REPORT

OF THE

ATTORNEY GENERAL

TO THE

GOVERNOR
STATE OF MINNESOTA

1939 - 1940

J. A. A. BURNQUIST
Attorney General


MILK
BUTTER
PROSPERITY

To His Excellency,

Honorable Harold E. Stassen

Governor

Sir:

In compliance with statutes relating thereto, I herewith transmit the report of this Department for the biennium 1939-1940.

Yours very truly,

J. A. A. BURNQUIST,
Attorney General.

December 31, 1940.

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 Apr. 1, 1904
W. J. Donahower	Apr. 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 Mar. 5, 1918
Clifford L. Hilton	Mar. 8, 1918, to Dec. 30, 1927
Albert Fuller Pratt	Jan. 1, 1928, to Jan. 28, 1928
G. A. Youngquist	Feb. 2, 1928, to Nov. 19, 1929
Henry N. Benson	Nov. 20, 1929, to Jan. 3, 1933
Harry H. Peterson	Jan. 3, 1933, to Dec. 15, 1936
William S. Ervin	Dec. 15, 1936, to Jan. 1, 1939
J. A. A. Burnquist	Jan. 1, 1939, to

STAFF

ATTORNEY GENERAL

J. A. A. Burnquist

DEPUTY ATTORNEYS GENERAL

Chester S. Wilson
Arthur Christofferson

ASSISTANT ATTORNEYS GENERAL

Hayes Dansingburg
Edward J. Devitt
M. Tedd Evans
Victor H. Gran
Philip F. Sherman
John A. Weeks

SPECIAL ASSISTANT ATTORNEYS GENERAL

Frederick O. Arneson
Alfred W. Bowen
George Markham
George Simpson
George B. Sjoselius
Rollin L. Smith
Mandt Torrison
Kent C. van den Berg
William W. Watson
Faner C. Wonderly

DEPARTMENT CLERK

Genevieve Spangenberg

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5010 5021	Pillsbury Academy	Tax Exemption	308 U. S. 506, 634 84 Law ed. 65, 101 283 + 727
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5295	Lake Elysian	Water Levels	293 + 140
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5307	N. W. Airlines	Income Tax	293 + 243
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5505	Goar v. Civil Service	Mandamus	296 + 24
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5421	H. H. Irvine	Income Tax	Affirmed
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	May et al.	Awards—Duplicity	285 + 834
	Elsie Appleton	Dismissal of Proceedings	294 + 418
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761A	M. A. Comer	Refreshment License	290 + 434
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766A	Nels W. Elsberg	Paying False Claims	295 + 913
767A	Loren Allen	Auditing False Claims	Dismissed (Appellant Died)
768A	Haven Larson	Manslaughter	292 + 107
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5244	U. S. vs. Clearwater Co.	Condemnation	Awards Increased
5254	St. Cloud Brew. Co., Bankrupt	Tax Claim	Disallowed
5309	Lewis Lake Cooperative Cheese Assn., Bankrupt	Claim	Claim filed
5430 } 5447 }	Reese Motor Sales	Resale—Used Cars	Dismissed—See 297 + 24
5452	Holman D. Pettibone v. Cook County, Minn.	Refund of Taxes	Judgment for Defendant —Appealed U. S. Circuit Court, May 1941 Calendar
5527	U. S. v. Minn.	Highway No. 61, Grand Portage	113 Fed. 2nd 770
5568	Col. B. F. Ristine	Gas Tax	Dismissed — Appealed U. S. Circuit Court, May 1941 Calendar

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5171	Albert C. Kavli	Forfeited Tax Land	Writ quashed
5189	Magnus W. Brown v. Dakota County	Old Age Assistance	Motion denied
5210	Madson v. Tax Commission	Refund of Taxes	Plaintiff to take nothing by action
5220	T. E. McAllister	Income Tax Lien	Paid
5226	First National Bank of St. Paul	Abandoned Bank Deposits	Dismissed
5246	West Publishing Co.	Refund of Income Tax	Settled
5248	Wm. W. Maghan	Mandamus	Denied
5260	Louis Plepler v. State Printer	Injunction	Dismissed
5261	Russell-Miller Milling Co.	Refund Income Taxes	Judgment
5262 to 5264, 5267 to 5272	Daniel F. Bull v. Minn. Tax Commission and seven other cases	Income Taxes	Dismissed
5273	Dan'l F. and Bess Bull	Mandamus	Dismissed
5278	Wm. Doering v. Sherburne Co.	Old Age Assistance	Affirmed
5281	W. S. & C. A. Gish	Damages Caused by Dam	Dismissed
5284	John Good v. Elsberg	Highway Contracts (Moss Peat Products)	Settled
5285	J. M. O'Connell v. Elsberg	Highway Contracts	$10,345.80 Collected
5287	John P. Good v. Elsberg	Highway Contracts	Dismissed
5288	Sloane v. Phil Sundby	Bids—Game Warden Outfits	Dismissed
5289	Archie D. Beidleman v. Elsberg	Insurance Premiums	Dismissed
5290	Wm. R. Thomas v. Elsberg	Highway Contracts	$131,000.00 verdict for State
5292	John Teras Estate	Proof of Heirship	Petition filed
5296	John Conery	Old Age Assistance	Dismissed
5297	Simon & Jessie Robyn	Old Age Assistance	Affirmed
5299	A. J. Rockne v. Herman Aufderheide	For an Accounting	Disbursement of funds authorized
5302	Kontz v. Bolinger	Mechanics' Lien	Dismissed
5204	Seaboard Surety v. McCusick	Timber Permit	Demurrer Filed
5305	Seaboard Surety v. Syver Hanson	Timber Permit	Demurrer Filed
5306	Healy-Ruff Co. v. Insurance Commissioner	Certiorari	Denied
5308	Robt. G. Flynn	Soldiers' Preference	Dismissed
5310	Harmsen v. Utecht	Habeas Corpus	Dismissed
5312	U. S. F. & G. Co.	Roy Strader's Bond	$3,772 Collected
5313	Omaha Ry.—Re Beaver Creek Township	R. R. Crossing	Order Overruled
5314	Rhodes v. Conservation Commission	Soldiers' Preference	Writ Quashed
5317	Parke-Davis Co.	Income Tax	Judgment on Stipulation
5321	Monarch Petroleum	Gas Tax	$2,181.64 Collected
5324	Beall v. Lawton	Old Age Assistance	Affirmed
5325	Bertha Olson	Aid—Dependent Children	Affirmed
5328	Theo. Tuomie	Rough Fish Contract	Dismissed
5329	Nat. Bat. Broadcasting Co.	Income Tax Refund	Judgment Satisfied
5330	Alvert v. Secretary of State	Motor Vehicle Title	Plates Delivered
5333	Good v. Kise	Damages—Raid	No Cause of Action
5335	Henry Whetston	Old Age Assistance	Affirmed
5337	Blanche Englund	Aid—Dependent Children	Dismissed
5338	Railway Express Agency	Gross Earnings	Demurrer Sustained
5340	Fleischmann Malting Co.	Workmen's Compensation	$800 Collected
5341	Estate of Peter Classen	Claim for Maintenance	Affirmed
5342	Carl L. Lidberg	Gas Tax	Judgment Entered
5343	Lizzie Ahrens and Van Havermeat	Guardianship	Affirmed
5344	G. Palmer Jaffray	Income Tax Refund	Awaiting Decision
5345	Dr. McQuiggan v. Dr. Gish	Quo Warranto	Writ Quashed
5346	Glieden v. Neumann and Grendahl	Damages	Dismissed
5348	Hofum v. Amundson	Partition	$193.12 Collected
5350	Daugherty v. Industrial Com.	Soldiers' Preference	Dismissed
5353	State Farm Mutual Auto Ins.	L. 1933, Ch. 286	$2,311 Collected
5354	Majestic Mutual Life Asso.	L. 1933, Ch. 241	Dismissed
5357	Minter v. Tax & Civil Service Commission	Soldiers' Preference	Dismissed
5358	Union Local No. 554 v. Labor Conciliator	Injunction	Denied
5359	Fred M. Shogren	Soldiers' Preference	Writ Quashed
5362	Chas. Bank	Soldiers' Preference	Judgment for Petitioner
5363	Nat'l Drug v. Mass Bonding Co.	Contract	$2,500 Collected
5364	Shima v. Keller Drug	Injunction	Denied
5370	Gus. A. Peterson	Inspection Fees	Default Judgment
5371	Jos. Conyac	Mandamus	Dismissed
5372	White Bear Lake Ind. Sch. Dist.	Tax Abatement	Dismissed
5374	Esaac Hoff Estate	Maintenance	$800 Collected

DISTRICT COURT CIVIL CASES—Continued

DOCKET	CASE	ACTION	DECISION
5376	Dan Finn	L. 1939, Ch. 37	Deed Executed
5380	Annie G. Pooch	Certiorari	Dismissed
5381	McAllister v. Tri-State Tel.	Rate Case	Dismissed
5383	Morris Fisheries, Inc.	Garnishment	Dismissed
5387	Clarence Breneman	Failure to Carry Compensation Insurance	Awaiting Trial
5388	Thomas Mattison	Old Age Assistance	Order Void
5389	Thorne Oil Co.	Inspection Fees	Judgment Entered
5390	Simo v. Christgau	Mandamus	Dismissed—See 294 + 647
5392	Kenneth Arneson	Funds Held by Board	Payments Made
5399	Butler Bros.	Income Tax	Judgment Entered
5400	Myrtle Cofield	Return of Fines	Demurrer Filed
5403	Sadie N. S. Shepard	Income Tax	Set for April, 1941
5404	Gopher Loan Co.	Small Loan License	Dismissed
5405	Utility Loan Co.	Small Loan License	Dismissed
5406	Harry Edminster	Soldiers' Preference	Dismissed—See 294 + 647
5407	Paul C. Hartig	Soldiers' Preference	
5408	Village of Manhattan Beach	Quo Warranto	Organization Void
5409	C. A. Nachbar & Co.	Declaratory Judgment	Dismissed
5410	Johnson Drake & Piper	Income Tax	Paid in Full
5411	Berkman v. County of Roseau	L. 1939, Ch. 341	Dismissed
5412	Iverson v. Hennepin County	Correcting Birth Records	Order Filed
5414	C. M. St. P. & Pac. Ry. Co.	Omitted Gross Earnings	$10,016.62 Collected
5416	Standard Accident Ins. Co.	L. 1937, Ch. 401	$927.64 Collected
5417	Jas. Giannoulis	Damages	Settled
5418	Lake Region Oil Co.	Inspection Fee	Judgment Entered
5419	West Pub. Co.	Income Tax Refund	Settled
5420	West Pub. Co.	Income Tax Refund	Settled
5422	Irvine v. Tax Com.	Income Tax Refund	Awaiting Sup. Court Decision—Case No. 5421
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5424			
5426	Engberg v. Nelson et al	Conspiracy—Highway Contracts	Dismissed
5427			
5428	Clarence E. Kent v. Eldon Rowe	Soldiers' Preference	Dismissed—See 294 + 647
5429	Chesapeake Brands, Inc.	Certiorari	Dismissed
5433	Town of Kragero	Flooding Highway	Abandoned
5434	Irene Henz Guardianship	Restoration	Denied
5441	Emil Kroll Estate	Maintenance	$408.19 Collected
5443	Booth Cold Storage	L. 1921, Ch. 495	Food Destroyed
5444	Colleen Chartrow	Adoption	Denied
5446	John E. Peterson v. Retirement Ass'n	Mandamus	Writ Discharged
5448	Whitemore v. Retirement Board	Mandamus	Refund Granted
5449	Hamm Brewing Co.	Income Tax	Answer Filed
5450	O'Donnell v. Civil Service	Certiorari	Affirmed
5451	Wilberg v. Civil Service	Certiorari	Affirmed
5453	Johnson Printing Co.	Mandamus	Judgment for Relator
5454	U. S. Packinghouse Workers	Labor Strike	Judgment for Plaintiff
5456	Hartz Stores	Chain Store Tax	Law Held Valid—297 + 9
5457	Western Auto Supply Co.	Chain Store Tax	Law Held Valid—297 + 9
5458	Walter Nelson	Equipment Rental	Settled
5459	Nelson, Mullen & Nelson	Equipment Rental	Settled
5460			
5463	McAllister v. Civil Service (2 Actions)	Certiorari	
		Mandamus	Settled
5464	Whitmore v. Civil Service Board (2 Actions)	Certiorari	
		Mandamus	Settled
5465	Bard v. Civil Service (2 Actions)	Certiorari	
		Mandamus	Settled
5467	Red Owl Stores, Inc.	Chain Store Tax	Law Held Valid—297 + 9
5468	Montgomery Ward & Co.	Chain Store Tax	Law Held Valid—297 + 9
5469	Wm. J. Dooley	Mandamus	Relator Entitled to Writ
5472	Minn. State Prison v. Internal Revenue Fund	Tax Refund	Claim Filed
5474	Louis Plepler	Mandamus	Dismissed
5477	Walter W. Magee	Highway Contract	$2,999.64 Collected
5478	E. A. Young	Highway Contract	Settled
5479	Jas. Silverman	Workmen's Compensation	Judgment Entered
5481	East Side Liquor Stores, Inc.	Certiorari	Dismissed
5483	Floyd v. Civil Service	Certiorari	Affirmed
5484	David Park Co.	License Plates	Writ Quashed
5485	Albert Hokkanon v. Game Wardens		Pending Settlement
5486	Geesick v. Game Wardens		Set for 4-14-41
5487	O. H. Brandemoen	Land Rental	Dismissed
5488	Oscar Rosemoen	Land Rental	Dismissed
5489	Hans K. Sandbo	Land Rental	Pending Settlement

