no further extension can be granted and that by the terms of the permit the purchaser is required to pay for the timber remaining uncut at the price specified in the permit.

You indicate further that it is your belief that the estimate made by the cruisers before the timber was sold was much below the quantity of timber actually growing upon the land and you inquire whether it is your duty to bill the uncut timber in accordance with the cruisers report or whether you shall secure a new estimate of the timber remaining on the land and bill the same to the purchaser in accordance with such estimate.

The statute provides:

"That the purchaser shall pay to the state the permit price for all timber, including timber which he fails to cut and remove."

The question now presented is, what amount of timber included in the permit and sold to the purchaser thereunder remains uncut and unpaid for. There would seem to be no prescribed method of arriving at the result. It is clearly within your right and in view of the doubt you express as to the correctness of the original estimate it would seem to be your duty to ascertain by scale or estimate the actual amount of timber covered by the permit and not cut and removed thereunder and to charge the purchaser therefor at the contract price.

Yours truly,

JAMES E. MARKHAM,
Assistant Attorney General.

August 25, 1916.

564

TIMBER—Sales—Scale and measurement.

J. A. O. Preus, State Auditor.

Dear Sir: The state board of timber commissioners asked to be informed whether under present laws, the timber growing upon state lands must needs be sold at a specified price per thousand feet, and if so, what converting factors may be used by the scalers in converting ties, posts, poles and pulp wood measurements into thousand feet board measurements.

It is provided in section 5265 G. S. 1913, that "the auditor may sell the timber on the pine lands in his charge including tamarack and cedar timber thereon suitable for posts, telegraph poles, or railroad ties, when authorized to do so by the board of timber commissioneres, and not otherwise. When such sale is made, the auditor shall issue to the purchaser a permit to remove and cut the same. Before any sale is made, the timber shall be estimated and appraised but no sale shall be made on any estimate or appraisal made more than one year prior thereto."

The action of the board of timber commissioners in authorizing the sale and the action of the auditor in making it must be based upon a report made by a state estimator, to be designated by the auditor.

"The report shall state the amount of each kind of timber subject to sale which measures not less than eight inches in diameter twenty-four feet from the ground; the value per thousand feet of all **such** timber; the **amount** and **value** of all **timber below such standard,** including pine, tamarack and cedar posts, telegraph poles, and railroad ties." (Section 5268).

When the timber has been sold the requirement is that:

"The permit shall state the amount of timber estimated to be thereon; the estimated value thereof, **and the price at which it is sold or the price per thousand feet, in case it is sold by the thousand feet,** and shall specify the bark mark to be used." (Section 5276).

The surveyor general is required to scale all timber cut from the state lands pursuant to a timber permit and to report his scale to the state auditor.

"Each report shall describe the land on which the timber was cut * * * the bark and stamp mark used thereon, the **number of logs or pieces and the total number of feet."** (Section 5282).

I think it apparent from these provisions that it is contemplated that the state auditor under the direction of the board of timber commissioners may sell at the annual state sale, all of the timber of all kinds and dimensions growing upon state land where the amount of such timber has been estimated and the board has authorized the sale, and I think it fairly inferable from the provisions of the statute to which I have directed attention, that timber of all kinds measuring not less than eight inches in diameter, twenty-four feet from the ground, shall be sold by the thousand feet and that all other timber growing thereon, including pine tamarack and cedar posts and telegraph poles and railroad ties may be sold at the

same time and included in the same permit, with the provision that they shall be counted and paid for by the piece at the prices bid at the sale and specified in the permit.

This seems to me to be the reasonable and practical interpretation of the language employed

The construction here placed upon the act as applied to the state sale results in uniformity of practice, and if adopted obviates the further inquiry as to what are proper factors to be employed in converting smaller timber measurements into the equivalent in thousand feet board measurements.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

August 12, 1916.

565

TOWNS—Assessors—Compensation of.

John H. Hanfler, Town Clerk.

Dear Sir: You are advised that it is my opinion that a town assessor is entitled to the statutory per diem of three dollars ($3) and that the town board cannot by resolution or otherwise fix the compensation at either more or less than this amount.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

March 23, 1915.

566

TOWNS—Board of audit—Meetings may be held on dates not specified in statute.

G. H. Carr, Town Clerk.

Dear Sir: You inquire whether it would be lawful for the town board of audit to meet on February 27th, when the first Tuesday preceding the annual meeting came on March 2nd.

I am inclined to the opinion that the language of Section 1147, G. S. 1913, is directory rather than mandatory, and that it is not absolutely necessary that the meeing of the board of audit be held on Tuesday next preceding the annual town meeting, and if it be held at some other date preceding such annual town meeting as will serve practically the same purpose as if it were held on the particular date specified, the action of the board of audit will not be invalid for that reason.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

March 5, 1915.

567

TOWNS—Bonds—Hours opening and closing polls—Voting.

Philip M. Stone, Esq.

Dear Sir: I have to say that in my judgment the voting for or against the bonding of a town does not require the polls to be open from nine A. M. until nine P. M., but they may be opened at nine A. M. and remain open a sufficient length of time to enable all voters to attend. If there is any considerable number of voters that cannot attend such meeting of the town during working hours, the meeting should be kept open so as to enable working men to go to the polls and express their preference in the matter of bonding the town. If you expect to have to put any of the bonds on the market, I would advise holding the special township election open from nine o'clock in the morning until nine o'clock at night.

Yours truly,
LYNDON A. SMITH,
Attorney General.

June 25, 1915.

568

TOWNS—Clerks cannot be allowed office rent.

H. H. Kattmann, Town Clerk.

Dear Sir: You inquire whether a town clerk can be allowed office rent by the township, there being no town hall in which he may hold his office. In my opinion your inquiry is to be answered in the negative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

May 9, 1916.

569

TOWNS—Clerks—Duty in regard to illegal claims.

T. B. Thompson, Town Clerk.

Dear Sir: I think if a town clerk countersigns a town order given to pay a bill illegally allowed by the town board, that he and his bondsmen would be liable for such payment. Of course you must determine whether the bill is legal or not, exercising your best judgment, and if you have any doubts you would be justified in refusing to countersign the order and leave the parties to their right to appeal to the court to compel you to sign the order, which if the court does so order would be a protection to you and your bondsmen.

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

August 12, 1915.

570

TOWNS—Clerks—Fees for acknowledging claims against townships.

L. W. Hazelton, Esq.

Dear Sir: This office has previously held that a town clerk cannot charge the township for taking acknowledgments of accounts against the township. The taking of these must be paid by the party securing such service. In other words, you collect your fees from the claimants and not from the town.

Yours truly,
LYNDON A. SMITH,
Attorney General.

April 6, 1916.

571

TOWNS—Clerks—Fees of—Cannot charge township for qualifying town officers.

C. G. Wesche, Town Clerk.

Dear Sir: You ask whether a town clerk has a legal right to charge the township twenty-five cents each for qualifying town officers; twenty-five cents for acknowledging town officers bonds. Your inquiries are answered in the negative, the charge for such services must be paid by the officers for whom the service is rendered.

The law provides that a clerk may charge a fee of twenty-five cents for a copy of the certificate furnished to a wolf bounty claimant and ten cents for filing the same. These charges, however, are to be paid for by the claimant and not by the town.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

April 8, 1915.

572

TOWNS—Clerks—Not entitled to compensation for services rendered in township division proceedings.

Henry Falk, Supervisor.

Dear Sir: I am obliged to advise you that it is not a part of the duties of the town clerk to go to the court house and attend to matters in the county auditor's office relating to the division of a township and to attend to securing action by the county commissioners relative to the division of the funds paid the old town and the new. It not being the duty of the clerk so to do, although his services may have been of great benefit to the town, he cannot lawfully be compensated therefor.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

April 19, 1916.

573

TOWNS—Cattle running at large forbidden—Repeal previous statute.

M. W. Hingeley, Esq.

Dear Sir: There was a provision of statute contained in the general statutes, 1894, permitting the electors at a town meeting—
"to determine the time and manner in which cattle and other animals are permitted to go at large."

This provision was eliminated by the revised laws 1905, and this language was substituted:
"to make such lawful orders and by-laws as they deem proper for restraining horses, cattle, sheep, swine and other domestic animals from going at large on the highways and providing for impounding such animals so going at large."

This same provision is incorporated in the General Statutes 1913, and is still in force.

There is a general provision contained in section 6063, G. S. 1913, to the effect that—

"It shall be unlawful for any owner or any person having the control of any animal * * * to permit the same to run at large in the state of Minnesota."

Answering your specific inquiry I have to advise that the electors of a township no longer have authority to adopt a provision permitting cattle to run at large and that the general provision quoted above makes it unlawful for an owner to permit any such animals to run at large and any action of the town meeting directing to the contrary is without authority and is void.

Yours truly,

JAMES E. MARKHAM,
Assistant Attorney General.

June 6, 1916.

574

TOWNS—No power to prohibit dogs running at large.

J. O. Harris, Esq.

Dear Sir: You state that at the last annual town meeting of a town in your county, the question of permitting the running of hunting dogs in open season was put to a vote and carried not to allow the running of dogs in said town. You inquire whether the annual town meeting had this authority to take the action in question.

In my opinion your inquiry is to be answered in the negative.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

August 1, 1916.

575

TOWNS—Depository—Rescinding previous action of board designating a depository.

L. S. Reed, Town Clerk.

Dear Sir: As a general rule, it may be stated that a town board has a right to rescind previous action taken by it prior to the time that contractual relations have been entered into, being prior to the time that contract rights have accrued in favor of some party other than the town. Under the situation as you state it, although there has been a designation of the second bank as a depository, still that bank had not made or proffered a sufficient bond which had met with the approval of the board, and hence the bank in question had not become a legal depository of the township. It was therefore competent for the town board to rescind such action, prior to the filing and approval of a bond

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

October 30, 1915.

576

TOWNS—Depository—Revoking designation of.