DISTRICT COURT CIVIL CASES—Continued

DOCKET	CASE	ACTION	DECISION
5491	George T. Nathe	Liquor License	Dismissed
5493	Louise Blake	A. D. C.	Dismissed
5496	Wolff v. University	Damages	Settled
5497	Northern Pacific Ry. Co.	5% Gross Earnings Tax	Set for April, 1941
5498	Minn. & International Ry. Co.	Omitted Gross Earnings	Set for April, 1941
5499	S. L. Moore et al	Automobile Tax	$50 Collected
5500	Otto Gildermister et al	Gasoline Tax	$475 Collected
5501	G. N. Ry. Co.	Income Tax Refund	Answer Filed
5502	Alice Drechsler	Income Tax	Dismissed
5504	Geo. Hormel Co.	Income Tax	Dismissed
5507	Archer-Daniels Midland Co.	Income Tax	Dismissed
5508	Kalman & Co.	Income Tax	Settled
5509	St. Paul Union Depot Co.	Income Tax	Dismissed
5510	C. Thomas Stores	Income Tax	$72.68 Collected
5511	Cold Spring Brewing Co.	Income Tax	Settled
5512	Arthur A. Fider	Maintenance	$100 Collected
5513	W. H. Bruen	Maintenance	Judgment Entered
5514	Edward E. Bersing	Maintenance	Judgment Entered
5515	Cyrus C. Howe	Old Age Assistance	Referee Appointed
5516	Northland Life Insurance Co.	Dissolution	Dissolved
5517	Roscoe F. Ferguson	Mandamus	Judgment for Relator
5518	F. Peltier v. Heinen	Damages—False Arrest	Dismissed
5520	Wayne E. Koivistov	L. 1939, Ch. 403	Dismissed
5521	C. L. Nelson	Equipment Rental	Awaiting Settlement
5522	P. C. Roth	Equipment Rental	Settled for $11,500.00
5523	R. L. Mudge v. Civil Service	Mandamus	Set for April, 1941
5524	Louis O'Connell	Removing Timber	Settled
5525	John F. Noble v. Motor Vehicle Registrar	License Plates	Demurrer Sustained
5526	G. N. Ry. Co.	Income Tax	Answer Filed
5532	C. D. Delaney	Inspection Fee	$50.48 Collected
5537	Ranghild Pederson	Old Age Assistance	Reversed
5539	Collins Oil Co.	Oil Inspection Fee	$419.87 Collected
5541	Harry J. Bilson	Income Tax on Building and Loan Association	Writ Quashed
5542	Triplex Corp. of America	Injunction	Submitted
5543	Leo Shapiro	Lease	Dismissed
5546	Chelsea Corp.	Franchise Tax	S & C Served
5548	Joyce and Phillip Arneson	Adoption	Granted
5549	Wm. H. Ziegler	Equipment Rental	Settled for $2,500.00
5551	Village of Cooley	Quo Warranto	Annexation Void
5555	Amalgamated Assn. of Steel & Tin Workers	Injunction	Denied
5556	Minn. Federal Savings & Loan	Income Tax	April, 1941 Calendar
5557	Mabel Connell	Injunction	Stricken
5559	Optometry Board v. Morris Credit Jewelers	Injunction	Granted
5562	Charles J. Robinson et al	Inheritance Taxes	Judgment Entered
5565	North Star Insurance Co.	Dissolution	Dissolved
5566	Eugene Debs Carstater	Certiorari	Reinstated
5567	Oliver A. Leverson	Damages	Demurrer Served
5571	Robert & Nellie Smith	O A A	Order for Judgment
5573	Wm. W. Saari	Mandamus	Writ Quashed
5574	Eva Basch Estate	Maintenance	$800 Collected
5576	Patricia Ann Anderson	Adoption	Denied
5578	Otto Brewery Co., Bankrupt	Liquor Tax	Claim Filed
5579	Eliz. Puchleitner v. State Colony for Epileptics	Damages	Verdict for Defendant
5580	Adam Miller	O A A	Order of State Agency Void
5581	Evert Top	O A A	April, 1941 Calendar
5583	J. Maley	Mandamus	Dismissed
5584	B. Mitchell Estate	Maintenance	$290.33 Collected
5585	Niels Thorpe	Maintenance	Judgment Docketed
5586	George E. Lommen	Mandamus — Writ of Election to Fill Vacancy	No Cause of Action
5588	Avis I. Merry	Partition	Dismissed
5590	Ira Severance	O A A	Affirmed
5591	Kyte Securities Co.	Income & Franchise Tax	Uncollectible
5593	Milton Truwe	Support of Child	Money To Be Paid Into Court
5595	Kenneth & Wanda Fortman	L. 1939, Ch. 386	Dismissed
5596	Julia Needham	A D C	Affirmed
5597	Jennie Fairbanks	A D C	Affirmed
5598	Leonard A. Schiff	Mandamus	Dismissed
5600 5601	Liquid Carbonic Corp.	Franchise Tax Refund	Settled
5605	Cas. Mutual Ins. Co.	Gross Premiums Tax	April, 1941 Calendar

DISTRICT COURT CIVIL CASES—Continued

DOCKET	CASE	ACTION	DECISION
5606	Virginia Bigelow	Income Tax Refund	Awaiting Outcome 5421
5607	Bach Transfer & Stor. Co.		Dismissed
5609	Emil Hautajarvi v. James Niles	Damages	Dismissed
5610	Morris Berger	Maintenance	$176.25 Collected
5611	Michael Koorey	Aid to Blind	Sustained
5613	Electrolux, Inc.	Income Tax Refund	April, 1941 Calendar
5614	Theo. Hamm Brew. Co.	Income Tax Refund	Answer Filed
5615	Henry Holst	O A A	Affirmed
5616	John H. Shoberg et al	Maintenance	Judgment Entered
5617	Thornton Bros. Co.	Arbitration	Awaiting Decision
5618	Village of North Pole	Quo Warranto — Village Incorporation	Writ Issued
5620	Coolerator Co.	Income Tax Refund	Pending Settlement
5621	Gluek Brewing Co.	Income Tax Refund	Settled
5622	Theo. Hamm Brewing Co.	Income Tax Refund	April, 1941 Calendar
5623	J. H. and Jane G. Phelps	Maintenance	$200 Collected
5625	Edgar S. Young	Mandamus	Demurrer Sustained
5626	Tri-State Telephone Co.	Rates	Appearance in Behalf of State Filed
5627	Thiel Truck Service	Public Conveyance	Affirmed
NOTE: Cases listed in 1938 report as pending In re Laws 1933, Ch. 213		Chain Store Tax	Law Held Unconstitutional 84 Law ed. 571 286 + 360 294 + 230
	Laws Ex. S. 1937, Ch. 93	Chain Store Tax	Law Held Valid—297 + 9
	Laws 1933, Ch. 405	Franchise Tax	Law Held Unconstitutional 85 Law ed. 346 292 + 401, 407, 411
	Mason's Supp. 1938, Sec. 4754	Track Clearance	Encroachment Held of a Transitory Character 286 + 303

DISTRICT COURT CRIMINAL CASES

DOCKET	CASE	ACTION	DECISION
748A	Fred Bukowski	Bank Robbery	Dismissed
749A	Rodney R. Hagglund	Arson	Not Guilty
756A	Oscar G. Nickish	Mason's 1927, Sec. 5692..	Acquitted
762A	H. A. Galpin	Libel	Pled Guilty
764A	Philip Crea	Murder	Guilty
773A	Axel H. Hallgren	Murder	Pled Guilty
777A	John T. Lyell	Arson	Guilty
780A	George Wallace and Franklin Wolf	Extortion	Pled Guilty

PROBATE COURT

DOCKET	CASE	ACTION	DECISION
5082	Harold, Viola & Olga Hopp	Guardianship	Affirmed
5291	John Cornelius Estate	Maintenance	$1,440 Allowed
5315	John McKinnon Estate	Escheat	Final Decree Vacated
5336	Guy E. Clutter	Maintenance	$307.67 Collected
5365	Leonard Pikkarainen	Guardianship	Petition Granted
5369	Emma K., Robert & Eleanor Cermak	Guardianship	Terminated
5378	Ellsworth H. Scott	Guardianship	Denied
5379	Fred Krolop	Restoration	Denied
5386	Vivian T. Clossen	Restoration	Denied
5391	Anna Mary Graml	Guardianship	Discharged
5393	Edw. Bruederly Estate	Maintenance	$1,500 Collected
5396	Julene Bechstrom	Restoration	Dismissed
5413	Eva and Barbara Marazzo	Restoration	Settled
5425	Rose Vossen	Restoration	Denied
5432	Wm. Chas. Hill	Guardianship	Discharged
5435	Lillian Ollela	Restoration	Denied
5473	Mildred Karon	Restoration	Granted
5482	Rosella Collins	Restoration	Granted
5490	Mabel E. Bailey Estate	Claim	Dismissed
5534	Melio Marazzo	Restoration	Dismissed
5535	Eleanor A. Acklund	Guardianship	Denied

PROBATE COURT—Continued

DOCKET	CASE	ACTION	DECISION
5550	John H. Koubele	Restoration	Settled
5553	Julia Hines	Escheat	Petition Filed
5560	Geraldine Joercks	Restoration	Briefs Filed
5564	August Larson	Guardianship	Dismissed
5569	Viola Stein	Restoration	Dismissed
5570	Mary E. Schmidt, Deceased	Probating Estate	Trustee Appointed
5572	Mary Lkashna	Restoration	Denied
5582	Lillie George Fay	Restoration	Denied
5592	Max Weisberg	Restoration	Denied
5619	Vernon Hoppner	Psychopathic Personality	Committed

STATE DEPARTMENTS

GOVERNOR

5316	Thomas O'Laughlin v. Minn. Athletic Com.	Malfeasance in Office	Dismissed

INDUSTRIAL COMMISSION

5375	Albert Johnson v. Interstate Iron Co.	Compensation	Denied
5394	Roland Quinn	Claim	Disallowed
5415	Oscar Hjelti	Claim	Dismissed
5476	Geo. E. Sudeith	Claim	Affirmed
5186	Irene R. Arland	Claim	Affirmed
5298	Griswold Signal Co. and Standard Accident Ins. Co.	Claim	Dismissed
5318	Frank Kopacka	Claim	Dismissed
5319	Stanley Gallant v. Aetna Cas. & Sur. Co., State Treasurer	Claim	Allowed
5347	Wm. J. Allen	Claim	Dismissed
5351	Thos. E. Strizich, behalf of Marija Zajec	Claim	Allowed

TAX COMMISSIONER

5286	Hall-Sellers, Agnew-Alworth, Webb, Susquehanna and Virginia Iron Mines	Income Tax	Settled
5373	Minn. Dakota & Western Ry. Co.	Tax Refund	Allowed
5382	N. P. Ry. Co. and Minn. & Intern'l Ry. Co.	Abatement	Cancelled

UNEMPLOYMENT COMPENSATION DIVISION

5445	W. F. McNabb, Mary Young Schiller, John Landy	Compensation Claim	Denied

STATE HIGHWAY DEPARTMENT

Condemnation Proceedings		266
Appeals to District Court from awards:		
Jury trial	71	
Settled	163	
Dismissed	148	
Pending	184	566
Workmen's Compensation cases		20
Contractors Arbitration suits		8
Legislative Claim suits		50
Supreme Court (listed under Supreme Court actions)		6

TABLE NO. 1

PROSECUTIONS REPORTED BY COUNTY ATTORNEYS FOR 1938, 1939, 1940

COUNTY AND COUNTY ATTORNEY	IN DISTRICT COURT											
	Pleaded Guilty			Found Guilty			Acquittals			Dismissals		
	1938	1939	1940	1938	1939	1940	1938	1939	1940	1938	1939	1940
Atkin—John T. Galarneault	16	20	16	4	1	1	3	2	2	5	13	20
Anoka—Leeds H. Cutter—Edw. J. Walsh	33	6	12	.....	.....	.....	.....	.....	.....	9	2	1
Becker—H. N. Jenson—Carl G. Buck	11	18	21	18	2	1	3	.....	.....	4	1	1
Beltrami—Clarence R. Smith	43	28	36	9	6	1	1	1	2	8	2	8
Benton—J. Arthur Bensen	19	22	13	3	2	2	1	.....	.....	8	4	5
Big Stone—C. J. Benson	7	9	6	.....	.....	1	.....	.....	1	4	1	1
Blue Earth—Milton D. Mason	*	42	35	.....	.....	.....	.....	2	1	.....	1	.....
Brown—T. O. Streissguth	45	43	33	1	1	1	.....	.....	2	6	2	1
Carlton—Rudolph Rautio—Arthur R. Lieberman	22	21	21	.....	2	2	.....	.....	.....	9	2	2
Carver—John J. Fahey—A. E. Haering	23	22	30	2	1	.....	.....	.....	.....	2	.....	.....
Cass—Edward L. Rogers	13	13	9	4	7	3	1	3	4	13	5	4
Chippewa—C. A. Rolloff	18	7	5	2	2	.....	.....	1	.....	3	2	3
Chisago—Carl W. Gustafson	6	14	14	5	.....	.....	.....	.....	.....	2	1	.....
Clay—James A. Garrity	38	39	46	.....	2	1	1	.....	.....	.....	.....	3
Clearwater—O. E. Lewis	10	31	12	.....	1	.....	.....	1	.....	.....	1	.....
Cook—J. Henry Eliasen—E. P. J. Chapman	7	4	5	.....	2	2	.....	.....	.....	1	1	.....
Cottonwood—M. F. Juhnke	6	12	6	1	.....	.....	1	1	.....	1	1	1
Crow Wing—Franklin E. Ebner	38	82	18	1	3	1	2	1	.....	.....	127	4
Dakota—Harold E. Stassen—David L. Grannis, Jr	36	26	33	1	2	2	1	3	3	3	14	10
Dodge—Kenneth A. Myster	7	22	11	1	1	.....	.....	.....	.....	.....	.....	.....
Douglas—Kenneth H. Dell—C. Fred Hanson	24	21	7	.....	.....	.....	.....	.....	.....	3	1	.....
Faribault—H. C. Lindgren	23	47	22	2	.....	.....	.....	1	.....	1	1	4
Fillmore—Clarence T. Perkins	15	23	17	2	3	.....	2	1	1	1	.....	.....
Freeborn—Elmer R. Peterson—Joseph R. Gunderson	39	58	40	1	1	1	.....	.....	.....	2	7	2
Goodhue—Milton I. Holst	20	18	27	6	4	1	2	.....	.....	3	1	2
Grant—R. J. Stromme	6	4	7	.....	1	.....	.....	1	.....	.....	.....	1
Hennepin—Ed. J. Goff	451	396	456	43	70	40	23	30	19	61	53	95
Houston—L. L. Roerkohl	6	15	15	.....	.....	3	.....	.....	.....	4	4	2
Hubbard—Chas. L. Clark	9	14	21	.....	1	1	.....	.....	.....	2	7	3
Isanti—Harold L. Westin	9	12	13	.....	.....	1	.....	.....	.....	.....	1	1
Itasca—John J. Benton—Ben Grussendorf	23	18	18	3	1	3	1	1	1	12	8	2
Jackson—Warren P. Adams—L. A. Paulsrude	14	15	16	.....	.....	.....	.....	1	.....	.....	7	1
Kanabec—Geo. L. Angstman—S. Alfred Halgren	7	3	6	.....	.....	1	1	.....	.....	4	.....	2
Kandiyohi—Roy A. Hendrickson	2	8	8	1	.....	.....	.....	.....	.....	.....	7	.....
Kittson—Lyman A. Brink	26	17	19	2	2	.....	.....	1	.....	3	2	2
Koochiching—J. J. Hadler	16	8	18	2	.....	4	.....	.....	.....	6	5	8
Lac qui Parle—R. M. Saltness—H. W. Swenson	3	13	16	.....	.....	1	1	.....	.....	3	2	3
Lake—Emmett Jones	9	4	16	.....	.....	.....	1	.....	.....	1	.....	.....