L. S. Read, Town Clerk.

Dear Sir: You inquire whether, after a bank has been designated as a township depository for a legal term and given a bond which has been duly approved and after the bank has been officially notified that it is the township depository, can the town revoke the designation and designate another bank as such depository, the first named bank having complied in all respects with its agreement with the town board.

Your inquiry is properly answered in the negative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

October 6, 1915.

577

TOWNS—Incorporation of village in—Assumption bonded indebtedness.

W. P. Hicken, Esq.

Dear Sir: It appears that a township was bonded; that later on a village was duly incorporated from territory theretofore situate in and forming a part of the township. The territory contained in the village was not relieved from liability on the bonds because of its incorporation as a village.

You now inquire as to how the village's portion of the bonded indebtedness should be figured, that is, should the valuation of the property comprising the village be taken at the time that the bonds were issued or at the time that the village was incorporated. In my opinion each year when a tax levy is made for the purpose of paying interest on this bond issue or any installment of the principal, the percentage that should be assessed against the property in the village should be the percentage that the assessed valuation of the preceding year on such property bears to the whole assessed valuation of the property in the township and in the village.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

September 19, 1916.

578

TOWNS—Limit indebtedness—How determined.

Emanuel E. Shimota, Esq.

Dear Sir: I have to say that the ordinary limit of a town's indebtedness is ten per cent of its assessed value. In estimating the indebtedness, such indebtedness as is paid by an assessment levy upon property benefited is not to be counted, neither are orders payable forthwith, nor the sinking fund.

Yours truly,
LYNDON A. SMITH,
Attorney General.

August 20, 1915.

579

TOWNS—Interest on town fund belongs to town.

J. W. Thomas, Esq.

Dear Sir: You are advised that in the opinion of this department the interest that is received on township funds belongs to the township and not to the town treasurer.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

March 29, 1916.

580

TOWNS—Meetings—May be held on date of general election.

H. H. Kattmann, Town Clerk.

Dear Sir: You inquire whether or not a special town meeting can be held for voting on the issuance of bonds at the same time that the general election is held on November 7.

Your inquiry is answered in the affirmative. The election of course is a special election, but may be held on the same day and in the same room as is the general election.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

October 13, 1916.

581

TOWNS—Meetings—Where held.

Peter W. Boos, Esq.

Dear Sir: As a general proposition, it may be stated that annual town meetings and special town meetings shall be held at the same place that the last town meeting was held, or at such other place in the town or city, or village within or adjoining the same as may have been designated by the annual town meeting.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

April 20, 1916.

582

TOWNS—Annual meeting—Ballots.

W. F. Reynolds, Esq.

Dear Sir: If your township has not adopted the Australian ballot system under the 1915 law, there is no provision for the printing by public authority of a township ballot. The law makes no provision for a caucus before an annual town meeting, although one can be held if desired. If a caucus is held and certain persons are nominated thereat for official positions, the voter of the township is not obliged to vote for any such nominee or to vote the caucus ticket. He may vote for any eligible person that he desires for township office, and prepare his own ballot.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

February 26, 1916.

583

TOWNS—Officers of—Conviction of criminal offense does not remove.

C. O. Johnson, Esq.

Dear Sir: I call your attention to section 1188, general statutes 1913, in which provision is made for the removal from office of a town officer who violates the provisions of law therein referred to. It has been held by this office that the mere conviction of such town officer of the offense

does not in itself remove him from office, nor does it allow the justice of the peace before whom he is convicted to remove him. Removal proceedings must be instituted in the district court to accomplish that end after the conviction referred to.

Yours truly,

CLIFFORD L. HILTON,

Assistant Attorney General.

September 26, 1916.

584

TOWNS—Officers—Interest of road overseer in contract—Town election ballots.

Ira Blackwelder, Esq.

Dear Sir: I beg to advise you that we are of the opinion that a road overseer has authority, by virtue of his office, to hire teams for work on the town roads. Section 5032, R. L. 1905, provides:

"Every public officer who shall be authorized to sell or lease any property, to make any contract in his official capacity, or to take part in the making or any such sale, lease or contract, and every employe of such officer who shall voluntarily become interested individually in such sale, lease or contract, directly or indirectly, shall be guilty of a gross misdemeanor."

It follows that it would be a crime for the overseer to voluntarily become interested in a contract with the town for the hire of his team, since such a contract would be one he is authorized to make in his official capacity. Any such attempted contract would be void.

Stone vs. Bevans, 88 Minn. 127.

With reference to your second question I would say that if your township has, by resolution, which must have been passed at least thirty days before the election for township officers, resolved that the election of the township officers shall be held and conducted under the so-called Australian ballot system, then and in such case the names of the candidates for township offices are placed upon the official ballot by filing with the town clerk an affidavit substantially as required by the provisions of chapter 20, laws 1912, and paying a fee of one dollar therefor. The ballot is prepared and printed at the expense of the town by the town clerk.

Chapter 315, laws 1915, which I assume is the law you refer to, is not applicable to town elections, unless the town board has passed the resolution above referred to.

Yours truly,

C. LOUIS WEEKS,

Assistant Attorney General.

April 18, 1916.

585

TOWNS—Supervisor appointed for part of year—Compensation of.

V. A. Anderson, Town Clerk.

Dear Sir: You state that a town supervisor has been appointed to fill a vacancy caused by the resignation of a former supervisor, and you ask whether such person is entitled to the full compensation of $60.

The compensation that a town may pay for a supervisor's services in any one year is limited by law to $60 for each supervisor so serving for the year in question, provided of course, that enough service is rendered by the officer to equal such sum at the per diem allowed. Where, however, one man serves as supervisor for part of the year and another by appointment serves the remainder of the year, the amount paid to both cannot in any event exceed $60.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

September 11, 1916.

586

TOWNS—Supervisors—Limit on compensation of.

Wm. A. Sandurck, Town Clerk.

Dear Sir: You state that on account of the settling up of a township division case extra work devolved upon the supervisors so their per diem compensation would amount to more than that provided by the law.

You ask, by direction of the town board, whether the supervisors may charge and collect this excess, being for extra meetings that they have held in connection with the division case.

I am obliged to answer your inquiry in the negative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

February 8, 1915.

587

TOWNS—Supervisor—Cannot be surety on bond of Justice Peace.

F. P. McShane, Justice of the Peace.

Dear Sir: I am of the opinion that a member of the town board should not be a surety upon a bond of the justice of the peace of his town.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

April 3, 1915.

588

TOWNS—Supervisors—Chairman town board is one.

James M. McArdel, Town Clerk.

Dear Sir: Your attention is called to section 1174, G. S. 1913.

Each township is entitled to three supervisors and the chairman of the town board is one of these three supervisors. In other words, a township cannot have three supervisors and another supervisor as chairman.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

June 1, 1916.

589

TOWNS—Supervisors—Right to reimbursement under facts stated.

George H. Miller, Town Clerk.

Dear Sir: The statutes do not apparently contemplate that the town supervisors have any official duties to perform in connection with the establishment of a county ditch or the assessing benefits therefor. It therefore follows that if the town board is not officially interested in the proceedings and that the town as such has no connection therewith, the town supervisors are not entitled to reimbursement for their traveling expenses in attending the meeting of the county board.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

June 16, 1915.

590

TOWNS—Supervisors—Compensation of.

G. H. Carr, Town Clerk.

Dear Sir: You are advised, that section 1177, G. S. 1913, provides that the compensation of town supervisors shall be two dollars per day, but not more than sixty dollars in any one year, and that the voters at any town meeting—before balloting for officers begins—may by resolution increase the compensation not to exceed 50 per cent.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

July 2, 1915.

591

TOWNS—Supervisors—Expenses in attending ditch hearings.

George H. Miller, Town Clerk.

Dear Sir: I state that if a town is being assessed for benefits on its town roads in county ditch proceedings, and the town board considers it necessary to appear before the county board at the hearing of the viewers' report in order to properly protect the interests of the town, such trip and appearance would be official business for which the members of the town board could lawfully charge the town. Of course such members are not officially interested in the amount of the assessments made against land in the town.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

June 26, 1915.

592

TOWNS—Town supervisor and election judge are not incompatible.

William M. Jamieson, Town Clerk.

Dear Sir: You are advised, that a town supervisor who is a candidate for re-election is not disqualified to serve as a judge of election on town meeting day. This answer applies only to the town meetings, whether annual or special.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

January 27, 1916.

593

TOWNS—Supervisors—Increase in salary of—Cannot be made retroactive.

Frank S. Averill, Town Clerk.

Dear Sir: An increase in the compensation of town officers cannot be made at a town meeting to be effective for the preceding year, but can only be made at such town meeting to be effective during the ensuing year and then only when such action is taken prior to the election of officers.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

April 8, 1915.

594

TOWNS—Constructing telephone lines—Issuing orders anticipating taxes.

D. P. Tierney, Forestry Department.

Dear Sir: I do not think that it would be competent for township authorities to take money from their funds in the township treasury for use in building a telephone line, the payment for which would properly be made from the township fire fund. It seems that there is not money in the township fire fund although a levy has been made for such fund, but will not be collected until later on in the year of 1916. This department has held that town orders may be issued in anticipation of the collection of taxes already levied, such orders presented and marked "not paid for want of funds" and to be paid from the fund when the moneys therefor are collected pursuant to the tax levy made. Your attention is called to section 1146, G. S. 1913, which reads as follows:

"The town board of any township in this state, by unanimous vote thereof, may transfer any surplus beyond the needs of the current year in any town fund to any other town fund to supply a deficiency therein."

Although there may be unexpended moneys in the general fund, still it does not appear from the letter that you enclosed that there will be more money in the general fund than will be necessary for the expenditures required to be made therefrom, and hence it could not be said from the facts stated that there was what might be called a surplus in that fund.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

January 12, 1916.

595

TOWNS—Cannot publish treasurer's financial statement.

Andrew Fritz, Public Examiner.

Dear Sir: I know of no statute authorizing town officials to spend town funds for the publication of the treasurer's annual financial statement. The town board has no authority except that conferred by statute, and therefore in the absence of a statute permitting such publication, we must conclude that the spending of public funds therefor is prohibited.

Yours truly,

WILLIAM J. STEVENSON,
Assistant Attorney General.

May 12, 1915.

596

TOWNS—Fees for filing town treasurers bond—By whom paid.

Andrew E. Fritz, Public Examiner.

Dear Sir: It is my opinion that the fees for filing the town treasurer's bond with the register of deeds under section 1155, G. S. 1913, should be

paid by the town, in counties where the register of deeds makes a charge therefor.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

May 18, 1915.

597

TOWNS—May provide for payment premium on treasurer's bond.

Mason H. Forbes, Assistant County Attorney.

Dear Sir: You state that your office is in receipt of a letter from the clerk of one of the townships in your county inquiring whether or not the town board could provide for the payment of premiums on the bonds of the officers and whether such premiums would be a legal charge against the town board.

Your inquiry is answered in the affirmative insofar as the town treasurer is concerned and in the negative in regard to all other town officers.

Your attention is called to section 8238, G. S. 1913.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

April 18, 1916.

598

TOWNS—Village dance hall law not applicable to.

George J. Hughes, Justice of the Peace.

Dear Sir: You refer to a law which "empowers village councils to license and regulate the keeping of dance halls and the holding of public dances in any village," and you ask whether this law empowers a town board to so license and regulate.

In my opinion your inquiry is to be answered in the negative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

May 27, 1915.

599

VILLAGES—Alien physicians—Cannot hold office on board of health.

V. Lookwood, Village President.

Dear Sir: You state that at the present time you have only one physician in your village and that he is not a citizen of the United States. You inquire whether he can be appointed as a member of the village

board of health and serve in that capacity. Your inquiry is answered in the negative. A person who is not a citizen of the United States cannot hold an official position in the state of Minnesota.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

April 18, 1916.

600

VILLAGES—Auditorium—Not to be leased to exclusion of public enjoyment.

Charles P. Hall, City Attorney.

Dear Sir: Your inquiry relates to the power of the board of management of a memorial auditorium, accepted under the provisions of chapter 224, G. L. 1903, to enter into a contract with an individual to assume the management of the auditorium under the supervision and direction of the board, at a fixed salary and in addition thereto a percentage of any profits arising from the rentals received during the year for the use of the auditorium for other than public purposes. The suggested objections to this arrangement are:

(1) That it would tend to divert the surplus funds from the auditorium fund which, under the act and resolution of acceptance, is to be accumulated for the perpetual maintenance of the building, and,

(2) That the suggested arrangement is contrary to public policy and the purposes for which the auditorium was given and required to be maintained by the municipality.

It is obvious that any arrangement by which the management of the auditorium becomes a mere money-making enterprise, is foreign to the purpose of its establishment. The board would not be authorized to lease the building to an individual, at least without reserving the right of full enjoyment thereof for all public and municipal purposes, as they should arise during the period of the lease. The board would have no right to enter into a contract with an individual to manage the operation of the building, including the rental thereof, say for theatrical performances, or other entertainments for which the lessee charges an admission fee, to the exclusion of the right of the people to use and enjoy the building for municipal assemblages; nor would it have the right to turn over to the individual such control of the building that questionable entertainments might be permitted by the management.

The absolute control of the building and the right to direct for what purpose it shall be used, must be retained by the board. If the proposed contract with the prospective manager so provides and if he acts merely as the agent and representative of the board in managing the building, under its immediate direction and control at all times, all revenues to be turned into the treasury and all maintenance expenses to be allowed and paid out upon the order of the board, in other words, if the manager is to be merely an employe, but is to receive a reasonable compensation, the total of which I think should be limited in his contract, then I see no

objection to the proposed arrangement. If, on the other hand, it is contemplated to substitute the manager for the board and to leave it to him to say what kind of entertainment shall be given and what admission charges may be received, and if the use of the building for municipal purposes is to be restricted in any way, in favor of entertainments for which a charge is made, then I think the arrangement would be contrary to the purpose of the gift and to the spirit of the act and resolution accepting it, and hence it would not be within the power of the board to enter into the suggested contract

This is not very definite, but I am unable to make it more definite without fuller knowledge of the terms of the proposed arrangement.

If it is thought desirable that the employment of a manager under a profit sharing contract, such as your letter suggests, should be entered into, it might be well to prepare and submit a tentative form thereof. In this way objectionable features, if any, might be eliminated and perhaps additional provisions might be inserted, safe-guarding the continuance of the primary purpose for which the gift was made.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

July 14, 1916.

601

VILLAGES—Bonds for purchase of park.

Alfred P. Stolberg, County Attorney.

Dear Sir: I beg to advise you that in my opinion subdivision 1 of section 1855, G. S. 1913, authorizes the issuance by the village of bonds for the purpose of purchasing property for park purposes when the issuance of such bonds has been duly authorized by the voters. as required by the provisions of chapter 10, provided the issuance of such bonds does not transcend the limitations otherwise prescribed by the act.

You call our attention ta the language of said subdivision 1, which authorizes the issuance of bonds:

"For the construction of sewers, subways, streets, sidewalks, pavements, culverts, parks and parkways:"

Giving this language a strict grammatical construction would permit the issuance by village of bonds **only** for the construction of a park or parkway. Parks, of course, are not **constructed,** although they may be improved. To give the language a strict grammatical construction would, therefore, render it meaningless and of no effect. I think it is to be construed as authorizing the issuance of bonds for the purpose of acquiring a park and improving it.

Yours truly,
C. LOUIS WEEKS,
Assistant Attorney General.

August 23, 1916.

602

VILLAGES—Cemeteries—How acquired.

Murphy & Cook, Village Attorneys.

Gentlemen: You ask information as to how a village incorporated under the general laws may proceed to purchase lands for a cemetery pursuant to paragraph 11, section 1268, G. S. 1913. It seems that your village has outstanding indebtedness and no cash in the treasury, and you inquire whether it would be possible for the council, on its own motion or resolution, to purchase the lands and pay for the same with a village warrant. The village council can incur no indebtedness unless there is money in the treasury to pay the same, or unless there has been a tax levy made, from which money will be derived available for the purpose. If the district proceeds by condemnation, it must be prepared to pay the amount that may be awarded in cash and the owner of the land will not be obliged to take a village warrant which would not be immediately paid.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

August 1, 1916

603

VILLAGES—Constable's fees—Manner service.

Samuel A. Miller, Constable.

Dear Sir: The statute allows the constable a fee of 50 cents for serving a summons on the garnishee and in addition thereto, mileage in traveling to and from the place of service, when necessary, at the rate of 10 cents per mile.

The manner of serving the summons as prescribed by section 7512, G. S. 1913, is by reading it to the defendant and delivering a copy thereof to him if he can be found, and if not found by leaving a copy at his usual place of abode. Section 7860 provides that the garnishee summons shall be served in the same manner, except that the service must be personal, that is, it must be read to the garnishee and a copy must be left with him personally. Where the constable in the performance of his duty is required to make a copy of the summons, he is entitled to receive 15 cents for each copy so made. This applies as well to any necessary copy or copies of the garnishee summons.

The statute does not specifically fix a fee for the service upon the defendant of the garnishee summons and notice, but I think the constable is justified in treating such service as an additional service of the garnishment summons and accordingly is entitled to an additional 50 cents for such service. Also he would be entitled to an additional 15 cents for making copy for the defendant, if this has not been furnished to him by the justice.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

September 11, 1916.

604

VILLAGES—Constables—When retain fees.

F. E. Murphy, Village Attorney.

Dear Sir: By an examination of section 270, G. S. 1913, it would seem clear that a constable in a village of less than 5000 inhabitants would be entitled to collect fees for his services and retain them as is provided in section 5765, G. S. 1913. But constables in villages of more than 5000 inhabitants, you will notice by section 270, are to receive the same salary as policemen and all fees which he earns should be collected by the city clerk.

Yours truly,

LYNDON A. SMITH,
Attorney General.

January 19, 1916.

605

VILLAGES—Council—Special meeting—How called.

C. T. Murphy, Village Attorney.

Dear Sir: Answering your inquiry you are advised that a special meeting of your council under the law under which it was organized, can only be called by giving reasonable and proper notice to all members of the council of the time and place of such special meeting. Dillon says:

"If the meeting be a separate one the general rule is, unless modified by the chapter or statute or valid ordinance, that notice is necessary, and must be personally served if practicable, upon every member entitled to be present, so that each one may be afforded an opportunity to participate and vote."

3, Dillon, Municipal Corporations, 553.

This department has held, however, that where all the members of a municipal body are present at a special meeting and take part in the proceedings therein, that the failure to give notice of such meeting would not invalidate anything done by that body at such a meeting but such is not your case. I am of the opinion that the town board will have a right to purchase this property without the voters of the town authorizing the purchase.

Andrews vs School District, 37 Minn. 96.
Bank vs. Goodland, 109 Minn. 28.

Yours truly,

JOHN C. NETHAWAY,
Assistant Attorney General.

August 13, 1915.

606

VILLAGES—Council—Authority to employ detective.

Andrew E. Fritz, Public Examiner.

Dear Sir: You inquire whether a village council has authority to employ detectives to secure evidence with reference to burglaries and other crimes committed within the village.

In my opinion, your inquiry is to be answered in the negative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

May 15, 1916.

607

VILLAGES—Council—How may act.

P. A. Linneberg, Esq.

Dear Sir: If your village is operating under chapter 9, revised laws 1905, then the newly elected village officers will assume the duties of their offices on the first Tuesday in April. If, however, the village is operating under the 1885 law as amended, then the duly elected persons assume their offices on their qualifications.

The members of the council when acting as individuals, cannot bind the village. The action of the council must be taken at properly called meetings and the council must act as such and not by individual members acting by themselves. It is not competent for the council to transact business and allow bills if there are only two of the members of the council present, such two not constituting a quorum or a majority of the council.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

March 27, 1915.

608

VILLAGES—Detatchment of territory.