Lake of the Woods—Wheelock B. Sherwood	12	3	.....	.....	.....	.....	.....	1	.....	.....	.....	.....
Le Sueur—George T. Havel	24	20	17	.....	1	.....	.....	.....	.....	.....	.....	1
Lincoln—B. M. Heinzen	36	11	6	1	.....	.....	.....	.....	.....	.....	1	.....
Lyon—C. J. Donnelly	29	21	21	1	.....	.....	1	.....	.....	1	3	.....
McLeod—Joseph P. O'Hara—Wm. O. McNelly	20	8	12	1	.....	1	.....	.....	.....	.....	2	1
Mahnomen—L. A. Wilson	22	14	11	1	.....	.....	.....	.....	.....	.....	2	2
Marshall—A. A. Trost	10	15	17	2	5	.....	.....	.....	.....	1	4	.....
Martin—C. L. Erickson	18	30	16	.....	1	4	1	.....	3	1	4	2
Meeker—Sam G. Gandrud	9	11	9	2	2	1	.....	.....	.....	.....	.....	.....
Mille Lacs—C. C. Mitchell—John S. Nyquist	7	14	63	.....	.....	.....	.....	.....	.....	.....	4	3
Morrison—Austin L. Grimes	28	38	42	6	2	1	1	.....	2	3	.....	1
Mower—A. C. Richardson	35	53	29	4	2	1	1	2	1	5	4	2
Murray—H. G. Whitney—J. T. Schueller	24	8	12	.....	.....	.....	1	.....	.....	.....	2	2
Nicollet—A. L. McConville—Emerson Hopp	16	29	21	.....	1	.....	.....	1	2	.....	.....	3
Nobles—Arnold W. Brecht	17	27	28	.....	.....	.....	.....	.....	.....	1	4	.....
Norman—Lloyd J. Hetland	7	11	8	.....	.....	.....	.....	.....	.....	.....	3	1
Olmsted—Hayes Dansingburg—Thomas J. Scanlan	56	51	43	2	1	4	.....	.....	3	5	1	1
Otter Tail—Wm. P. Berghuis	44	61	59	4	2	4	.....	2	2	22	6	15
Pennington—H. O. Berve—Paul A. Lundgren	13	19	*	.....	4	.....	.....	1	.....	5	.....	.....
Pine—Albert Johnson	13	13	8	2	.....	.....	.....	.....	.....	2	.....	.....
Pipestone—J. H. Manion	12	9	2	1	.....	.....	.....	.....	.....	1	.....	6
Polk—F. H. Stadsvold	53	72	80	2	2	.....	.....	.....	.....	3	32	5
Pope—Wm. Merrill	3	7	4	1	.....	.....	.....	.....	.....	.....	3	2
Ramsey—Michael F. Kinkead—James F. Lynch	309	288	282	6	28	11	.....	5	3	7	52	5
Red Lake—Fred L. Farley—Ralph H. Lee	7	3	7	1	.....	.....	.....	1	.....	6	3	.....
Redwood—Geo. A. Barnes—Thos. F. Reed, Jr	19	32	28	1	.....	.....	.....	.....	.....	.....	12	7
Renville—Russell L. Frazee	18	37	28	.....	.....	.....	.....	.....	.....	2	2	3
Rice—Thos. H. Quinn—John E. Coughlin	21	21	22	5	4	2	3	.....	3	2	3	2
Rock—Frank F. Michael—Mort. B. Skewes	9	3	11	.....	.....	.....	.....	.....	1	.....	.....	.....
Roseau—R. J. Knutson—Bert Hanson	3	*	*	.....	.....	.....	1	.....	.....	7	.....	.....
St. Louis—Thomas J. Naylor	198	164	223	5	13	10	2	4	2	16	23	18
Scott—H. A. Irwin	16	21	38	.....	.....	.....	.....	5	.....	.....	.....	17
Sherburne—Geo. H. Tyler	2	10	11	.....	.....	.....	.....	.....	.....	1	.....	8
Sibley—Chas. W. Quandt—Everett L. Young	4	21	22	.....	.....	.....	.....	.....	.....	.....	1	4
Stearns—Harry E. Burns	59	45	59	3	4	8	1	.....	1	43	39	24
Steele—A. B. Anderson	13	11	17	.....	1	1	.....	.....	1	1	1	3
Stevens—Clayton A. Gay	6	9	8	.....	1	1	.....	.....	.....	1	3	.....
Swift—Lester A. Johnson—Frank A. Barnard	5	13	4	1	.....	.....	.....	.....	.....	1	.....	.....
Todd—J. Norman Peterson—Henry F. Prinz	40	43	30	.....	.....	2	.....	1	.....	6	6	2
Traverse—E. E. Huber	4	14	5	.....	.....	2	.....	.....	.....	.....	.....	.....
Wabasha—Wm. G. Lindmeier	16	14	6	.....	.....	.....	1	.....	.....	4	.....	.....
Wadena—Hugh G. Parker	8	22	18	.....	.....	.....	.....	.....	.....	.....	2	1
Waseca—John H. McLoone	12	18	16	.....	.....	.....	.....	.....	.....	1	.....	1
Washington—Milton Lindbloom	20	18	12	.....	.....	.....	.....	1	.....	3	3	1
Watonwan—E. M. Perrier	13	16	17	.....	2	2	.....	.....	1	3	.....	1
Wilkin—E. H. Elwin—M. O. Ettesvold	5	1	8	1	.....	.....	.....	1	.....	2	1	.....
Winona—E. D. Libera—W. Kenneth Nissen	19	28	22	1	4	.....	.....	3	.....	1	4	3
Wright—Thos. P. Welch—W. S. Johnson	14	7	9	.....	1	1	.....	.....	1	4	4	3
Yellow Medicine—Paul D. Stratton	6	14	6	1	1	.....	1	.....	1	1	1	2
Totals	2,454	2,593	2,541	169	200	130	59	79	63	346	521	344

*Report not received.

TABLE NO. 1—Continued

PROSECUTIONS REPORTED BY COUNTY ATTORNEYS FOR 1938, 1939, 1940

COUNTY AND COUNTY ATTORNEY	IN MUNICIPAL AND JUSTICE COURTS											
	Pleaded Guilty			Found Guilty			Acquittals			Dismissals		
	1938	1939	1940	1938	1939	1940	1938	1939	1940	1938	1939	1940
Aitkin—John T. Galarneault	99	166	133	.....	2	6	1	2	4	.....	.....	.....
Anoka—Leeds H. Cutter—Edw. J. Walsh	245	369	314	1	.....	9	.....	.....	1	5	10	11
Becker—H. N. Jenson—Carl G. Buck	59	254	366	19	28	39	1	1	1	5	18	15
Beltrami—Clarence R. Smith	82	54	86	7	4	1	3	.....	2	.....	7	6
Benton—J. Arthur Bensen	77	72	84	7	10	7	2	.....	3	9	15	25
Big Stone—C. J. Benson	24	23	33	9	.....	3	.....	2	1	17	7	4
Blue Earth—Milton D. Mason	.....	1,674	1,286	.....	22	45	.....	5	7	.....	18	27
Brown—T. O. Streissguth	109	133	206	2	2	3	.....	1	1	.....	2	5
Carlton—Rudolph Rautio—Arthur R. Lieberman	275	401	382	68	30	42	2	1	.....	37	10	1
Carver—John J. Fahey—A. E. Haering	74	70	84	9	11	23	.....	3	1	4	8	28
Cass—Edward L. Rogers	40	33	50	3	17	22	1	5	1	21	33	16
Chippewa—C. A. Rolloff	140	160	202	6	5	6	5	2	3	2	3	.....
Chisago—Carl W. Gustafson	151	147	169	15	13	18	1	1	5	14	6	14
Clay—James A. Garrity	359	574	481	.....	.....	.....	.....	.....	.....	.....	.....	.....
Clearwater—O. E. Lewis	129	184	158	2	1	5	.....	2	.....	.....	1	5
Cook—J. Henry Eliasen—E. P. J. Chapman	21	48	61	3	.....	1	1	1	.....	1	1	3
Cottonwood—M. F. Juhnke	32	104	80	4	.....	3	3	.....	.....	3	.....	.....
Crow Wing—Franklin E. Ebner	478	763	891	2	5	8	14	6	1	26	42	21
Dakota—Harold E. Stassen—David L. Grannis, Jr.	786	1,252	989	37	190	385	6	11	9	47	62	90
Dodge—Kenneth A. Myster	111	123	104	6	.....	2	.....	.....	.....	3	1	5
Douglas—Kenneth H. Dell—C. Fred Hanson	226	238	137	4	13	13	3	1	1	3	13	9
Faribault—H. C. Lindgren	140	127	142	10	18	1	1	1	1	4	8	9
Fillmore—Clarence T. Perkins	42	47	61	8	2	1	.....	.....	.....	.....	.....	.....
Freeborn—Elmer R. Peterson—Joseph R. Gunderson	141	86	176	29	91	81	1	.....	.....	11	9	8
Goodhue—Milton I. Holst	227	301	252	1	4	11	2	5	1	6	14	16
Grant—R. J. Stromme	25	25	14	.....	1	.....	.....	.....	.....	2	.....	.....
Hennepin—Ed. J. Goff	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Houston—L. L. Roerkohl	166	174	138	8	3	.....	1	.....	1	4	3	3
Hubbard—Chas. L. Clark	82	37	80	8	6	17	2	2	2	5	3	8
Isanti—Harold L. Westin	87	76	98	1	1	3	.....	.....	.....	3	7	.....
Itasca—John J. Benton—Ben Grussendorf	229	285	580	19	12	23	1	5	6	37	78	91
Jackson—Warren P. Adams—L. A. Paulsrude	89	149	92	4	10	8	.....	2	2	4	8	13
Kanabec—Geo. L. Angstman—S. Alfred Halgren	47	55	78	2	.....	.....	3	2	.....	7	2	1
Kandiyohi—Roy A. Hendrickson	452	624	940	1	1	3	5	.....	2	36	17	23
Kittson—Lyman A. Brink	51	58	36	1	1	5	.....	.....	.....	1	1	.....
Koochiching—J. J. Hadler	145	233	205	5	6	2	3	3	2	10	6	5
Lac qui Parle—R. M. Saltness—H. W. Swenson	74	98	176	2	2	1	.....	.....	.....	5	5	20
Lake—Emmett Jones	141	61	111	.....	.....	.....	1	.....	.....	24	7	8

Lake of the Woods—Wheelock B. Sherwood	51	67	140	7	1	3	.....	.....	.....	6	9	10
Le Sueur—George T. Havel	122	92	114	1	2	.....	1	3	.....	.....	1	1
Lincoln—B. M. Heinzen	36	47	61	.....	.....	1	.....	.....	.....	.....	2	4
Lyon—C. J. Donnelly	70	41	222	3	.....	27	.....	.....	.....	1	.....	.....
McLeod—Joseph P. O'Hara—Wm. O. McNelly	206	285	320	3	19	3	2	.....	1	2	10	10
Mahnomen—L. A. Wilson	35	57	53	.....	2	2	.....	.....	.....	1	2	1
Marshall—A. A. Trost	68	63	74	5	3	4	1	.....	.....	5	.....	3
Martin—C. L. Erickson	133	94	228	26	9	3	1	.....	4	.....	1	4
Meeker—Sam G. Gandrud	101	178	180	1	.....	5	.....	.....	.....	.....	.....	.....
Mille Lacs—C. C. Mitchell—John S. Nyquist	113	239	285	3	32	36	1	7	6	2	7	11
Morrison—Austin L. Grimes	144	218	327	8	5	20	2	5	5	46	61	49
Mower—A. C. Richardson	193	308	268	16	17	23	3	2	10	12	23	15
Murray—H. G. Whitney—J. T. Schueller	64	90	138	44	74	23	1	.....	2	1	9	7
Nicollet—A. L. McConville—Emerson Hopp	212	182	101	10	.....	.....	2	.....	1	6	.....	4
Nobles—Arnold W. Brecht	106	196	213	2	5	2	.....	1	1	5	1	5
Norman—Lloyd J. Hetland	65	78	51	3	.....	.....	1	.....	.....	16	8	3
Olmsted—Hayes Dansingburg—Thomas J. Scanlan	349	423	477	8	24	11	.....	1	8	7	14	14
Otter Tail—Wm. P. Berghuis	234	344	394	6	10	9	2	9	6	45	41	34
Pennington—H. O. Berve—Paul A. Lundgren	17	58	.....	.....	13	.....	.....	.....	.....	11	18	.....
Pine—Albert Johnson	217	209	335	10	4	5	1	1	1	3	4	3
Pipestone—J. H. Manion	151	200	186	2	2	1	1	1	.....	41	21	40
Polk—F. H. Stadsvold	59	83	25	1	.....	3	.....	1	1	27	19	27
Pope—Wm. Merrill	74	127	135	5	3	3	.....	.....	.....	3	12	5
Ramsey—Michael F. Kinkead—James F. Lynch	583	924	807	.....	54	78	1	7	1	5	5	6
Red Lake—Fred L. Farley—Ralph H. Lee	53	75	102	.....	.....	.....	.....	1	.....	2	5	4
Redwood—Geo. A. Barnes—Thos. F. Reed, Jr	99	279	170	4	.....	1	.....	4	1	9	18	13
Renville—Russell L. Frazee	70	102	86	.....	.....	4	.....	.....	.....	27	36	18
Rice—Thos. H. Quinn—John E. Coughlin	289	354	443	5	17	9	5	9	6	30	17	15
Rock—Frank F. Michael—Mort. B. Skewes	110	134	183	4	.....	.....	.....	1	.....	.....	1	.....
Roseau—R. J. Knutson—Bert Hanson	64	.....	.....	1	.....	.....	2	.....	.....	17	.....	.....
St. Louis—Thomas J. Naylor	271	478	548	4	4	18	1	2	4	24	33	32
Scott—H. A. Irwin	62	75	83	5	2	3	1	2	2	8	2	81
Sherburne—Geo. H. Tyler	92	101	119	.....	1	9	.....	.....	2	2	.....	8
Sibley—Chas. W. Quandt—Everett L. Young	64	70	109	4	18	23	.....	.....	.....	3	7	8
Stearns—Harry E. Burns	149	132	151	1	6	.....	5	14	3	104	103	128
Steele—A. B. Anderson	237	291	308	4	11	2	4	4	4	6	3	2
Stevens—Clayton A. Gay	128	149	133	11	4	7	1	.....	.....	6	4	2
Swift—Lester A. Johnson—Frank A. Barnard	84	173	133	.....	1	.....	2	.....	.....	5	1	.....
Todd—J. Norman Peterson—Henry F. Prinz	255	202	258	1	1	1	3	1	3	61	37	39
Traverse—E. E. Huber	50	77	104	3	2	1	.....	.....	.....	4	5	1
Wabasha—Wm. G. Lindmeier	77	7	138	2	136	.....	.....	7	.....	6	.....	4
Wadena—Hugh G. Parker	67	186	139	2	5	3	1	.....	1	.....	2	1
Waseca—John H. McLoone	106	133	133	.....	1	.....	.....	.....	.....	1	.....	2
Washington—Milton Lindbloom	183	245	252	1	7	8	2	2	.....	6	1	17
Watonwan—E. M. Perrier	166	154	202	2	7	9	3	.....	2	9	3	5
Wilkin—E. H. Elwin—M. O. Ettesvold	58	36	81	4	.....	.....	1	.....	.....	.....	2	8
Winona—E. D. Libera—W. Kenneth Nissen	614	781	722	18	26	15	9	23	4	166	50	28
Wright—Thos. P. Welch—W. S. Johnson	139	63	118	.....	3	.....	.....	.....	.....	9	2	4
Yellow Medicine—Paul D. Stratton	58	66	94	4	.....	.....	.....	2	.....	3	4	4
Totals	12,603	18,244	19,418	547	1,042	1,172	123	174	137	1,109	1,029	1,170

TABLE NO. 2

TABULATED STATEMENT OF CRIMINAL CASES AS REPORTED BY COUNTY ATTORNEYS FOR 1938, 1939, 1940

NATURE OF ACCUSATION	IN JUSTICE, MUNICIPAL AND DISTRICT COURTS											
	Pleaded Guilty			Found Guilty			Acquittals			Dismissals		
	1938	1939	1940	1938	1939	1940	1938	1939	1940	1938	1939	1940
I. Crimes Against the Person:												
Murder in first degree	3	2	2	1	2	3	2	1	.....	2	.....	1
Murder in second degree	5	4	3	.....	1	2	.....	1	.....	1	2	1
Murder in third degree	.....	3	2	2	.....	.....	.....	.....	.....	1	.....	.....
Manslaughter in first degree	5	2	.....	1	1	1	2	1	.....	1	.....	.....
Manslaughter in second degree	2	2	3	1	2	1	1	.....	.....	3	.....	1
Criminal negligence	12	10	11	1	1	1	4	6	5	4	4	1
Assault in first degree	12	7	14	6	3	1	1	.....	2	4	8	3
Assault in second degree	47	53	70	9	9	13	5	5	6	41	20	21
Assault in third degree	489	510	508	108	119	82	24	49	28	132	113	118
Threat bodily harm—Peace bond	10	7	8	2	3	6	.....	6	2	3	11	1
Bank Robbery	3	.....	.....	1	.....	.....	4	.....	.....	4	.....	.....
Robbery in first degree	70	70	25	3	7	2	.....	9	.....	3	9	7
Robbery in second degree	19	26	12	2	1	1	.....	2	.....	2	3	.....
Robbery in third degree	20	14	36	.....	.....	12	2	1	.....	4	3	10
Kidnapping	.....	.....	3	1	.....	.....	.....	.....	.....	2	1	1
Maiming	.....	.....	.....	.....	.....	.....	.....	.....	.....	1	.....	.....
Slander	.....	8	5	.....	2	3	1	1	.....	5	4	3
Criminal libel	.....	2	2	.....	.....	.....	.....	.....	.....	.....	.....	.....
II. Crimes Against Morality, Etc.:												
Rape	5	5	14	.....	3	1	1	3	.....	8	5	19
Carnal knowledge—												
Female under 10 years	1	2	.....	.....	.....	.....	1	.....	.....	.....	.....	.....
Female 10 to 13 years	4	10	7	.....	4	.....	.....	2	.....	2	1	1
Female 14 to 17 years	43	70	55	4	7	6	2	1	5	25	24	13
Incest	9	13	7	1	2	.....	1	.....	2	1	.....	2
Indecent assault	46	45	50	6	1	7	2	3	4	10	3	8
Sodomy	3	8	11	3	5	.....	.....	.....	1	1	4	5
Psychopathic Personality	.....	.....	.....	.....	6	3	.....	.....	.....	.....	.....	.....
Abortion	10	4	7	.....	.....	1	1	.....	.....	1	.....	.....
Abduction	1	4	6	.....	.....	.....	1	.....	.....	1	1	2
Seduction	1	.....	.....	.....	1	.....	.....	.....	.....	.....	.....	.....
Indecent exposure	13	13	19	5	.....	3	.....	.....	.....	.....	1	1
Adultery	18	15	22	1	.....	3	.....	1	.....	10	6	7
Fornication	18	21	7	2	3	.....	1	1	.....	2	1	.....
Keeping house of ill-fame	5	8	13	.....	.....	2	1	.....	.....	1	.....	4

II. Crimes Against Morality, Etc.—Cont.												
Bigamy	8	3	4	.....	.....	.....	.....	.....	.....	1	1	1
Disorderly conduct	106	217	233	5	28	19	1	4	4	1	12	7
Crimes against children, etc.—												
Paternity—Illegitimate child	245	244	215	33	36	27	9	4	4	56	62	47
Absconding to evade paternity proceedings	.....	1	.....	.....	.....	.....	.....	.....	.....	1	1	2
Abandonment—wife or child	103	75	106	5	9	7	1	.....	1	61	48	40
Non-support—wife or child	147	136	158	33	36	41	4	9	2	48	56	79
Contributing delinquency of minor	12	23	9	.....	2	.....	.....	.....	.....	4	2	.....
Miscellaneous—												
Public dance laws	6	8	8	.....	7	1	.....	.....	.....	4	.....	1
Gambling—Lottery laws	128	209	244	3	.....	3	2	3	.....	1	134	31
III. Crimes Against Property:												
Arson in first degree	1	1	2	.....	.....	.....	.....	.....	.....	.....	1	1
Arson in second degree	2	4	5	1	.....	.....	.....	.....	.....	2	1	2
Arson in third degree	17	20	29	1	.....	1	2	3	1	3	2	3
Burglary in first degree	.....	1	2	.....	.....	.....	.....	.....	.....	.....	.....	.....
Burglary in second degree	17	111	4	1	.....	.....	1	.....	.....	4	.....	1
Burglary in third degree	198	158	209	3	3	5	.....	1	2	13	18	16
Unlawful entry	36	39	33	.....	2	.....	.....	1	.....	3	8	1
Forgery in first degree	5	10	4	.....	.....	.....	.....	.....	.....	1	1	.....
Forgery in second degree	163	149	195	6	8	1	1	3	3	19	18	16
Forgery in third degree	36	52	15	2	.....	.....	1	.....	.....	10	8	7
Grand Larceny in first degree	128	73	79	10	5	2	1	2	.....	17	27	15
Grand Larceny in second degree	537	532	496	22	19	18	7	18	.....	109	115	89
Petit Larceny	660	710	651	52	62	62	12	18	15	89	134	143
Extortion	4	3	2	.....	.....	2	.....	.....	.....	1	.....	8
Receiving stolen property	39	28	32	5	1	.....	3	3	2	22	7	8
Check without funds	376	350	348	6	18	14	.....	3	2	141	156	163
Mortgaged chattels	35	27	26	1	1	1	1	1	2	24	17	19
Malicious mischief	77	109	90	6	9	10	4	3	1	34	23	19
Trespass	15	10	27	.....	1	5	.....	.....	1	4	3	11
IV. Crimes Against Sovereignty, Public Justice, Safety, Peace, Etc.:												
Bribery	.....	.....	2	.....	.....	.....	.....	.....	2	.....	2	1
Perjury	1	2	.....	.....	.....	.....	.....	.....	.....	5	4	2
Resisting or interfering with officer	44	43	65	2	2	7	.....	1	.....	6	7	6
Concealed weapons	15	17	20	1	.....	1	.....	.....	2	4	1	3
Language provocative of assault	62	73	53	12	4	11	4	4	3	16	13	8
Habitual offender	3	2	3	.....	.....	.....	.....	.....	.....	.....	.....	.....
Escape	17	12	6	1	.....	.....	.....	.....	.....	.....	.....	1
Contempt of court	2	3	7	3	3	3	.....	.....	.....	.....	.....	.....
Unlawful assembly	9	28	8	.....	.....	.....	4	.....	.....	.....	1	.....
Nuisance	5	19	25	.....	2	1	.....	.....	.....	.....	2	3
Swindling	.....	1	5	1	5	.....	.....	.....	2	2	.....	.....
Riot	.....	.....	.....	3	3	.....	.....	.....	.....	.....	.....	.....
Malfeasance in office	.....	.....	3	.....	1	.....	.....	.....	.....	2	.....	.....
Breach of Peace	22	38	46	.....	1	16	.....	.....	1	5	1	2

TABLE NO. 2—Continued

TABULATED STATEMENT OF CRIMINAL CASES AS REPORTED BY COUNTY ATTORNEYS FOR 1938, 1939, 1940

NATURE OF ACCUSATION	IN JUSTICE, MUNICIPAL AND DISTRICT COURTS											
	Pleaded Guilty			Found Guilty			Acquittals			Dismissals		
	1938	1939	1940	1938	1939	1940	1938	1939	1940	1938	1939	1940
V. Miscellaneous Crimes:												
Cruelty to animals	1	6	5	.....	.....	.....	1	.....	.....	1	2	5
Vagrancy	198	396	385	1	5	10	.....	1	.....	5	2	3
Violations of laws re:												
Compulsory education	19	8	12	3	12	5	.....	.....	.....	4	12	3
Forestry	100	71	86	4	8	8	2	.....	1	12	8	11
Wild Animals (game and fish)	1,455	1,478	1,960	46	63	93	16	13	21	53	70	104
Health	15	21	28	.....	3	3	.....	1	1	.....	2	4
Food and Dairy	54	37	58	.....	1	5	1	.....	.....	4	1	.....
Traffic	5,582	10,148	10,762	139	417	521	21	23	37	72	78	118
Drunk drivers	634	668	970	39	52	67	11	9	11	21	19	15
Motor vehicles, unauthorized driving, tampering	223	340	216	6	18	13	1	2	.....	15	25	11
Drunkenness	1,983	2,282	2,227	64	89	108	4	6	7	41	39	45
Prohibition	402	491	432	20	40	18	4	3	4	38	43	82
Barbers	17	17	38	1	4	.....	.....	1	.....	1	4	1
Basic sciences	8	2	7	.....	.....	1	.....	.....	.....	.....	.....	1
Drugs	13	24	10	1	.....	1	.....	.....	.....	.....	1	3
Gasoline Tax	16	6	1	.....	2	.....	.....	.....	.....	3	.....	3
Hotels, Innkeepers	25	29	22	2	2	1	1	1	.....	19	13	26
Labor	3	1	4	.....	.....	.....	.....	.....	.....	.....	.....	.....
Livestock	7	9	1	.....	1	.....	1	1	.....	2	1	.....
Non-intoxicating malt liquor	9	33	28	2	3	3	.....	10	.....	.....	3	5
Securities	3	2	3	.....	.....	1	.....	.....	.....	1	.....	6
Small loan act	.....	.....	.....	.....	.....	1	.....	.....	.....	.....	.....	.....
Veterinary medicine	3	4	5	.....	.....	.....	.....	.....	.....	2	.....	.....
Weights and measures	1	7	5	.....	1	.....	1	1	.....	.....	.....	1
Miscellaneous	131	278	303	10	70	31	3	7	13	173	117	81
Total	15,057	20,837	21,959	716	1,242	1,302	182	253	200	1,455	1,550	1,514

SELECTED OPINIONS

BANKS and CORPORATIONS

BANKS

1

Stock—Lien on for indebtedness of stockholder—M27 §§ 7463, 7676.
Commissioner of Banks.