C. Rosenmeier, County Attorney.

Dear Sir: You ask, in proceeding under section 1231, G. S. 1913, providing for the detachment of territory from villages, containing more than 1280 acres of the land, if the county board has discretion in granting or refusing a hearing whether if a hearing is granted, the provision of the statute is so far mandatory that the board must make an order detaching the territory, if the conditions prescribed by statute exist.

The statute does not confer upon the county board the exercise of any discretion in the matter of granting or refusing a hearing. The provision is that upon filing the petition with the county auditor, the county

commissioners at their next meeting shall fix a time and place for hearing and shall direct notice of such hearing to be issued by the auditor and published and posted as therein prescribed. I am of the opinion that this duty is mandatory and that if the board should refuse to grant a hearing it would be required by mandamus to do so.

I reach the same conclusion in a limited way as to your second question. It is incumbent upon the board to determine facts and the findings of the board become conclusive, except, I take it, that they may be reviewed by certiorari. If the board finds against the petitioners on any of the matters required to be established, or if the board shall so find and yet shall find that the lands described in the petition may not be detached from the village without unreasonably affecting the symmetry of the settled portion thereof, or that it is necessary for the proper exercise of the police powers or other functions of the village that the land be not detached, then the board would have the right to deny the application. If the board finds the facts in accordance with the allegations of the petition, it is the duty of the board to grant the petition, unless it also finds for one or all of the specified reasons indicated, the public interest requires that the petition be denied.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

April 15, 1916.

609

VILLAGES—Dumping grounds.

A. Abrahamson, Recorder.

Dear Sir: You submit the following inquiry:

"Is the village council on behalf of the village compelled to furnish a dumping ground for refuse such as manure, dead animals, manure, etc., taken from private property inside of village limits?"

In my opinion, your inquiry is to be answered in the negative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

April 19, 1916.

610

VILLAGES—Eminent domain—Land already subjected to public use—Paramount purpose.

J. C. Miller, Clerk.

Dear Sir: I am of the opinion that the village (assuming that it has the power of condemnation for the purposes of laying out streets, alleys, etc.), can take the land in question by condemnation proceedings, for street purposes, even though such land now constitutes a part of the play

ground. The deed to the play ground contains the provisions "said grounds to be owned and used as a play ground by the village for the school district and for all kinds of legitimate sports and celebrations forever and ever."

In other words, land that is owned by a school district, or even by a village, for specific public purposes, may be taken in condemnation proceedings provided the new purpose for which the lands are to be used is a paramount purpose. In the condemnation proceedings all persons interested must be made parties. The questions that will be determined by a court in such condemnation proceedings are, among other things:

1. The power of the village to exercise the right of eminent domain for the purpose stated.
2. The necessity for the taking of the land.
3. The question as to whether the purpose for which the land is proposed to be taken is superior and paramount to the public purpose for which it is already being used.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

May 8, 1915.

611

VILLAGES—Interest on village funds belongs to village.

F. N. Sartell, Village Clerk.

Dear Sir: You do not state under what law your village is organized, but assuming that you are organized under the general law, (R. L. 1905) I have to inform you that in my opinion moneys received by a village treasurer as interest upon deposits made of village funds, belongs to the village irrespective of whether such moneys are deposited by the treasurer in designated depositories or not.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

May 10, 1915.

612

VILLAGES—Limit on borrowing funds—Computation of.

C. J. Dodge, Village Attorney.

Dear Sir: Relative to the borrowing limit of your village, I have to say that the borrowing limit for the market is ten per cent of the assessed valuation, real and personal, of the village, and over such indebtedness as does not consist of:

1. Orders or warrants payable forthwith.
2. Certificates of indebtedness and bonds for permanent improvement revolving funds.

3. Obligations payable from the proceeds of assessments,—and
4. Bonds for the purchase or construction of ordinary public utilities.
5. Sinking funds.

You will find this matter answered by sections 1851 and 1848, General Statutes 1913.

Yours truly,
LYNDON A. SMITH,
Attorney General.

June 10, 1915.

613

VILLAGES—Cannot grant an exclusive franchise.

Thomas Tomasek, Village Recorder.

Dear Sir: You are advised that your village, organized as you state under chapter 45, General Laws 1885, has no right to grant an exclusive franchise. Our supreme court held that the right to grant an exclusive franchise must be expressly conferred upon the municipality by the legislature, and as the law under which you are organized does not contain that authority you therefore have no right to grant an exclusive franchise. See:

Long vs. City of Duluth, 49 Minn. 28.

Opinions of Attorney General, No. 349, 1910.

This opinion of the Attorney General held that the village of Rush City did not have the power under its charter to grant an exclusive franchise. As the charter of your city and Rush City are similar, this rule must be considered as the ruling of this department and which I have followed in giving this opinion.

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

February 16, 1915.

614

VILLAGES—Local improvement assessments—School property exempt.

A. C. Hinckley, Village Clerk.

Dear Sir: You call attention to the circumstance that the school referred to in your communication is required as a condition to the right to receive state aid, to provide adequate sewers or other means of taking care of sewage and the proposed construction would be in furtherance of the obligation thus imposed upon the school. You ask whether under these circumstances the school property may be assessed for a part of the expense of the proposed sewer and outlet.

The general rule is that the laws of the state authoring the assessment of property either by general tax or special assessment, apply to private and not public property, and though laws are general in their terms they do not apply to the public property unless the intent so to apply them affirmatively appears.

The supreme court in a decision filed on June 30, of this year declares this doctrine. No part of the proposed sewer system can be assessed against the school property.

2. Your second inquiry is whether property benefited by the proposed construction but which may not be connected immediately therewith may be assessed.

The general rule is that a special assessment may be levied in advance of the work and even in advance of the letting of the contract. The circumstance that the property owner does not immediately avail himself of the benefit of the construction of a sewer system with which he may connect does not affect the right of the municipality to make the improvements and assess the cost upon the property especially benefited thereby.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

August 14, 1916.

615

VILLAGES—Orders—Interest on—Payment of.

F. L. Klock, Village Clerk.

Dear Sir: You have been heretofore advised of the ruling of this office to the effect that it was not competent for a village to pay interest annually on outstanding orders, that is if the village had outstanding orders, all of which it could not pay, with accrued interest thereon, the village cannot apply the money on hand and avilable for the payment of such orders to the payment of the interest on the same, without the payment of the principal thereof. We further held that when money was in the treasury, available for the payment of outstanding orders, such moneys should be applied to the payment of the oldest orders and the interest thereon, as far as such money would go.

You state that a preceding council issued village orders in payment of interest on outstanding orders, which interest orders have not yet been paid, and you inquire whether the present council would have the right to nullify such interest orders.

There is no express provision of the law for a village council to nullify village orders. The question of the payment of village orders is one that is up to the village treasurer, he not being authorized to pay any village ordes except lawful ones. I do not consider these interest orders to be lawful, and therefore the treasurer should not pay them. There would be no harm in the council passing a resolution stating the facts and instructing the village treasurer to pay them.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

November 25, 1916.

616

VILLAGES—When orders can be issued.

C. L. Parkin, Village President.

Dear Sir: I have to say that the method of determining whether or not warrants may be issued for the special purpose for which money may be borrowed, is, as a rule, that the money in the treasury and the taxes due and likely to be paid should be added together and from this amount deduct the amount that it will take to pay up outstanding indebtedness and the amount which it will take before any new money is to be received from amounts levied this year, and if there is a balance after substracting these two amounts, and any outstanding contracts which have practically appropriated money, then the balance, if any, may be used to draw new warrants upon for any legitimate purpose, such as the building of the steel tank would be.

Add together—

Amount in treasury.....$
Amount probably available from current and delinquent taxes.$

Total "A" .....$
Subtract from total "A".....$
Current expenses until money from 1916 levy is available....$
Outstanding warrants .....$
Outstanding contracts which have appropriated village money $

Total "B" .....$
Subtract from total "A" .....$
Total "B" .....$

Balance is amount that may be drawn against legally for any proper purpose.

Yours truly,

LYNDON A. SMITH,
Attorney General.

May 26, 1916.

617

VILLAGES—Orders—Negotiability of.

Francis E. Murphy, Village Attorney.

Dear Sir: I have to say that village orders are not strictly negotiable. Defenses to them are not cut off by the fact that they get into the hands of bona fide holders for value, without notice.

Yours truly,

LYNDON A. SMITH,
Attorney General.

February 16, 1915.

618

VILLAGES—Orders—Payment of.

E. O. Abrahamson, Esq.

Dear Sir: You state that the banks are holding about $2,500 of village orders, which cannot be taken up at this time and probably not for another year or possibly two. You further state that these banks are willing to hold these orders and also cash those that will be issued, if the council will pay interest on the same each year. You inquire whether the council can pay this interest annually as indicated, without taking up the orders.

In my opinion your inquiry is to be answered in the negative. A village order lawfully issued and bearing interest because not paid for want of funds when properly presented must be paid in its entirety with interest and cannot be paid by the payment of a part of the principal and interest at one time and the balance at some future time.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

December 23, 1915.

619

VILLAGES—Ordinances—Enforcing delinquent water and light bills as taxes.

Thad S. Bean, Village Attorney.

Dear Sir: You state that your village council is considering the adoption of an ordinance relating to the water, light and heating plant and providing substantially that contracts for water, light and heat shall be made only with the owners of buildings, not with the tenants, and upon bills for the same becoming delinquent, and the inabliity of the village treasurer or other village authorities to collect them, they shall become liens upon the property to which furnished and shall be filed with the county treasurer to be collected with their taxes in the usual way.

You ask whether, in our opinion, such an ordinance would be enforceable.

In my opinion, your inquiry is to be answered in the negative.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

April 18, 1916.

620

VILLAGES—Ordinances—Sentencing vagrants to work on streets.

Thad S. Bean, Village Attorney.

Dear Sir: You inquire whether it would be lawful and proper for the village council to adopt an ordinance providing substantially that vagrants, drunkards and other persons guilty of similar offenses, and who have families who suffer from lack of necessities by reason of the neglect or refusal of such offenders to work or provide for them, shall upon conviction in municipal court, be sentenced to so many days labor on the village streets or similar work for the village and that they be paid by the village at so much per day, and that any and all moneys so earned shall be paid to the family or other dependents of such offender.