You are advised a state bank has no lien on a stockholder's stock for his indebtedness to the bank.

This was squarely held in Anderson v. Cook County State Bank, 154 Minn. 231. The sections cited by you, to-wit § 7463 M.M.S. 27 (6176, G.S. '13) and § 7676 M.M.S. 27 (6357, G.S. '13) were both under consideration in that case. It was pointed out in Nicollet County Bank v. City Bank, 38 Minn. 85, that § 7676 was taken from the federal banking act, and that federal courts in construing the federal law had held any lien the bank may have had by virtue of other statutes had been abolished by the later law. This decision was made in 1887. It was affirmed again in 1935 in Rockwood v. Foshay Trust and Savings Bank, 195 Minn. 64. See also Sigel v. Security State Bank, 134 Minn. 272, and St. Paul Trust v. Jenks, 57 Minn. 248.

Tracing the history of §§ 7463 and 7676 supra we find that the earlier enactment was § 7463 which applied generally to all corporations, and the later enactment was § 7676, which was restricted to banks. Both these provisions were carried into the Revision of 1905. Under the rule announced in U. S. & C. Land Co. v. Sullivan, 113 Minn. 27, they are to be construed as were the original acts from which they were derived.

ROLLIN L. SMITH,
Special Assistant Attorney General.

August 22, 1939. 520

CORPORATIONS

2

Cooperatives—Liability of shareholder—Constitution of Minnesota, Article 10, Section 3—M38 § 7465-1.

Department of Agriculture, Dairy & Food.

You ask:

> "Are shares in a Cooperative organized after 1931 assessable or liable in case of dissolution of the Cooperative?"

Your question is answered in the negative. Prior to 1931, the liability of stockholders of a cooperative was fixed by Article 10, Section 3 of our State Constitution, which provided:

"Each stockholder in a corporation, not excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable for the amount of stock held or owned by them."

As proposed by Laws of 1929, Chapter 429, this constitutional provision was amended at the election held on November 4, 1930, so as to read as follows:

"The Legislature shall have power from time to time to provide for, limit and otherwise regulate the liability of stockholders or members of corporations and co-operative corporations or associations, however organized. Provided every stockholder in a banking or trust corporation or association shall be individually liable in an amount equal to the amount of stock owned by him for all debts of such corporation contracted prior to any transfer of such stock and such individual liability shall continue for one year after any transfer of such stock and the entry thereof on the books of the corporation or association."

Pursuant to such constitutional authority, the legislature enacted Laws of 1931, Chapter 210, Section 1, now found in Mason's Minnesota Statutes of 1927, and 1938 Supplement, Section 7465-1, which provides:

"Except as provided by Section 7465, Mason's Minnesota Statutes of 1927, no stockholder or member of any corporation or of any co-operative corporation or association, however or whenever organized, except a stockholder in a banking or trust corporation or association, shall be laible for any debt of said corporation, co-operative corporation or association."

For your convenience I am setting out Mason's Minnesota Statutes of 1927, Section 7465, which constitutes the specifications mentioned above:

"Every stockholder shall be personally liable for corporate debts in the following cases:

1. For all unpaid installments on stock owned by him or transferred for the purpose of defrauding creditors.

2. For failure by the corporation to comply substantially with the provisions as to organization and publicity.

3. For personally violating any of such provisions in the transaction of any corporate business as officer, director, or member, and for fraudulent or dishonest conduct in the discharge of any official duty."

Briefly, the so-called "double liability" feature of corporations is no longer a part of our laws. It is noteworthy, however, that the constitutional amendment which was adopted is not self-executory. By such amendment the legislature has the power to limit and regulate the liability of stockholders and members of corporations and cooperatives, regardless of how organized.

EDWARD J. DEVITT,
Assistant Attorney General.

June 30, 1939. 93a-18

3

Cooperatives—Quorum—Delegates to Central Cooperative—Proxy—Voting by Mail—M38 §§ 7836, 7838.

Department of Agriculture.

You ask:

1. For a clarification of the requirements for a quorum at a cooperative stockholders' meeting.

2. How many votes that a delegate to a central cooperative association may be entitled to represent.

We answer your first question as follows:

Section 1, Chapter 153, Laws 1937, also found as Section 7838 of the 1938 Supplement to Mason's Minnesota Statutes, amended the former cooperative law in regard to a quorum at their meetings and reads as follows:

> "At any regular or special meeting of the stockholders of any association incorporated under this act a quorum necessary to the transaction of business shall be at least twenty per cent of the total number of stockholders in the association when the number of stockholders in such association does not exceed two hundred and in associations having a larger number of stockholders fifty stockholders present in person shall constitute a quorum; provided, however, that where any association has for two successive years been unable to secure a quorum at its annual meeting thereafter a quorum shall be at least ten per cent of the total number of stockholders when the number of stockholders in such association does not exceed two hundred. The fact of the attendance of a sufficient number of stockholders to constitute a quorum shall be established by a registration of the stockholders of the association present at such meeting, which registration shall be verified by the president and secretary of the association and shall be reported in the minutes of such meeting. No action by any association organized under this act shall be valid or legal in the absence of a quorum at the meeting at which such action may be taken."

We believe this language is sufficiently clear for the purpose of determining the number necessary for a quorum in the ordinary cooperative. The same method will apply to central cooperatives, except where affiliated member cooperatives are given additional votes on the basis of volume of business or number of members. Their number will be determined by the articles of incorporation or by-laws of the central association.

We answer your second question as follows:

It is entirely optional with the local member cooperative as to whether it shall send one or more of its members to represent it at any meeting of the central cooperative. If it wishes to send only one, it may do so. However, they sometimes wish to send more than one so that they may consult with

each other before voting at the central cooperative meeting. They would, however, be only entitled to cast the number of votes to which the local member cooperative that they represent is entitled.

Voting by proxy is not permitted.

Voting by mail is permitted in accordance with Section 7836, 1938 Supplement to Mason's Minnesota Statutes, which is as follows:

> "Any stockholder who is absent from any meeting of the stockholders of any association organized under the provisions of this Act, may, as herein provided but not otherwise, vote by mail on the ballot herein prescribed, upon any motion, resolution or amendment to be acted upon at such meeting. Such ballot shall be in the form prescribed by the board of directors of such association and shall contain the exact text of the proposed motion, resolution or amendment to be acted upon at such meeting and the date of the meeting; and shall also contain spaces opposite the text of such motion, resolution or amendment in which such stockholder may indicate his affirmative or negative vote thereon. Such stockholder shall express his choice by marking an "X" in the appropriate space upon such ballot. Such ballot shall be certified to and signed by the stockholder if an individual, or if a corporation by the president or secretary thereof, and when received by the secretary of the association holding the meeting, shall be accepted and counted as the vote of such absent stockholder at such meeting."

JOHN A. WEEKS,
Assistant Attorney General.

April 18, 1939. 93a-30

4

Names—"Deceptively similar" construed and applied—M38 § 7492-4. Secretary of State.

You ask whether or not the names **Domestic Finance Corporation, Domestic Credit Company,** and **Domestic Loan Company** are, "deceptively similar" within the meaning of Section 7492-4, 1938 Supplement to Mason's Minnesota Statutes of 1927, which provides that the name of a corporation organized under the Business Corporation Act "shall not be the same as, or deceptively similar to, the name of any other domestic corporation or of any foreign corporation authorized to do business in this state * * *."

In my opinion your inquiry is properly answered in the affirmative. The names mentioned are in our opinion deceptively similar.

The test is whether the similarity is such as would deceive the ordinary customer. 12 Minn. Law Review 764; Brown Sheet Iron etc. v. Brown Steel Tank etc., 198 Minn. 276 at 279.

It is immaterial that the name was adopted in good faith and in ignorance of the prior appropriation thereof by another, and without any intent to acquire that other's business, or to profit by its name or reputation. It is immaterial that the person adopting the name has acquired none of that other's business. Northwestern Knitting Co. v. Garon, 112 Minn. 321, at 326.

If the simulation of an existing trade name is manifestly liable to deceive purchasers as to the origin and manufacture of goods it is not necessary to show actual deception or intentional fraud. Nesne v. Sundet, 93 Minn. 299.

Parties organizing a corporation must choose a name at their peril and the use of a name similar to the one adopted by another corporation may be enjoined at instance of the latter if misleading and calculated to injure its business. Good faith or actual intent is immaterial. Nesne v. Sundet, supra.

This office once had occasion to apply a former law (Section 1, Chapter 111, Laws 1919), providing that a corporate name "shall distinguish it from all other corporations domestic or foreign, authorized to do business in this state," to the case of two corporations, one in existence called "The Nut House of Minnesota," the other seeking a charter under the name "Nut Specialty House," and said:

> "It appears to me however, that the most important words common to both names are "Nut" and "House" in conjunction with the word "Nut;" that the resemblance between the names in such as would be likely to mislead purchasers, or those doing business with the respective corporations, and that the proposed name does not sufficiently distinguish the proposed corporation from the existing corporation.
>
> "In the mind of the ordinary person desiring to deal with one or the other of the corporations or to refer thereto the name of each will be carried as "The Nut House" as I look at it." Opinion to Mike Holm, September 23, 1921.

The phrase "deceptively similar" used in the present statute is broader and more inclusive than the expression "shall distinguish it from all other corporations" used in the old law, so the reasoning of the opinion cited not only applies, but applies with more force.

In this connection see generally Sheffield v. Sheffield, 105 Minn. 315; Rodseth v. N. W. Marble Works, 129 Minn. 472; Yellow Cab Co. v. Taxicab & T. Co., 142 Minn. 120; Yellow Cab Co. Inc. v. Becker, 145 Minn. 152; Twin City Brief Printing Co. v. Review Publishing Co., 139 Minn. 358; Citizens Wholesale Supply v. Golden Rule, 147 Minn. 248, L.R.A. 1918-A, 961.

Guided by the statements in these cases, and the former rulings of this office, and considering the object of this statute, the evil to be remedied, and the means employed, and construing it so as to supress the mischief, and advance the remedy, we hold the names **Domestic Credit Company, Domestic Loan Company,** and **Domestic Finance Corporation** deceptively

similar within the prohibition of the statute. The doctrine of prior adoption applies, and under facts stated in your letter the **Domestic Finance Corporation** is entitled to the exclusive use of this name, it having been the first corporation to adopt it.

The other two companies should be notified of this ruling, and the Minnesota corporation **The Domestic Credit Company** should be requested to change its name, and the holder of the reserved name **Domestic Loan Company** should be notified it is not available, and to select another if it desires to do so.

ROLLIN L. SMITH,
Special Assistant Attorney General.

March 16, 1939. 92a-16

CONSERVATION

FIREARMS

5

Gun "case" defined—M38 § 5498.

Division of Game and Fish.

You state that some question exists as to the meaning of the word "case" as used in the statute requiring guns carried in an automobile to be enclosed in a case. Also, that occasionally guns have been found wrapped in jackets, clothing or blankets, and the contention has been made that such a wrapping constitutes a case within the meaning of the statute.

You inquire as to the meaning of the word "case".

The statute referred to, namely the 1938 Supplement to Mason's Minnesota Statutes of 1927, Section 5498, (Art. 192 of the Game and Fish Laws) reads in part as follows:

> "No person * * * shall * * * carry a gun or other firearm, except a pistol or revolver, in a motor vehicle unless the same be unloaded in both barrels and magazine and taken apart **or contained in a case.** * * *"

The exact meaning of the word "case" as here used, has not been determined judicially.

Webster's New International Dictionary defines "case" as:

> "A box, sheath, or covering of any kind; as, a case for holding goods; a case for spectacles; a case of a watch, a cartridge, or an insect pupa."

Various illustrations of the use of "case" are there given. It is to be noted that in each of these illustrations the word "case" as applied in that instance, is a complete enclosure designed for the purpose of housing the particular articles specified.

There is little doubt but that the legislature, in using the phrase, "contained in a case," had reference to a gun case especially designed for the purpose of containing the gun. A gun case is an article of common usage. Various types and shapes are built, but all have for their specific purpose the housing of the gun. The word has a well recognized meaning in arms and ammunition circles.

We are therefore of the opinion that the legislature, in using the phrase referred to, intended to refer to a case especially designed to contain the gun, and that a mere wrapping of cloth, clothing or other articles does not comply with the requirement that the gun be "contained in a case."

MANDT TORRISON,
Special Assistant Attorney General.

October 24, 1939. 208e-3

6

Gun "taken apart" defined—M38 § 5498.
Division of Game and Fish.

You call our attention to the 1938 Supplement to Mason's Minnesota Statutes of 1927, Section 5498 (Art. 192 of the Game and Fish Laws) which contains the following provision:

> "* * * No person while in a motor vehicle shall take game, nor discharge any firearm therefrom at any wild animal, **nor carry a gun or other firearm,** except a pistol or revolver, **in a motor vehicle unless the same be unloaded in both barrels and magazine and taken apart or contained in a** case. * * *"

And state that in some instances, as in the case of single and double barrelled shot guns, the forearm is removed and the gun slightly ajar, in other words, partially broken open.

You inquire whether or not such a gun in an automobile is taken apart within the meaning of the statute above cited.

It is our opinion that it is not so taken apart. In our opinion a gun, to be taken apart within the meaning of the legislature in exacting this law, must be so dismantled as to be incapable of being fired. Any other holding would nullify the legislative intent.

We call your attention to the fact that deer shiners and persons shooting upland game birds from an automobile, customarily use cheap

single and double barrelled guns and customarily have the forearm off the gun when being used, in order that they may take the gun apart more readily if wardens attempt to stop them or search their car. It may be true that in some instances danger may result from the use of an old, worn out gun without the forearm in place. That fact, however, does not prevent the gun from being fired and certainly no line of demarcation can be drawn, based upon the age or worn condition of the arm. The sole question is whether it is taken apart within the legislative meaning.

We can attach no significance to the fact that the gun was partially broken other than that it is easier to slip the shells into the gun when in that condition and makes its quick use easier.

MANDT TORRISON,
Special Assistant Attorney General.

October 20, 1939. 208e-3

FORESTRY

7

Timber—Stolen from state land need not be definitely identified to permit seizure, provided some of stolen timber can be identified—L25 C276, L31 C263.

Director, Division of Forestry.

You request an opinion relative to your authority to seize and sell timber unlawfully taken from school trust fund lands.

It appears there are frequently two or more types of timber cut from a single piece of land.

You state that you have located one type of timber in a mill yard, or point of landing, and can definitely identify the same through stump or top matching. This type is intermingled with other logs that could have been cut from the same tract, and correspond in type to other timber stolen.

You ask whether or not it is necessary to definitely identify each type before collecting trespass damages for all of the timber stolen.

Your attention is called to Laws of 1925, Chapter 276, Section 32, providing in part as follows:

> "* * * and whenever any timber so unlawfully cut has been intermingled with any other timber or property so that it cannot be identified or plainly separated therefrom the auditor may so seize and sell the whole quantity so intermingled, and in such case the whole quantity of such timber **shall be conclusively presumed to have been unlawfully taken from state land.** * * *"

Under Laws of 1931, Chapter 263, the duties of the state auditor have, of course, been transferred to the director of the division of forestry.

The wording of the statute answers your question. There is no mention of different types of timber. It is obviously the intention of the statute to preclude the necessity of proving the identity of each stick of timber, or each type of timber, after it has been intermingled so that it cannot be identified or plainly separated.

The statute provides that the whole quantity shall be **conclusively presumed to have been unlawfully taken.** A conclusive presumption is not a presumption, or a rule of evidence at all. It is in effect a rule of substantive law merely stated in terms of presumption. A conclusive presumption dispenses altogether with a necessity of evidence as to the fact presumed.

It is therefore our opinion that when the state brings itself within the terms of the statute and is able to demonstrate that any timber unlawfully cut from state trust fund lands has been intermingled with any other timber so that it cannot be identified, the presumption set up as conclusive applies.

MANDT TORRISON,
Special Assistant Attorney General.

December 28, 1940. 203t

8

Trespass claims—Where standing timber on tax forfeited lands has not been appraised and approved.

Director, Division of Forestry.

You advise that in a number of instances, County Boards of various counties have offered for sale tax forfeited lands through the County Auditor, at public sale, without, however, in all cases having an appraisal of the timber on such lands as contain it made and approved by the Commissioner of Conservation.

You ask the following question:

> "If a county sells tax-forfeited land upon which merchantable timber is standing without having appraised the timber or gotten the approval of the Commissioner of Conservation, and such timber is cut and removed, can the Division of Forestry bring action for trespass against the person cutting and removing the timber?"

The 1938 Supplement to Mason's Minnesota Statutes of 1927, Section 2139-15, as amended by Laws of 1939, Chapter 328, requires that before any tax forfeited land is sold, any standing timber thereon be appraised separately and that the appraisal be approved by the Commissioner of

Conservation. The law also provides that no standing timber be removed from any such land until the amount equal to the appraised value of the timber be paid by the purchaser.

It is our opinion that the counties must comply with the provisions of this act with respect to the separate appraisal of timber, and approval of that appraisal by the Commissioner of Conservation before such tax forfeited lands can be sold. Failure to comply renders the sale void.

It is the general rule that the state is not bound or estopped by unlawful or unauthorized acts of public officers. 59 C.J. 321, L.R.A. 1917 E 1160. It is our belief that the doctrine of estoppel could not be maintained against the state on the basis of sales which were made without a compliance with this law, See State v. Red River etc. 157 Minn. 7.

Your question is therefore answered in the affirmative.

It may, of course, be difficult in some instances to prove that the trespass was intentional or with intent to defraud the state of the value of the timber, in which instance a settlement waiving the penalties and settling the claim for actual stumpage value might be justified (provided such value does not exceed the sum of $1,000.00).

MANDT TORRISON,
Special Assistant Attorney General.

May 11, 1940. 27g

Note: See L. 1941, C. 433.

GAME AND FISH

9

Bait Dealers—"Guest" defined—Sale of Minnows—M38 § 5536-2 (8).

Director, Game and Fish Division.

A question has arisen as to the definition and scope to be accorded the word "guest" as used in the 1938 supplement to Mason's Minnesota Statutes of 1927, Section 5536-2 (8).

The statutory provision inquired into reads as follows:

> "Bait dealers' license, $2.50, but operators of summer resorts and tourist camps who sell to their guests only, shall not be subject to the payment of such license fee."

You advise us further that a number of resort owners and boat livery people sell minnows to persons who come to their resort or livery for the sole purpose of renting a boat; that many of these customers do not secure lodging, room or cottage accommodations or take meals at such resorts, and in fact some of the resorts or liveries do not have lodging or meal facilities for customers.

You ask specifically whether or not the word "guest" as used in the above quoted statute includes such customers.

The word "guest" is used in connection with various legal relationships that have arisen under the statutes and the common law in various jurisdictions in this state. The Minnesota statutes nowhere specifically define the scope of the meaning of the word "guest". While this word in the majority of its uses applies to an invitee to social functions, or a transient customer at a hotel or inn under hotel and inn keepers' laws, who obtains lodging or meals at such hotels or inns, a very considerable number of cases have arisen which define "guest" as including one who merely goes to an inn for the purpose of temporary refreshment, either food or drink. McDaniels v. Robertson, 20 Vt. 316, 330, 62 Am. Dec. 567; McDonald v. Edgerton, 5 Barb. 560, 562 (N. Y.).

It has further been held that a guest includes a traveler who goes to a house held out to be an inn, for the purpose of receiving any entertainment as such inn has occasion to provide. Pinkerton vs. Woodward, 33 Cal. 557, 91 Am. Dec. 657.

There is further a considerable line of authority which provides that anyone keeping a horse with an inn keeper is a guest notwithstanding he himself secures no lodging or meals at the inn. Ingalsbee vs. Wood, 36 Barb. 452, 460 (N. Y.); Russell v. Fagan, 8 At. 258 (Del.); York v. Grindstone, 1 Salk 388; Mason v. Thompson, 26 Mass. 280, 285, 20 Am. Dec. 47.

With respect to automobile law, statutes and decisions using the word "guest" universally define the word to include anyone accepting the driver's hospitality and taking a ride either for pleasure or business purposes without compensation to the driver. Crawford v. Foster, 293 P. 841, 110 Cal. App. 81.

It is further clear that an invitee upon a country club who pays a green fee is a guest.

The trend of these decisions clearly indicates that the word "guest" in the statute referred to is broad enough to cover anyone making use for compensation of any of the facilities of summer resorts and tourist camps such as the rental of boats without the necessity of obtaining lodging or meals.

MANDT TORRISON,
Special Assistant Attorney General.

June 1, 1939. 209k

10

Blinds—Permanent—Artificial—As distinguished from temporary but stationary—M38 § 5556.

Director of Conservation.

You direct attention to the regulations contained in the 1938 Supplement to Mason's Minnesota Statutes 1927, Section 5556, (Art. 202 of the

Game and Fish Laws), relative to the use of blinds in public waters. You state further that considerable confusion exists as to the distinction between a permanent artificial blind and a temporary but stationary blind in public waters.

You request clarification.

A permanent artificial blind placed in public waters is prohibited. An attempt to define such a blind was made under an opinion of this office dated October 13, 1933. The opinion may not be entirely clear.

You are advised that in our opinion a permanent artificial blind such as is prohibited is one which will withstand seasonal changes, such as the storms and the ice action which may be anticipated in this area. It necessarily becomes a question of fact as to whether each structure has that stability which will resist ice action and storms and thereupon remain permanent.

It is our opinion that merely placing poles in mud and constructing a blind about or upon such poles, no matter how elaborate nor whether equipped with a platform or not, does not constitute a permanent artificial blind, if its stability is not such as a matter of fact will withstand conditions as above mentioned.

A temporary but stationary blind is permitted. Such a blind necessarily contemplates that poles will be driven into the mud or the bottom of the lake in order to make the blind stationary and in our opinion it was not contemplated by the legislature, nor is it practicable to require removal of such blinds from day to day.

MANDT TORRISON,
Special Assistant Attorney General.

September 25, 1939. 210a-1

11

Hunting—Public highways—M38 §§ 5551, 5510 (1).

Director, Division of Game and Fish.

You ask:

1. "Is it unlawful to shoot game birds and to hunt game birds along and on highways in this state except state trunk highways?"

The latest provision of law on the subject is found in Mason's 1938 Supplement, Section 5551, as follows:

"* * * No hunter shall discharge any firearm at any game birds which are within the limits of any state trunk highway, except migratory game birds."

This provision was put in its present form by the amendment made by Laws 1933, Chapter 392, Section 14. Before the amendment the corresponding provision of Section 5551, as amended by Laws 1931, Chapter 69, read as follows:

> "* * * No game birds may be taken at any time or in any manner within the limits of any public highway, except migratory game birds. * * *"

It is clear from the language of the present law as first above quoted that it applies only to state trunk highways, that is, such highways as are established under Article 16 of the state constitution. It has no application to other public highways. Hence it is now permissible to hunt or shoot game birds of any kind on any public highway in the state except a state trunk highway, subject to compliance with other applicable laws.

It should be borne in mind that, with rare exceptions the fee title to the land under public highways, including state trunk highways as well as other public roads and streets, belongs to the adjacent land owners, subject only to the public easement for highway purposes. Hence, generally speaking, no person has a right to hunt or shoot game upon any public highway without the permission of the adjacent property owner, even though such hunting or shooting may not be expressly prohibited by law. Any person who hunts or shoots game upon a highway without permission of the fee owner of the land may be liable to private action for trespass, also to prosecution for a misdemeanor under Mason's 1927 Statutes, Section 5501, in any case where hunting has been forbidden by the owner orally or through posted notice.

Of course the foregoing statements as to the rights of private land owners would not apply in any case where the state or a political subdivision thereof had acquired the entire fee title, or at least the public hunting rights, in the ground over which the highway passes. However, such cases are exceptional.

For a more complete discussion of the principles of law involved, see attorney general's opinion to Ed. J. Goff, county attorney of Hennepin County, dated September 23, 1933, (attorney general's file No. 210a-4, 229a-6).

2. You ask:

> "Is it unlawful for a hunter to stand on a state trunk highway and shoot game birds, not migratory waterfowl, in a field adjoining the highway?"

This is answered by the present provision of Section 5551, first above quoted, the application of which is confined to game birds which are actually within the limits of a state trunk highway. Hence it is permissible for a hunter standing upon a state highway to shoot birds which are outside the limits of the highway, subject to other applicable laws. The rules hereinbefore discussed as to the rights of adjacent land owners apply as well as under the first question.

We note that the opinion of September 23, 1933, before mentioned, rendered under a former attorney general, states that under the provisions of Section 5551 in question, in connection with Mason's Statutes, Section 5510 (1), as amended, it is a misdemeanor "to discharge any firearm from a state trunk highway at any game birds except migratory game birds." So far as this language might apply to game birds outside of the highway limits, it is clearly in error. Apparently the writer of the opinion made an inadvertent mistake in using this language, since the remainder of the opinion shows that he had a correct understanding of the application of the law. So far as the above quoted statement is erroneous, it should be disregarded. In other respects the opinion referred to is correct.

CHESTER S. WILSON,
Deputy Attorney General.

October 25, 1939. 210a-4

12

Indians—Enforcement of game laws on lands purchased by Federal Government—M27 §§ 5496, 4, 6-1, 6-2.

Director, Division of Game and Fish.

You advise us that areas in the northern part of Minnesota have been purchased by the Resettlement Division and turned over to the Bureau of Indian Affairs of the Department of Interior of the United States Government for the use of the Indians; that the Indians are of the opinion that these lands are now closed reservation lands, and that they have jurisdiction over wild animals thereon, and are entitled to make their own rules for hunting, trapping and fishing.

You inquire whether or not the Indians may set up their own rules as to the taking of such animals, or whether the Department of Conservation has the duty and right of enforcing the laws of the State of Minnesota relative to wild animals thereon.

We call your attention to Mason's Minnesota Statutes 1927, Section 5496, which reads as follows:

> "The ownership of wild animals so far as they are capable of ownership, is hereby declared to be in the state, not as a proprietor, but in its sovereign capacity as the representative and for the benefit of all its people in common."

That this statute is the law, is recognized in the following cases:

State v. Rodman, 58 Minn. 393; Thomas v. N. P. Ex. Co., 73 Minn. 185; Linden v. McCormick, 90 Minn. 337; State v. Shattuck, 96 Minn. 45; Waldo v. Gould, 165 Minn. 128; Bohman v. Gould, 169 Minn. 374; and Lacoste v. Dept. of Conservation, 263 U. S. 545.

It is our opinion that the title or ownership of lands or the acquisition of such title or ownership in no way affects the title or ownership of the wild animals of this state.

We are not concerned here with the question of Indian reservation lands which have never been ceded to the United States or to the State of Minnesota.

We are not unmindful of that line of decisions which hold that Indians upon their reservations or allotments are not subject to prosecution for violation of state game laws.

State v. Cloud, 179 Minn. 180.

This decision and others following it proceed upon the theory that as to original reservations and allotments created under specific authority of Acts of Congress, the Indians are wards of the Federal Government and subject to punishment only by the Federal Government. That such lands are within the **exclusive jurisdiction** of the United States. That such lands are held in trust by the Federal Government, **but nevertheless remained Indian country within the purview of the Federal Laws.** The Court in that case uses the following language:

> "The jurisdiction of the State extends over Indian country within its borders except as limited by Indian Treaties or Federal Laws, but it has no jurisdiction therein over those persons or those matters **which have been placed within the exclusive jurisdiction of the United States by the Indian Treaties and the Federal laws."**

The lands under discussion, purchased by the Resettlement Administration, and turned over to the Bureau of Indian Affairs have, so far as we can find, no relation to Indian Treaties, nor can they be classed as exclusive reservation lands, unless and until an Act of Congress so designates them. Even then, without the consent of the Legislature of Minnesota, such lands could not come within the exclusive jurisdiction of the United States, but would fall within the provisions of Mason's Minnesota Statutes 1927, Section 4, wherein concurrent jurisdiction is exercised by the State and the United States, and State criminal processes apply.