In my opinion, your inquiry is to be answered in the negative.

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

April 18, 1916.

621

VILLAGES—Publication of ordinances—Necessary when.

Francis E. Murphy, Esq.

Dear Sir: You state that your village council desires the opinion of this department as to the effect of a village ordinance duly passed, but to which no printer's affidavit of publication is attached; that it is your opinion that unless the publication could be proven, the ordinance would be of no effect.

Dillion on Municipal Corporations, 5th Edition, section 603, gives this ruling:

"In the absence of a statutory or charter provision directing that ordinances be published before they take effect, no publication is necessary, and ordinances take effect immediately without it. When ordinances are required to be published before they shall go into effect this requirement is essential and a publication must be in the designated mode. Until such publication be made or until they have gone into operation, no penalty can be enforced under them, but under this provision, unless it is required that the publication should be made within a specified time, the only effect of an omission to publish is that an ordinance remains inoperative. It may be made operative at any time by publication in the manner required by statute."

In a case in the supreme court an ordinance was passed on the 4th day of May, but was not published until the 9th day of September, between which dates several meetings of the council had taken place. There being no provision of law governing the village fixing any particular time within which the ordinance must be published, it was held that it could be published at any time, when it would become effective.

You are therefore advised that we concur in your opinion that unless the publication could be proven, the ordinance would be of no effect, provided, however, that the statute provided that the ordinance be published.

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

April 16, 1915.

622

VILLAGES—Power to prohibit or restrict raising of pigs in.

Railroad and Warehouse Commission.

Dear Sirs: Your inquiry pertains to the power of a village to prevent the raising and maintaining of live pigs within the thickly settled portion of the village.

You are advised that under sub-division 17 of chapter 1268, G. S. 1913, it is our opinion a village has the power to define a nuisance and prevent and abate same. Many of the villages throughout the state, under the power conferred in that sub-division of the section, have adopted ordinances preventing the keeping and housing of pigs and hogs within a certain portion of the village, and it has never been doubted that such power existed in all villages organized under the revised laws of 1905.

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

May 4, 1915.

623

VILLAGES—Printing—Folio.

Charles C. Kolars, Village Attorney.

Dear Sir: Replying to your letter of April 3, I have to say that this office is of the opinion that printing must be measured according to the statute definding a folio. The question is, in any case of the kind you refer to, "how many folios were there in the publication" measured according to the statutory rule.

Yours truly,
LYNDON A. SMITH,
Attorney General.

April 6, 1916.

624

VILLAGES—Publication of proceedings of.

E. C. Platt, Esq.

Dear Sir: You state that your village was organized under the revised laws of 1905, and I assume that you mean under chapter 9, and you

inquire as to the duty of the council to cause its proceedings to be published.

I advise you that ordinances, rules and by-laws passed by the council, and the annual financial statement of the clerk, must each be published in a newspaper selected by the council. (Section 1258, G. S. 1913; Section 1276, G. S. 1913). There is no provision which requires the publication of other proceedings of the council. The clerk is required to keep mintues of those proceedings and a detailed financial record (Section 1260, G. S. 1913), but he is not required to publish them.

Yours truly,

LYNDON A. SMITH,
Attorney General.

August 18, 1916.

625

VILLAGES—Separation from towns for election purposes—Qualifications of respective officers.

George L. Taylor, County Auditor.

Dear Sir: You are advised that if the village becomes a separate election and assessment district from the township in which it is located, then residents of the village are not qualified to hold township offices and upon the completion of such separation, the town offices held by residents of the village become vacant. These vacancies may be filled at a special election under the provisions of section 1124, General Statutes 1913. It is likely that the duly elected town clerk would continue to be a de facto town clerk until his successor had properly qualified and it would therefore be competent for a petition for a special election to be filed with him and for him to give the notice of the election. Such de facto town clerk would have the right to retain the township books and records until such time as there is a successor to turn them over to.

The foregoing has relation to special town meetings called for the purpose of filling vacanties, but your attention is directed to Section 1174, General Statutes 1913, which is as follows:

"Whenever a vacancy occurs in any town office, the town board shall fill the same by appointment. The person so appointed shall hold his office until the next annual town meeting and until his successor qualifies, provided, that vacancies in the office of supervisor shall be filled by the remaining supervisors and town clerk until the next annual town meeting, when his successor shall be elected to hold for the unexpired term."

Yours truly,

CLIFFORD L. HILTON,
Assistant Attorney General.

February 11, 1915.

626

VILLAGES—Sewers—Use of drainage ditch as outlet.

A. Westerdahl, President Village Council.

Dear Sir: The provisions of chapter 35, laws 1915, relating to the establishment and maintenance of the general sewer system, applies to all villages and to all cities having a population of 10,000 or less, except those organized under home rule charters. Your village, being organized under a special law, becomes subject to the provisions of the act above referred to, and I see no reason why you may not proceed to establish a general sewer system in accordance with the provisions thereof.

Your second inquiry presents some practical difficulties. There does not seem to be any statutory provision relating to the use of drainage ditches as an outlet for a sewer system, but I assume that a drainage ditch might be so used, with the consent of the county board, but I think this must needs be under some arrangement mutually satisfactory to the village and the county authorities, and that it would be incumbent upon the village to so manage the operation that the ditch outlet would not become offensive or dangerous to the public health. Perhaps some arrangement for the discharge of the flow of water into the ditch might accomplish the purpose, if that is practicable. It is more in the nature of an engineering or sanitary problem than a law question.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

June 20, 1916.

627

VILLAGES—Establishment sewers—Confusion in legislation

C. L. Benedict, Village Attorney.

Dear Sir: Chapter 35, laws 1915, was intended as a substitute for the provisions of existing statutes relating to the establishment and maintenance of sewers in villages and in cities having a popuation of 10,000 or less, and by section 28 all former laws inconsistent therewith were repealed, including chapter 312, laws 1903, and section 735 revised laws 1905, and the amendments thereto, so far as those laws related to the establishment and maintenance of a sewer system in villages. I agree with your suggestion that chapter 35, laws 1915, was designed and intended by the legislature as a complete working law relating to the construction and maintenance of sewers and, as I have said, all previous legislation on the subject was superseded. This left the provision contained in the general village act (section 735 R. L. 1905), in effect, so far as it relates to other street improvements, and the legislature, by the enactment of chapter 153, laws 1915, merely amended the portion of section 735 which had not been superseded, so that the petition for public improvement still affected by that provision should only require a majority of the owners of property affected by the assessment. I think this is the only rational view of the

legislative intent, and that the court would not hold that by amending the act in this one particular the legislature intended in any way to modify, much less repeal, the complete statute relating to the construction and maintenance of sewer systems in villages which at the same session went into effect only 30 days before.

Answering now the specific inquiries contained in your communication:

1. I am of the opinion that chapter 153, laws 1915, has no effect upon chapter 35, laws 1915.

2. Under the provisions of chapter 35, Laws 1915, the village council, without petition, may proceed by ordinance or resolution, to establish a sewer system or to alter or to extend any existing sewer system and to assess the cost thereof, exclusive of the cost of construction of the general or trunk sewer provided for as a part of the system upon the property thereby benefited, without any petition on the part of the owners of the propery to be assessed therefor.

I agree with your suggestion that as a convenient method for the property owners who favor the establishment and maintenance of a general sewer system in the village, they might well initiate the proceedings by the preparation and presentation to the village council of a petition such as the one provided for by chapter 153, laws 1915.

Yours truly,

JAMES E. MARKHAM,
Assistant Attorney General.

June 22, 1916.

628

VILLAGES—Issuance of bonds by for tile drain sewers.

J. F. Druar, Esq.

Dear Sir: You inquire whether the village of Forest Lake can issue bonds for the putting in of tile drain sewers. I have to say that I think it can. The statute with regard to putting in sewers might, and would in many cases, be construed to mean under ground sewers, but taken in connection with the language in which the word "sewers" is found, I would think that it was intended to give to the construction of sewers any necessary form which would best aid them in withdrawing water from the streets. If, however, there is to be a mixing up of public and private property in connection with these tile sewers, the current of decisions is against its being done. The supreme court once said:

"Where the purpose for which taxes are authorized to be imposed are partly private and partly public, the act must wholly fall, unless, perhaps where the part to be raised for the private purpose can be distinguished and severed from the other."

Yours truly,

LYNDON A. SMITH,
Attorney General.

June 25, 1915.

629

VILLAGES—Sidewalk assessments—Attempt to evade by conveyance of narrow frontage strip.

A. W. Knaak, City Recorder.

Dear Sir: You direct attention to a palpable attempt to evade the payment of a sidewalk assessment.

It is my opinion that the conveyance of the one foot strip off the east end of the three lots abutting the sidewalk after the resolution had been passed ordering the construction of the walk, would not have the effect of releasing the whole of the three lots from the liability of the assessment for sidewalks abutting them. The courts have held that conveyances of this character are somewhat in the nature of a fraud on the law. As an illustration, I refer to a Wisconsin case, where the owner of the property and his wife conveyed to one Mayer a strip of land one foot wide extending the whole length of the lot abutting upon the street during the year and before the work was ordered, but after the improvement had been adopted and the court in holding that the whole lot was liable for the assessment, said:

"Were the assessment of benefits on lot 2 confined to the one foot strip, such assesment would necessarily be for a merely nominal sum for the reason that the strip dissevered from the lot would be practically useless and of little or no value and could not possibly be materially benefited by the improvement. * * * If each lot owner along the line of the improvement has pursued the same course, no substantial assessment of benefits could have been made, for the whole or nearly the whole expense of the improvement would have been cast upon the taxpayers of the ward, and then by paying the nominal assessment on the various strips of all the lots abutting on the improvement, and which the law contemplates shall bear a share of the cost of it to the extent they are benefited thereby, they are relieved of the burden at the expense of the taxpayers of the ward. To sanction such a practice would be to subvert the whole system of assessment for benefits which has always prevailed in the municipalities of the state and would seriously embarrass and retard these municipalities in the making of street and other needed improvement. * * * The conveyance of the strip to Mayer was an open and avowed attempt on the part of the grantors to perpetrate a gross fraud on the law and on the taxpayers of the ward and would be a reproach and a disgrace to our jurisprudence if the courts, and especially a court of equity should allow the attempted fraud to succeed."