Those instances wherein the United States is authorized by State statutes to acquire exclusive jurisdiction are listed in Mason's Minnesota Statutes 1927, Sections 6-1 and 6-2. The exceptions there listed whereunder exclusive jurisdiction may be obtained do not embrace lands purchased in accordance with the premises of this opinion.

You are therefore advised that the title to the wild animals upon these lands is and remains in the State, and that it is the duty of the Department of Conservation to enforce the game laws with respect thereto upon such lands. You are further advised that unless, and until, the Federal Government, by its Congress, has seen fit to designate these lands as exclusive reservation lands, and the Legislature of the State of Minnesota has consented thereto, Indians thereon are subject to prosecution for violation of the state game laws.

MANDT TORRISON,
Special Assistant Attorney General.

July 7, 1939. **208c**

13

Law Violations—Appeals Justice Courts—Plea of guilty as waiver of right to appeal.

Director, Division of Game and Fish.

It appears that certain persons were arrested for illegal possession of muskrat in closed season, that a plea of guilty was entered, sentence was passed thereon, and that they were given time in which to pay the fines assessed. Also, that some time thereafter the defendants determined to appeal from their conviction to district court in order to attempt to stave off the loss of trapping privileges because of the conviction.

This office has held that a plea of guilty constitutes a waiver of the right to appeal. This must be necessarily true where the judgment of the Court was acquiesced in and some action of the defendants indicated that the plea was voluntary. See Report of Attorney General 1930, No. 177.

Under the facts stated, it is our opinion that the right to appeal has been waived, that the appeals are subject to dismissal upon motion, and that the licenses of the defendants were automatically revoked upon the proper entry of the judgment of conviction in justice court.

MANDT TORRISON,
Special Assistant Attorney General.

November 29, 1939. 208g-1

14

Law Violations—Jurisdiction of Justices of the Peace—Procedure in changing place of trial—M27 §§ 9910, 9012.

Director, Division of Game and Fish.

You ask whether game wardens are permitted to use their best judgment in taking cases into various courts, or whether Municipal Courts have the priority over justice courts as to violations of the game laws.

Also whether or not a warden has a right to request a change of venue on occasions when the warden feels the court will not for some reason cooperate in the prosecution of game violation cases.

In dealing with a game law violation, the warden selects the court in the county where the violation occurs and procures a complaint from that court, charging the offender with the violation complained of.

We call your attention to Mason's Minnesota Statutes of 1927, Section 9110, dealing with the criminal jurisdiction of Justice Courts. That section gives Justices of the Peace criminal jurisdiction throughout their respective counties, with this proviso;

"* * * provided, however, that no justices of the peace shall have jurisdiction of any offenses **committed within the limits of any city or village** wherein a municipal court is organized and existing, but such offenses, otherwise cognizable by justices of the peace, and those arising under the charter ordinances or by-laws of the city or village shall be examined or tried by the municipal court therein existing; * * *"

Your attention is particularly directed to the underscored language. The fact that an offender may be living within the limits of a municipality, and may be arrested there, has no bearing upon the jurisdiction of the courts. The test is whether or not any offense complained of was committed within the village or city limits.

This statute is jurisdictional, and if the offense is committed within the limits of a city or village having a municipal court, justices of the peace throughout the county have no jurisdiction of that offense. Hence, a change of venue could not in any case be taken.

If, after a complaint is issued and at any time before a decision is rendered, a warden feels that for any reason a fair trial will not be held, it has been the approved practice for the warden to withdraw his complaint and then obtain the issue of a new complaint in another court. Care must be taken that the complaint be withdrawn rather than dismissed. This is the only procedure by which the state can secure a change of the place of trial after the trial has once commenced. Prior to the commencement of the trial, the provisions of Mason's Minnesota Statutes of 1927, Section 9012 apply and a transfer of the action may be procured by filing with the justice of the peace an affidavit of prejudice.

MANDT TORRISON,
Special Assistant Attorney General.

August 28, 1939. 208g

15

Licenses—Age of applicants entitled thereto—M27 § 5499.

Ramsey County Auditor.

You ask the following questions:

1. At what age is it permissible to buy a license?

2. If under the age of 16, can he have any game in possession if with parent or guardian?

3. Is a license required by anyone under the age of 16, if accompanied by parent or guardian?

4. Does the same ruling hold good on non-resident hunting (under the age of 16) as is set up for non-resident fishing?

With respect to question 1, we assume that your inquiry is directed to the question of small game hunting licenses. Laws 1923, Chapter 426, Sec. 1, re-enacted the provisions of Laws 1919, Chapter 400, Sec. 31, and provided as follows:

> "No hunting license shall be issued to any person under 14 years of age * * *."

Since that enactment by the legislature of 1923, the entire field of hunting and fishing licenses has been recovered on various occasions. All of the regulations contained in the license laws enacted in 1923 have been carried through either in their original wording, or in modified wording in the subsequent enactments, with the exception of the provision above quoted, which has been completely disregarded. These subsequent enactments appear in Laws 1927, Chapter 438, Laws 1929, Chapter 332, Laws 1933, Chapter 392 and Laws 1937, Chapter 447.

In view of these subsequent enactments covering the entire field and omitting the quoted portion of the earlier law, it is our conclusion that that provision has been repealed and that there is now no restriction as to the age of persons to whom a license may be issued. This holding is in conformity with Rundlett v. City of St. Paul, 64 Minn. 223, 66 N. W. 967. In the official headnote of that opinion, the Court has used the following statement:

> "A statute revising the subject-matter of a former one, and intended as a substitute for it, operates as a repeal of the prior act to the extent to which its provisions are revised; * * *."

With respect to your other questions, it appears to us that the answer is not material to any enforcement duty nor would it be of any assistance to the County Auditors in determining what action they should or should not take.

Since under the above ruling the County Auditor is at liberty to issue a license to any person, irrespective of age, who applies for it and since it is not his duty to prosecute for failure to have a license, we prefer to reserve rulings on those questions until such time as they are presented by those having the duty of enforcement.

MANDT TORRISON,
Special Assistant Attorney General.

September 27, 1939. 209g

16

Licenses—Duty to issue upon proper application being made—M38 § 5536-1; M27 §§ 5536-4, 5536-5, 5536-3, 5537-7.

Director Division of Game and Fish.

You ask whether County Auditors or their agents may issue licenses on applications submitted by mail, which applications are in writing and

made under oath, or whether it is required that the applicant appear in person to complete the application.

You call our attention to the fact that hunting and fishing licenses on the forms now issued embody within the same the data required to be included in the application and hence the application becomes an integral part of the license itself.

Mason's Minnesota Statutes of 1927, Section 5536-1, et seq., as amended, are the present rules and regulations governing the issuance of game and fish licenses. Those provisions are based upon Chapter 438, Laws of 1927. That act superseded the former license law which was contained in Chapter 400, of the Laws of 1919, Section 20, et seq. It is interesting to note in connection with the question with which we are concerned that Section 22 of Chapter 400 of the Laws of 1919 contained the following language:

> "The applicant shall state under oath to the County Auditor or commissioner his name, age, residence and post office address and also whether a citizen of the United States or an alien."

The act of 1927 repealed the law just referred to.

Under Mason's Minnesota Statutes of 1927, Section 5536-4, the Commissioner is required to determine the form of all licenses and applications therefor and shall prepare blanks of which he shall furnish a sufficient supply to all officers and agents authorized to issue licenses. This statute further provides that licenses shall have attached thereto such coupons or stubs with proper markings and designations as may be necessary to carry out the provisions of law relating thereto.

Section 5536-5 provides as follows:

> "Applications for licenses shall be made on oath in writing, stating the name, age, post office address and legal residence of the applicant, the place where he last voted or if he has not voted, where he intends to vote and whether a citizen of the United States or of any other country."

The section further provides that any officer or agent authorized to issue licenses shall have authority to issue oaths upon applications and to certify the same.

Section 5536-3 provides that licenses **shall** be issued as follows:

Under the provisions above referred to, the director of game and fish has no discretion as to the issuance of these licenses, but must issue them to each individual applicant unless such applicant is under some disability, such as a prior conviction.

There is nothing in the provisions of the present law which can be interpreted as requiring the applicant to appear in person or to take an oath before the officer issuing the licenses. Had that been the intention of the legislature in Section 5536-4, it would have been very simple to have required that the application be made on oath, in writing before the agent

issuing the same. This becomes especially obvious in view of the fact that the law which was repealed when the present provisions went into effect did require the applicant to state under oath to the auditor or commissioner, etc., as above indicated.

We also call your attention to the provisions of Section 5536-7 which permits the re-sale of license blanks by county auditors. Although the purchaser of such blanks is not entitled to a discount unless he purchases the blanks in groups of not less than ten non-resident or 25 resident blanks, there is no minimum limitation as to the number he may buy. It is clear that all of the provisions of the present law are designed to facilitate the sale and handling of licenses without requiring prospective licensees or applicants to travel any farther than necessary to procure them.

In view of all these features of the present law, and the contrast with the law which is repealed, it is our opinion that it is mandatory upon the director to issue a license upon any application which meets the specific provisions of Section 5536-5.

MANDT TORRISON,
Special Assistant Attorney General.

March 18, 1939. 209

17

Licenses—Statute voiding licenses is mandatory—M38 § 5536-8.

Renville County Attorney.

You inquire as to whether the 1938 Supplement to Mason's Minnesota Statutes of 1927, Section 5536-8, is mandatory as to the revocation of the license.

The statute in question reads as follows:

> "Upon conviction of any person for any violation of any provision of law relating to any license issued to such person or relating to the wild animals covered by such license, such license **shall immediately become null and void** and no license of the same kind shall be issued to such person for a period of one year after the date of commission of the offense. * * *"

It is our opinion that this statute **ipso facto** nullifies the privileges conferred by the licenses referred to, and that neither judges, nor the conservation department, nor the enforcement officers have any power, or authority to reinstate such licenses.

The statute is mandatory.

MANDT TORRISON,
Special Assistant Attorney General.

October 13, 1939. 209d

18

Motor Boats—Use of outboard motors in hunting.

Director Division of Game and Fish.

You inquire as to when a row boat containing an outboard motor shall be classed as a motor boat within the prohibition against the use of motor boats in duck hunting.

You are advised that a row boat upon which an outboard motor is used is only to be considered as a motor boat when the motor is attached thereto.

Detaching the motor and placing it in the bottom of the boat results in a restoration of the original character of the boat as a row boat.

A motor boat may be used in going to and from shooting grounds, but it is unlawful to hunt out of such a boat. It therefore becomes necessary to comply with the law to detach the motor, and place it in the bottom of the boat, or elsewhere, before hunting from the boat.

This is in conformity with the interpretation placed upon the restriction of the Biological Survey against the use of motor boats in hunting migratory wild fowl.

MANDT TORRISON,
Special Assistant Attorney General.

September 23, 1939. 210a

19

Pheasants—Authority of Director to limit the taking of—L39 C424.

Commissioner of Conservation.

You ask whether under those statutes you have authority to limit the taking of pheasants to cock birds only.

Laws of 1939, Chapter 424 (Art. 199 of the Game and Fish Laws for 1939-1940), provides in part as follows:

> "* * * Chinese ringneck or English pheasants may be taken and possessed in such counties of the state and in such numbers and during such times in the several counties * * * and subject to such other provisions not inconsistent with law as the Commissioner (Director of Game and Fish) may by regulations from time to time prescribe * * *."

This act further provides (Art. 200 of the Game and Fish Laws for 1939-1940):

> "A person may take during the open season * * * not to exceed 3 Chinese ringneck or English pheasants in the aggregate of both kinds, only one of which may be a female * * *."

In the first provision quoted, the authority of the Director to establish daily bag limits is clear. The second quoted provision also obviously intended to establish a maximum limit for Chinese ringneck or English pheasants. In our opinion it cannot be interpreted as establishing a minimum limit nor that the numbers specified are arbitrary or fixed.

Reading the two sections together, and giving due consideration to their purpose, as well as the use of the expression "not to exceed," and "only one of which may be," it appears clear that it was the intention of the legislature to limit the Director in setting bag limits so as to restrict taking to not more than 3 pheasants, and so as to permit not more than one hen to be taken.

There would seem to be no question but that the Director could limit the daily bag to 2 male birds, or one male bird, or could close the season entirely.

Certainly it can not be reasonably argued that if the limit of pheasants was set at one per day, the legislature intended to say that that one must be a female.

In our opinion, therefore, the expression "only one of which may be a female" was only intended to limit the maximum number of females which could be taken, and was not in any way intended to compel the inclusion of a female in the bag limit.

You are therefore advised that you have authority to limit the taking of pheasants by regulation to male birds only.

MANDT TORRISON,
Special Assistant Attorney General.

September 5, 1940. 210d-7

20

Rock Bass—Sale of—Taken from international waters—M27 §§ 5580, 5598.

Director Division of Game and Fish.

You state that a shipment of rock bass was made from a concern dealing in fish at Warroad, and are being held for the purpose of resale in Minnesota. It is presumed that these fish came from the Ontario portion of International waters.

You inquire whether these fish can be legally sold in the State of Minnesota.

You are answered in the negative. Mason's Minnesota Statutes 1927, Section 5580, provides as follows:

"Provided black bass, crappies, sand pike, muskellunge, sunfish and **rock bass**, except those taken in international waters in connection with commercial fishing operation, whether taken within or without this state, or in any county of this state, may not be bought or sold at any time in this state."

From this section alone it might appear that an exception has been made with respect to rock bass taken by commercial fishing operations in international waters.