Fass vs. Seeharver, 60 Wis. 525.

I find that this same rule has been adopted by the courts in several other states and in fact seems to be the universal rule in all the states where the question has arisen, and I am therefore of the opinion and so advise you that the whole of these lots, regardless of this strip being conveyed, are subject to assessment for the construction of the sidewalk abutting thereon.

Yours truly,

JOHN C. NETHAWAY,

Assistant Attorney General.

October 9, 1915.

630

VILLAGES—Sidewalk assessments.

A. O. Rogosheski, Village Recorder.

Dear Sir: Your inquiry pertains to the building of sidewalks by your village and the enforcement of assessments therefor. It appears that the improvements were made before an assessment was made, and you ask if the village has a right to assess the abutting property for the expense of building the walks.

You are advised that the rule is that the power to assess property for public improvements is a continuing power and can be made after the improvements have finally been completed. In regard to sidewalks, I would call your attention to chapter 167, laws of 1901, which prescribes an orderly proceeding for the assessment and collection of sidewalk assessments.

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

August 16, 1915.

631

VILLAGES—Sidewalks—Right of council to order without petition.

E. M. Kimball, Village Clerk.

Dear Sir: I have to say that it would seem that the village council can order the construction of a sidewalk without a petition from the owners of adjacent land. See General Statutes, Minnesota, 1913, section 1284 and 45 Minn. Reports, page 4.

Yours truly,
LYNDON A. SMITH,
Attorney General.

July 6, 1915.

632

VILLAGES—Sidewalks over railroad right of way—Limit on indebtedness.

H. J. Hedburg, Village Recorder.

Dear Sir: You ask:

1. "What is the limit a village is allowed to issue village warrants for use in general street improvements and building sidewalks?"

You are advised that section 1851, General Statutes 1913, provides in speaking of limit of debt:

"Nor shall any other municipal corporation, except school districts, become so indebted beyond ten per cent of its assessed value."

You do not state what is the assessed value of the property in your village. Therefore you must apply this section of the statute to the conditions that exist in your village in that respect.

You also ask:

2. "Can a village compel a railroad company to build cement sidewalks across a street running through railroad right of way?"

I would call your attention to chapter 78, General Laws 1913, where it is among other things provided as follows:

"And a suitable sidewalk shall be constructed by said company to connect with and correspond to the sidewalks constructed and installed by the municipality or by the owners of the abutting property, but cement or concrete construction shall not be required in track space actually occupied by the railroad tracks, if some substantial and suitable material is used in lieu thereof."

The railroad companies are questioning the constitutionality of this law, but there has been no litigation or decision and we have on repeated occasions held the law constitutional and that villages could compel by mandamus the construction of sidewalks such as are contemplated by this law.

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

April 10, 1915.

633

VILLAGES—Removing trees and laying sidewalks.

J. A. Redding, Village Recorder.

Dear Sir: You ask:

If the village board can require trees removed and sidewalks laid on the line now occupied by the trees. I have to say that in my judgment the village board can only do so in case of what seems to them an urgent necessity. The planting of trees in our municipalities is encouraged by the laws of the state and a certain amount of protection afforded them; at the same time the entire street from one side to the other is primarily for travel and the trees must, in my judgment, yield to the necessities of travel. The question must be solved by the board so as to protect the trees so far as the necessities of travel permit.

Yours truly,
LYNDON A. SMITH,
Attorney General.

July 10, 1915.

634

VILLAGES—Streets—Acquisition of land.

F. E. Murphy, Village Attorney.

Dear Sir: You ask:

"May a village condemn land for a street when the only means possible of paying the damages awarded is by making payments by village orders, there being no funds in the village treasury to pay such orders when issued?"

I am of the opinion that this question should be answered in the negative. In my opinion the statute contemplates and requires that the damages awarded should be paid in money. While the legislature might have provided, had it seen fit to do so, that damages awarded in condemnation proceedings and payable by the village might be paid by the issuance of village orders, since the issuance of such orderes would "secure" to the person whose property was taken the payment of compensation therefor (Constitution of Minnesota, article I, section 13), it has not done so.

Yours truly,
C. LOUIS WEEKS,
Assistant Attorney General.

December 3, 1915.

635

VILLAGES—Streets—Vacation—Member council personally interested signing petition.

Henry Hrdlicka, Esq.

Dear Sir: The decisions of the courts are that in the absence of fraud or collusion, the fact that a member of a council is interested along with the public in the vacating of a street, does not take from him the right to act on a petition for such vacation, the same as he would if he were not personally interested.

Yours truly,
LYNDON A. SMITH,
Attorney General.

August 16, 1916.

636

VILLAGES—Street sprinkling cost may be paid from general fund.

Francis E. Murphy, Village Attorney.

Dear Sir: You ask:

Whether or not it is possible for a village to oil or sprinkle the streets out of the general fund of the village.

You refer us to section 1284, General Statutes 1913. This section was slightly amended by chapter 153, G. L. 1915, but the amendment does not

affect or control the question which you submit. The language of the general statutes and the act of 1915, found at the latter part thereof, is as follows:

"The cost of such improvement or sprinkling or any part thereof, not less than half, may be assessed and levied, by resolution of the council, upon the lots or parcels of ground fronting on the street, or part of street or side thereof so improved or sprinkled and most benefited thereby."

In view of the fact that the word "may" is used, I am inclined to the opinion that this is simply directory and not mandatory and that the village may oil or sprinkle its streets without assessing the cost thereof against the abutting property.

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

September 8, 1915.

637

VILLAGES—Power to prohibit Sunday theatres—Treasurer—Compensation of.

P. A. Presting, Village Recorder.

Dear Sir: You submit two questions:

(1). "Has a village council the power to prohibit or pass an ordinance prohibiting moving picture shows from operating on Sunday in a village when the sentiment or the majority of the citizens are against it?"

(2). "What fees is a village treasurer entitled to, 2 per cent of the money received into the treasury during the year, or 2 per cent of the moneys paid out?"

Your first inquiry is answered in the affirmative.

Your second inquiry is answered by saying that under the statute the treasurer is entitled to 2 per cent on all moneys paid in and not on moneys paid out.

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

March 20, 1915.

638

VILLAGES—Under facts stated not entitled to share of funds in town treasury.

L. J. Dasson, President Village Council.

Dear Sir: You state that your village is located in a township, but is not separated therefrom for election and assessment purposes, and that therefore the voters in the village have a right to participate in town meetings.

You inquire if, under the facts stated, the village is entitled to a share of the money that is paid into the township treasury.

Your inquiry is answered in the negative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

April 25, 1916.

639

VILLAGES—Water and light.

T. F. Spreiter, President Village Council.

Dear Sir: You submit the following inquiries at the request of your village council and, as you state, pursuant to the desire of your village attorney:

1. "Has the village council the power to pay the members of the commission as appointed by them a salary from the funds of the village, or if a salary can be provided for, may that be paid from the proceeds of the light and water plant?"

2. "Can the commission, as created by the village council by resolution, appoint and employ one of their number as the secretary of such commission, or must the secretary be some one outside of such commission?"

I find no provision in the statute which authorizes the payment of a salary to a member of the water and light commission of a village.

In my opinion your second inquiry is to be answered in the negative.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

April 22, 1916.

640

VILLAGES—Water mains—Conflicting legislation—Petitions—To whom addressed.

Alfred E. Rietz, Esq.

Dear Sir: You inquire whether, in extending water mains under a petition, as provided for in sections 1313 and 1318, inclusive, G. S. 1913, the petition for such extended mains should be addressed to the village council or to the water—light—power and building commission appointed in your village under the provisions of section 1807.

The section last referred to is taken from chapter 412, Laws 1907, while the general act authorizing the establishing of a waterworks system, or the extension of existing water mains, being the sections of the general statutes first above referred to, are taken from chapter 346, Laws 1911.

So far as the legislation of 1907 and that of 1911 are in conflict, I take it that the latter act would control. However, I find nothing in the

legislation of 1907, providing for the appointment of a commission, and definding its powers and duties, which in any way conflicts with the act of 1911 above referred to.

Answering your specific inquiry, I am of the opinion that the petition for the installation of water mains should be addressed to the village council, and that all proceedings relating thereto, including the levying of the necessary assessment to defray the cost thereof, should be had before that body.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

July 12, 1916.

641

VILLAGES—Compensation treasurer—Not computed on money paid him by predecessor.

Robert H. Keyes, Village Recorder.

Dear Sir: You are advised, that a village treasurer is not entitled to a 2 per cent commission on moneys paid over to him by his predecessor in office. Under the facts stated in your letter, it would seem that the person who was treasurer when the $800 was received in the village treasury from the county treasurer would be entitled to the commission and not the one who became treasurer after such money went into the village treasury. The treasurer gets his commission on the money that passes into the treasury and not merely what comes into his hands.

Yours truly,
WILLIAM J. STEVENSON,
Assistant Attorney General.

July 6, 1915.

642

WAREHOUSES—Warehouseman—Who is.

Railroad & Warehouse Commission.

Gentlemen: It is stated that a certain person owns a four story building in Minneapolis, each floor being used for the storage of farm implements and machinery by different concerns. Such owner acts as agent for these concerns, but not the exclusive agent. He is paid a monthly rental for the use of the floor space, which sum includes the cost of hauling the implements from the cars to the warehouse, packing and delivering for shipment in filling orders. He claims that he does not use warehouse receipts nor handle machinery and implements for public storage. An opinion of this office is requested upon the question of whether the owner of the building is a warehouseman within the meaning of chapter 210, laws 1915.

In section 2 of said act the following definition is given:

"The term 'warehouseman' when used in this act, means and includes every corporation, company or association, firm, partnership, joint stock company or association, firm, partnership or individual, their trustees, assignees or receivers appointed by any court whatsoever, controlling, operating or managing in any city of the first class in this state, directly or indirectly, any building or structure or any part thereof, or any buildings or structures or any other property whatsoever and using the same for the storage or warehousing of goods, wares or merchandise for hire, but shall not include persons, corporations or other parties operating grain or cold storage warehouses."

In the case of State vs. M. & St. L. Ry. Co., 115 Minn. 116, a warehouseman is defined as "one who receives into his warehouse goods and merchandise for storage for hire."

One of the distinguishing features of the business of a warehouseman, as defined by the statute and our supreme court, is that the goods be stored for hire. From the facts stated in your letter it would seem that the person in question is storing the goods not for hire, but in premises leased by the owners thereof. If such is the case, I am of the opinion that he is not a warehouseman within the terms of chapter 210, laws 1915.

Yours truly,
HENRY C. FLANNERY,
Assistant Attorney General.

May 24, 1916.

643

WAREHOUSES—Other than grain or cold storage—Liability of surety in case of fire.

Railroad and Warehouse Commission.

Gentlemen: Your request is stated in the following language:

"We would like to know whether or not warehouse operators for whom we furnish license bonds are responsible for loss by fire. In other words, if there was a fire in one of their warehouses and contents were burned, would they be responsible to the owners of the property stored therein."

I have to say that the storing of goods with a warehouseman constitutes a bailment. Whether the bailor is responsible to the bailee for goods damaged by fire while in his custody depends upon two questions; first the nature of the contract of bailment, and second, whether or not the bailor has been guilty of negligence or has failed to exercise that degree of care which the contract of bailment requires.

You will therefore see that the question submitted cannot be answered categorically since each concrete case would have to be considered as it arises and would be governed by its own peculiar circumstances.

Yours truly,
HENRY C. FLANNERY,
Assistant Attorney General.

November 27, 1916.

644

WEIGHTS AND MEASURES—Elevators—Fifty pound weight in lieu of bushel.

Railroad and Warehouse Commission.

Gentlemen: You inquire whether or not in this state an elevator can purchase by fifty pound weight instead of by bushel. I have to say that I do not find that there has been any change in the state law since the opinion of this office was given to the following effect, to-wit: That the laws of this state do not prevent the sale of articles by some other description than the bushel, provided there is no express or implied use of the bushel as a descriptive term, for, and measurement of, the amount sold except in certain instances such as coal, charcoal and ice, which articles cannot be sold except by weight. Public local warehouses in this state must use in handling grain no other measure than the standard bushel and no other number of pounds are to be used or called a bushel than the number of pounds provided by law as the standard weight of the kind of grain in question. (Section 4486, G. S. 1913). As was said by the late Assistant Attorney General Edgerton, in his letter of November 26, 1913:

"The law does not, however, specifically prohibit the purchase of barley otherwise than by the bushel. In the absence of such prohibition, it is my opinion that the parties referred to are at liberty to contract upon the basis (of 68 cents for each fifty pounds of barley) proposed."

If the term "bushel" is used, then that bushel must be the bushel prescribed in section 5790, G. S. 1913, or be a bushel by weight prescribed in section 5794, to-wit: forty-eight (48) pounds.

Yours truly,

LYNDON A. SMITH,
Attorney General.

May 10, 1916.

645

WEIGHTS AND MEASURES—Forty-eight pound sacks of flour.

Railroad and Warehouse Commission.

Gentlemen: You ask:

1. Can a manufacturer in Minnesota put up sacks of flour for sale in this state containing 48 pounds? and

2. Where 48 pound sacks are shipped in interstate commerce into this state can the merchants or dealers sell the same for consumption in Minnesota?

I have to say that the answer to your first question is that a manufacturer in Minnesota cannot put up for sale in this state sacks of flour containing other than 49 pounds if such manufacturers are putting them out as quarter barrel sacks.

The answer to your second question is that merchants and dealers cannot sell 48 pound sacks for quarter barrel sacks whether they are brought in from another state or put up in this state and sold or offered for sale as quarter barrel sacks.

Merchants can buy flour where they please and bring it into this state, and the sale of flour cannot be prohibited. It is "the staff of life" and is not in its unadulterated and natural condition subject to regulation by police power. Its sale can be regulated. If a sack of flour comes into Minnesota labeled or purporting to be a quarter barrel sack, it should be a sack containing 49 pounds. Retailers thereof must not expressly or impliedly sell less than 49 pounds of flour as and for a quarter barrel.

Such an interpretation of the law does not interfere with the federal constitution. It does not interfere with interstate commerce. See the recent case of Armour & Company vs. North Dakota, 240 U. S. 510 and cases therein cited.

Yours truly,
LYNDON A. SMITH,
Attorney General.

May 10, 1916.

646

WEIGHTS AND MEASURES—Penalties.

J. A. Wirtensohn, Clerk of Municipal Court.

Dear Sir: In view of the rulings of the supreme court in State vs. Horrigan, 55 Minn. 183, holding the words "penalties" and "fines" to be synonymous we feel justified in holding that by the use of the word "penalties" found in chapter 281, laws 1915, means and should include fines. It will be noted that no where in the act or the other laws relating to weights and measures, can be found any provision in regard to penalties and it does not seem that the legislature inserted the word "penalty" and omitted the word "fines" that appeared in the previous laws, unless upon the understanding that the word "penalty" includes "fines," and the decision which I have cited would seem to justify that conclusion.

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

September 23, 1915.

647

WITNESSES—Fees paid by defendant under facts stated.

F. J. Hendricks, Esq.

Dear Sir: Where a person is charged with the commission of a crime, is tried and acquitted, he is responsible for the compensation to be paid his own witnesses. I take it that the case you refer to is one brought

in justice court. The state or the county is not required to, nor can it pay for the witnesses called in behalf of the defendant.

Yours truly,
CLIFFORD L. HILTON,
Assistant Attorney General.

August 1, 1916.

648

WITNESS FEES—Police officer not entitled to.

H. P. Bengtson, County Attorney.

Dear Sir: I am of the opinion that when a police officer is a witness in a criminal prosecution he is never entitled to fees, per diem or mileage. He is entitled, however, to be reimbursed by the county in which the criminal prosecution is pending, for all expenses actually and necessarily incurred by him in connection with the giving of his testimony in the matter.

Section 5775, General Statutes 1913, so far as it relates to the question you ask, was in substantially its present form in 1895, and constituted a general rule. In 1901, section 5766, G. S. 1913, was passed and constitutes a special rule applicable only in cases brought in the name of the state, whether civil or criminal.

Yours truly,
LYNDON A. SMITH,
Attorney General.

February 15, 1915.

649

WORKMEN'S COMPENSATION—Agreement between employer and employe.

State Labor Commissioner.

Dear Sir: I am of the opinion that a contract between an employer and employe, in which the parties do agree not to be bound by part 2 of the workmen's compensation act, becomes effective upon execution of the contract.

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

July 21, 1915.

650

WORKMEN'S COMPENSATION—Citizen injured in assisting police officer.

State Commissioner of Labor.

Dear Sir: You direct attention to the circumstance that a citizen of one of the cities of the state was called upon by a police officer to aid

in the prevention of the escape of an offender against the law and that the person so called upon was injured in assisting the officer in retaining the arrested person in custody.

You inquire whether, under these circumstances, the person so summoned to assist the police officer is entitled to compensation under the workmen's compensation act.

The statute defining the term "employee" as used therein contains the provision that:

"It shall include every person in the service of a county, city, town, village or school district therein, under any appointment or contract of hire, express or implied, oral or written."

You will note that the statute contemplates a contract of hire and, in a general way at least, the relation of master and servant.

A citizen summoned by the sheriff as a part of his posse, or by a police officer, to aid him in the arrest or detention of an accused person does not thereby become an employe of the county or city, but the performance of the duty which he is called upon to perform is one of the incidental duties of citizenship for the performance of which the law does not contemplate the allowance of compensation.

Yours truly,

JAMES E. MARKHAM,
Assistant Attorney General.

December 30, 1916.

651

WORKMEN'S COMPENSATION—Contaminated drinking water—Liability for sickness resulting from.

James P. McMahon, County Attorney.

Dear Sir: The workmen's compensation act, so-called, provides that:

"When personal injury or death is caused to an employe by accident arising out of and in the course of his employment, of which injury the actual or lawfully imputed negligence of the employer is the natural and proximate cause, he, or in case of death, his personal representative, * * * shall receive compensation by way of damages therefor from his employer."

The word "accident" is defined in subdivision H of section 34 of the act, in which it is declared that:

"The word 'accident' as used in the phrases 'personal injuries due to accident' or 'injuries or death caused by accident' in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforseen event, **happening suddenly and violently** with or without human fault, **and producing at the time, injury to the physical structure of the body.**"

In view of this language I think it quite clear that the statute does not impose a liability for loss resulting from sickness occasioned by the use of contaminated drinking water. To create a liability under the compensation act, as you will see, the injury must be due to accident happening suddenly and violently, and producing at the time injury to the physical structure of the body.

The claim of these employes for compensation must rest upon the application of the general law imposing liability upon the employer for negligent conduct resulting in injury to the employe.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

November 8, 1916.

652

WORKMEN'S COMPENSATION—Contribution by employes to relief fund.

Frank Hicks, Esq.

Dear Sir: You state that it has been the custom for many years for employers of labor in your part of the state to charge and receive from their employes certain contributions from the compensation due them as laborers to provide a fund to cover hospital expenses in case the employes become incapacitated while in service and you ask whether this practice is permissible in view of the provisions contained in the workmen's compensation act.

I take it that these contributions cover and are intended to cover hospital expenses in case of disability due to accidental injury and also incapacity due to sickness not resulting from accidental injury and if this is true I am of the opinion that the employer has no right to make these collections or deductions from the workman's wages. In case of accidental injury while in the service, the workmen's compensation act imposes upon an employer the duty to furnish such medical, surgical and hospital treatment as may be reasonably necessary during a prescribed period and any agreement between the employer and employe that this expense should be defrayed by the employe in the way of assessments or contributions from his wages is contrary to the intent of the act.

The only contribution by the workman authorized by the provisions of the act is that contained in subdivision 6 of section 31-A of chapter 467, laws 1913, by which it is made lawful for the employer and the workman to agree to carry the risks covered by part 2 of the act **in conjunction with other risks and provided other and greater benefits, such as additional compensation, accident, sickness or old age insurance or benefits.** The fact that such agreement involves a contribution by the workman from his wages does not invalidate such an agreement, **provided the employes pays not less than the cost of the insurance of the risks otherwise conferred by part 2 of the act and the workman gets the whole of the additional compensation or benefits.**

I do not understand that the contributions or deductions from the wages referred to in your letter involve any agreement between the employer and employe made pursuant to this provision.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

March 24, 1916.

653

WORKMEN'S COMPENSATION—County liable as employer.

Anton Thompson, County Attorney.

Dear Sir: You call attention to the fact that Otter Tail county is doing a considerable amount of road and bridge work by day labor and you ask whether the county would be liable to the workman who may be injured in connection with this work, under the provisions of the workmen's compensation act

The act in paragraph D, section 34, provides that the term

"Employer as used therein shall mean every person not excluded by section 8, who employs another to perform services for hire and to whom the employer directly pays wages, and shall include any person, corporation, co-partnership or association or group thereof, and shall include county, village, town, city and school district and other public employers, except the state."

The provisions of section 8 refered to do not in any way limit the liability indicated by the provision just quoted, and you are advised therefore, that the county would be liable under the act for the payment of compensation to an employe injured in the performance of his duty in connection with road and bridge work.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

April 17, 1916.

654

WORKMEN'S COMPENSATION—Employe in interstate service.

State Labor Commissioner.

Dear Sir: You ask:

Whether the workmen's compensation act applies to a man worked for a contractor in doing grading work on an interstate railroad already in use. The work consisting of surfacing the old line.

In view of the ruling of the supreme court in the case of Pederson vs. Railway Company 229 U. S. 146, I am of the opinion that the man would be engaged in interstate commerce, and the act would not apply to him were he injured.

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

July 22, 1915.

655

WORKMEN'S COMPENSATION—Employe of county on state roads.

State Labor Commissioner.

Dear Sir: You state that a man was injured on road work in the service of a county in this state. You further state that the work of this road is to be paid for, part by an appropriation made by the county

board and part by funds appropriated by the state. You ask:

"Should the employe in this case look solely to the county for his compensation, or is the county liable only to the extent to which this appropriation is being used for financing the work?"

I do not think that the fact as to the source from which the money is derived to pay for the work has any bearing upon the question of liability, and you are therefore advised that if the man was an employe of the county, the county is solely liable.

Yours truly,

JOHN C. NETHAWAY,
Assistant Attorney General.

January 12, 1916.

656

WORKMEN'S COMPENSATION—Liability of county.

E. H. Nicholas, County Attorney.

Dear Sir: You ask:

"Is there any liability on the part of the county for an injury sustained by a workman in its employ while working on a public highway or bridge?"

It has been held by this department that if the employe engaged in employment for the county, and such employment was not casual, then the county, under sub-division D, section 34, chapter 467, general laws 1913, would be liable to the employe under that act. It seems to us that the language found in sub-division D, chapter 34, is too plain to bear any other construction than that given to it by this department—that a county is liable under the workmen's compensation act if the labor performed was not casual.

See State ex rel vs. District Court, 131 Minn. 352.

Yours truly,

JOHN C. NETHAWAY,
Assistant Attorney General.

May 7, 1915.

657

WORKMEN'S COMPENSATION—Municipal obligation.

Frank A. Crosby, Village Clerk.

Dear Sir: It is provided by subdivision 1 of section 34, chapter 467, G. L. 1913, known as the "employers' liability act," that the word "employe" shall include,

"Every person in the service of a county, city, town, village or school district, therein, under any appointment or contract of hire, express or implied, oral or written; but shall not include any official of any county, city, town or village, or school district therein, who shall have been elected or appointed for a regular term of office, or to complete the unexpired portion of any regular term."

If the marshal of your village is elected or appointed for a fixed term of office, he is not an employe of the village entitled to compensation under the act referred to. If his employment is without any fixed tenure, then he is an employe of the village and in case of accidental injury, would be entitled to compensation under the act.

Yours truly,

JAMES E. MARKHAM,
Assistant Attorney General.

April 27, 1916.

658

WORKMEN'S COMPENSATION—Municipal obligation.

State Labor Commissioner.

Dear Sir: It appears from your statement of facts that the county commissioners of St. Louis county, acting under the provisions of chapter 188, laws 1913, organized and established a work farm, designed and intended by that act as a penal institution to which persons convicted of misdemeanors might be committed; that one * * * a citizen of Duluth, was convicted of a misdemeanor and on December 26, 1915 was committed to this institution.

The act provides that,

"The superintendent of said workfarm shall cause all prisoners confined therein to be employed at hard labor as far as practicable, either upon said farm or elsewhere in said county; in order to enable said prisoners to be engaged in productive employment and to be self-supporting."

There are other provisions of the act conferring upon the board of work farm commissioners authority to enter into contracts necessary for the employment of the inmates in work other than that required to be done upon the work farm.

It further appears that * * * was a man of family and that, under the provisions of section 6 of the act referred to there was paid to his wife, by direction of the board, $15 per month during the period of his commitment.

It further appears that on February 11, 1916, while * * * was engaged with other inmates of this institution in the construction of a ditch upon the premises of one B, pursuant to contract between B and the board, he received an accidental injury, resulting in the loss of his left eye and your inquiry is whether, under these conditions, he has a claim against the county for compensation under the workmen's compensation act.

The answer depends upon the question whether he was an employe of the county at the time he received his injury. The act provides that the term "employe" shall include:

"Every person in the service of a city, county, town or village, or school district therein under any appointment or contract of hire, express or implied, oral or written; but shall not include any official of any county,

city, town, village or school district therein, who shall have been elected or appointed for a regular term of office, or to complete the unexpired portion of any regular term."

This is the only provision in the act imposing a liability for the payment of compensation upon a county or municipality, and I am of the opinion that * * * was not an employe of the county within the definition as above quoted, and is not entitled to compensation from the county, under the act above referred to.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

April 27, 1916.

659

WORKMEN'S COMPENSATION — School teachers employes within provisions.

Charles A. Pitkin, Esq.

Dear Sir: Your inquiry is whether the provisions of the workmen's compensation act apply to the school districts and if so whether teachers employed therein as well as janitors and other employes are entitled to compensation under the act, if injured in the performance of their duties.

The term 'employe' as used in the act includes;

"Every person in the service of a county, city, town, village or school district therein, under any appointment or contract of hire, express or implied, oral or written; but shall not include any official of any county, city, town, village or school district therein, who shall have been elected or appointed for a regular term of office."

This language is broad enough and in my opinion clearly does include teachers, engaged in service in the public schools throughout the state. Your inquiry is answered in the affirmative.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

August 18, 1916.

660

WORKMEN'S COMPENSATION—Step-children as dependents.

State Labor Commissioner.

Dear Sir: You in substance ask if a step-child of a person who is injured and dies would be entitled to compensation under the workmen's compensation act.

You will notice by examination of sub-division B, of section 16, chapter 209, laws 1915, that the word "child" is defined, and among others includes step-children who were members of the family of the decreased at the time of the injury and dependant upon him for support.

You are therefore advised that step-children who were dependant upon the decreased for support at the time of his injury are included within the act as amended by the law of 1915.

Yours truly,
JOHN C. NETHAWAY,
Assistant Attorney General.

January 6, 1916.

661

WORKMEN'S COMPENSATION—Volunteer firemen.

O. S. Vesta, Village Attorney.

Dear Sir: You state that the village of Arlington is incorporated under the provisions of chapter 9, revised laws 1905, and has a volunteer fire department, the members of which receive no remuneration, and your inquiry is whether the village may be liable in damages for injury sustained by a member of such volunteer department while engaged in the extinguishment of a fire.

It is provided by sub-division (g) of section 34, of the workmen's compensation act so-called, that the term "employe" shall include:

"Every person in the service of a county, city, town, village or school district therein, under any appointment or contract of hire, oral or written; but shall not include any official of any county, city, town, village or school district therein who shall have been elected or appointed for a regular term of office, or to complete an unexpired portion of any regular term."

By the village act under which Arlington is incorporated the village council is authorized, "to establish a fire department, appoint the officers and members thereof, prescribe their duties and provide fire engines and other fire apparatus, engine houses, pumps, water mains, reservoirs and other water works."

I assume that the members of your volunteer department are appointed by the village council by authority of the statutory provision above referred to, and I am of the opinion that they come within the provisions of the compensation act, notwithstanding the circumstance, that they receive no stated compensation. The members of a volunteer department render a valuable service in the protection of the property of the village and its inhabitants, and in most of the villages there is an ordinance containing, among others, the provision that volunteer firemen responding to a fire call and registering at headquarters, shall be paid some small amount out of the village treasury.

It would seem to be unjust to deny the benefits of the act to firemen who are appointed by the municipal authority merely because the appointment does not carry with it any fixed compensation for the services required.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

August 24, 1916.

662

WORKMEN'S COMPENSATION—Volunteer firemen.

C. C. Jensen, City Clerk.

Dear Sir: You state that in your city there is maintained a volunteer fire department but that pursuant to a city ordinance each member of the department reporting at headquarters, after a fire, having taken part in extinguishing the conflagration receives a dollar as compensation for his service. This is an arrangement frequently employed in the smaller cities and villages throughout the state.

The question you present is whether under these circumstances, a fireman is an employe of the city, so that if injured he would be entitled to compensation under the workmen's compensation act.

You are advised that the answer to the inquiry must be in the affirmative.

Yours truly,
JAMES E. MARKHAM,
Assistant Attorney General.

August 11, 1916.

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