This provision of the statutes, however, must be interpreted in conjunction with Section 5598, which provides in part as follows:

"Any variety of fish, except black bass, **rock bass**, muskellunge, and sunfish, may be taken by residents of Minnesota who are citizens of the

United States, by means of pound nets, gill nets and fyke nets, * * *" in international waters. Since by Section 5580 the legislature has prohibited the sale of rock bass whether taken within or without the State, except such as might be taken in commercial waters in connection with commercial fishing operations, and since it has further expressly prohibited the taking of rock bass by commercial fishing operations in those international waters, the intention to prohibit the sale of rock bass is clear. Undoubtedly the exception provided for in Section 5580, namely, "except those taken in international waters **in connection with commercial fishing operation**" has reference to commercial fishing operations authorized by the State of Minnesota.

MANDT TORRISON,
Special Assistant Attorney General.

June 23, 1939 211a-9

21

Wardens—Authority to enter private lands for game management without permission of owner.

Beaver—Trapping and removal—L39 C424.

Director, Division of Game and Fish.

You advise that the question of removal of beaver from lands to which they are doing damage, or for game management purposes, has become a problem.

You call attention to Laws of 1939, Chapter 424, which repealed former provisions authorizing trapping and removal of beaver under special permits under certain circumstances and which now provides that land owners may kill or destroy beaver and turn the carcass over to the Director of the Division of Game and Fish.

You point out the fact that in many instances this results in waste.

You inquire whether enforcement officers of the Division of Game and Fish may live trap and remove beaver without procuring express permission from owners or occupants of lands and may enter private lands in order to effectuate their removal wherever necessary without procuring express permission.

The title to all wild game is in the state in its sovereign capacity. This has been definitely established and cannot be controverted. State v. Rodman, 58 Minn. 393; Thomas v. N. P. Ex. Co., 73 Minn. 185; Linden v. McCormick, 90 Minn. 337; State v. Shattuck, 96 Minn. 45; Waldo v. Gould, 165 Minn. 128; Bohman v. Gould, 169 Minn. 374.

On the other hand, it has been held in this state that the owner of the soil has dominion over it and the exclusive privilege of hunting, including the right to control and protect wild game thereon. Realty Co. v. Johnson, 92 Minn. 363. However, the Court in this case pointed out that the title to all wild game is in the state and the owner of premises whereon it was located has only a qualified property interest therein. In other words, that interest is subservient to the ownership by the state and whatever control it may feel compelled to exercise thereover.

We have searched the authorities and are unable to find wherein the Supreme Court of this State has passed upon the specific question involved. The exact question, however, was discussed and considered by the Court of Last Resort of the State of New York, also involving the same animal, namely, beaver. Barrett et al. v. State of New York, 220 N. Y. 423, 116 N. E. 99. Because this case presents the precise answer, we shall quote from it at some length. The law of New York is the same as the established law of Minnesota with respect to the ownership of wild animals in the State in its sovereign capacity. The Court says:

> "* * * the general right of the government to protect wild animals is too well established to be now called in question. Their ownership is in the state in its sovereign capacity, for the benefit of all the people. Their preservation is a matter of public interest. They are a species of natural wealth which without special protection would be destroyed. Everywhere and at all times governments have assumed the right to prescribe how and when they may be taken or killed. * * * Wherever protection is accorded, harm may be done to the individual. Deer or moose may browse on his crops; mink or skunks kill his chickens; robins eat his cherries. In certain cases the legislature may be mistaken in its belief that more good than harm is occasioned. But this is clearly a matter which is confided to its discretion. **It exercises a governmental function for the benefit of the public at large, and no one can complain of the incidental injuries that may result.** * * * The attempt to introduce life into a new environment does not always result happily. * * * Yet governments have made such experiments in the belief that the public good would be promoted. Sometimes they have been mistaken. Again, the attempt has succeeded. The English pheas-

ant is a valuable addition to our stock of birds. But whether a success or failure, the attempt is well within governmental powers.

"If this is so with regard to foreign life, still more is it true with regard to animals native to the state, still existing here, when the intent is to increase the stock * * *.

"If the state may provide for the increase of beaver by prohibiting their destruction, **it is difficult to see why it may not attain the same result by removing colonies to a more favorable locality or by replacing those destroyed by fresh importations.** * * *"

It will be seen from the above case that the Court of Last Resort in New York has specifically held that the State, acting in a governmental capacity, may remove or transplant beaver.

The final question then arises as to whether officials of the Division of Game and Fish who have as their duty the management of the game resources of the State, may enter private lands for the purpose of carrying out those duties without first obtaining permission so to do.

Here again we are confronted with a problem which apparently has not been specifically presented to our Supreme Court. However, it has been well established by decisions in a number of jurisdictions that a public servant, acting within the scope of his valid authority and doing no more damage than reasonably necessary to discharge that duty, may justify thereby acts which would otherwise be a trespass.

Edwards v. Law, 71 N. Y. S. 1097, 63 App. Div. 451, wherein an entry was held justified for the purpose of making a map survey required by a public administration board;

Suttles v. Cantin, 22 B. C. 139, wherein an entry on private lands to abate a nuisance under a mining law was justified;

Harriman v. Whitney, 196 Mass. 466, 82 N. E. 671, wherein an entry upon private lands for the purpose of repairing a street was justified;

Winslow v. Gifford, 6 Cush. (Mass.) 327, wherein an entry upon private lands to ascertain the boundary of public landing places was justified;

American Print Works v. Lawrence, 21 N. J. L. 248, wherein the destruction of buildings to prevent the spread of a fire by an officer having the duty to control fires was held justified;

Hann v. Sullivan, 7 Newfoundland 826, wherein a fisheries warden who interfered with the use of private property where an owner had not obtained a proper permit was held not to have committed trespass.

From these decisions and others of similar import, it would appear to be clearly the law that enforcement officers of the Division of Game and Fish may enter upon private lands for the purpose of carrying out duties imposed upon them in the management of wild game without being liable

for trespass or for claims of damage, provided, however, substantial damage to such private property or unreasonable interference with its use is not occasioned thereby.

MANDT TORRISON,
Special Assistant Attorney General.

March 6, 1940. 210d-1

22

Wardens—Searches and seizures—Right to enter and search automobile without warrant—M27 §5631 (3).

Director Division of Game and Fish.

You request an opinion relative to the right of a warden to stop and search an automobile in the line of his duty without a search warrant.

Mason's Minnesota Statutes of 1927, Section 5631 (3) (Art. 58 of the 1939-40 Game and Fish Laws), authorizes wardens

> "* * * to open, enter and examine all buildings, camps, vessels, boats, wagons, **automobiles or other vehicles** * * * and other receptacles and places **where they have reason to believe the wild animals, taken or held in violation of this chapter, are to be found.**"

with or without a warrant.

Much confusion exists in the minds of the public and even among some lawyers as to the right to stop, enter and search an automobile. This confusion apparently arises because of provisions in the Federal Constitution (Art. 4) and in the State Constitution (Art. 1, Sec. 10), which forbid **unreasonable searches and seizures.**

It is to be especially noted that these constitutional provisions do not forbid searches and seizures without a warrant, but only unreasonable searches and seizures. Under the statute quoted, in order to justify the search and entry of an automobile, the warden must have "reason to believe" illegal game is contained therein.

Under the decisions, reasonable grounds for belief are held to be the general test of authority.

We interpret the meaning of the general rule "reasonable grounds for belief" to carry the same meaning as the statutory phrase "reason to believe" and are of the opinion that the Minnesota statute is valid and does not violate any constitutional provision.

Of course, whether or not a warden has reasonable grounds to believe an automobile may contain illegally possessed wild animals, is dependent upon the facts in each case.

MANDT TORRISON,
Special Assistant Attorney General.

December 29, 1939. 208h

23

Waters—Boundary waters between Minnesota and Wisconsin defined—Regulations concerning the taking of fish—L39 C269.

Commissioner of Conservation.

You call attention to conditions existing on the Mississippi River under Director's Order No. 769, which undertakes to prescribe regulations for that portion of the river flowing between the channel markers.

You also invite attention to the provisions of Laws of 1939, Chapter 269 (Art. 14 of the Game and Fish Laws), which contains the following language:

> "* * * Provided, however, the Commissioner of Conservation is authorized and shall have the power to make any and all regulations for the taking of fish from boundary waters between the State of Minnesota and the State of Wisconsin, and such regulations, when made, shall supersede any previously existing provisions."

You advise further that the water extends laterally from the channel markers for a very considerable distance first to the old shore line of the river, and since the establishment of the dams by the War Department and the subsequent raising of the water in the pools, to what has become a new shore line or water's edge still farther laterally from the channel markers. You inquire what if any authority the Commissioner of Conservation has relative to regulations concerning the taking of fish in the waters extending laterally from the channel markers.

The answer to your question involves the definition of what the legislature meant by the term, "boundary waters," as contained in the section of the statute above quoted.

In the first place it is obvious that a definition in an agreement between the Conservation Commission of Wisconsin and the Commissioner of Conservation of Minnesota as to what shall be accounted boundary waters for the purpose of that agreement, is not necessarily at all material in determining the extent of the authority of the Commissioner of Conservation of Minnesota under the act herein quoted.

It is well established by judicial decision that a "boundary on a river" implies a boundary changing as the shore line changes, either by accretion, erosion or dereliction. Stochley vs. Cissna, 119 Fed. 812; Nebraska vs. Iowa, 143 U. S. 359, 12 Sup. Ct. 396; DeLoney vs. State, 115 S. W. 138, 88 Ark. 311; Missouri vs. Kansas, 29 Sup. Ct. 417, 213 U. S. 78. This definition then would contemplate that the boundary waters extend at least to the natural ordinary high water mark of the old shore line or to the water's edge of the river under natural conditions.

There remains only the question as to whether the lagoons, backwaters and sloughs created by the artificial raising of the water through construction works by the War Department and the natural widening of the main

pools by the same means has added to the boundary waters the additional surface waters thus created.

It is our opinion that such waters are to be included. To permit of any other interpretation would result in an absurdity, the implications of which may not be ascribed to the legislature. Any other interpretation would result in a situation wherein an imaginary line over the old shore line might result in one set of regulations by the Commissioner on one side of that water line, with statutory regulations applicable to the inland waters of the state applying to the other.

A case in point is Attorney General vs. Bay Boom Wild Rice & Fur Farm, 178 N. W. 569. In this case a dam at Menasha, Wisconsin, raised the waters of Lake Poigan and the Wolf River so that large, marshy areas were overflowed. It was there held that these waters were added as a part of the public waters of Lake Poigan; that the public acquired the same rights to use those waters for recreational purposes as they had over the original lake waters and that they became one complete body of public water.

On the basis of that authority, and because it is inconceivable that the legislature could have intended to create an absurd situation as above pointed out, we hold that all of the sloughs and backwaters, the bays and the newly extended water areas connected with the main channel of the river by a channel which is navigable at periods when the water level is approximately equal to the normal pool elevation as created by the War Department, are a part of the boundary waters between Wisconsin and Minnesota within the meaning of the legislative act to which you have called attention.

We have not attempted to discuss the question as to where the definite boundary between the state of Wisconsin and the state of Minnesota is. That boundary is the thread of the main channel of the river between the two states. It is probably a shifting boundary and shifts with the river channel. It probably is unnecessary to call your attention to the fact that your authority to regulate extends only from the Minnesota shore line to that boundary.

MANDT TORRISON,
Special Assistant Attorney General.

December 11, 1939. 3701

COURTS and CRIMINAL LAW

COURTS

24

District—Power to commit defendant to insane hospital—M27 §§ 9915, 10722.

Hennepin County Attorney.

You ask our opinion on the following question:

> "Has the District Court the power under this statute (Section 10722, Mason's Minnesota Statutes of 1927), to commit one charged with crime to the State Hospital for the dangerous insane when the findings of the Court Commission were that the defendant 'has an inadequate mental make-up, that he is a constitutional psychopathic inferior individual, that his mental condition is such that he is in need of a prolonged period of medical care and observation at a State hospital for the dangerous insane,' without a finding that defendant has homicidal tendencies?"

We are of the opinion that pursuant to this section the district court may commit the defendant to any state hospital, and may commit him to the hospital for the dangerous insane, even without a finding that the defendant has homicidal tendencies. The court may want to so commit the defendant to avoid the danger of his escape from the institution.

Under the second half of the said section, following the semicolon, it is compulsory on the court to commit him to the hospital for the dangerous insane if the defendant be found to have homicidal tendencies.

This section of the statute should be considered along with Section 9915, Mason's Minnesota Statutes of 1927. They have been held to be directory only, and do not affect the jurisdiction of the court if it proceeds to final judgment and sentence. See State ex rel. Novak v. Utecht, 203 Minn. 448, 281 N. W. 775.

M. TEDD EVANS,
Assistant Attorney General.

March 18, 1940. 248b-3

25

Justice—Civil Action—Issuing summons—Compulsory—M27 §§ 9015, 9016, 9027.

Nicollet County Attorney.

You inquire whether it is mandatory, as a matter of law, for a justice of the peace to issue a summons in a civil action when the complaint appears without color of right or reason.

We assume that the would-be complaint states or attempts to state a cause of action which is within the jurisdiction of the justice. If it is a matter in which the justice has no jurisdiction, then we believe the justice could rightfully refuse to issue the summons.

The duties of the justice of the peace are divided into two parts: those performed in a ministerial capacity and those performed in a judicial capacity. When a complaint is made to a justice for the purpose of having a summons issued, such officer, when issuing such summons, is acting in a ministerial capacity. McCarthy v. Clancy, 148 At. 551, 110 Conn. 482. His position is similar to that of a clerk of district court receiving a complaint for filing when required by statute. It is not his duty at such time to determine whether or not a cause of action exists, such determination to be made when he acts in a judicial capacity. It might well be that at the time of issuing the summons, the complaint, which may be either oral or written, is imperfect or fails to state a cause of action. However, the pleadings in justice court, under our statutes, shall take place at the time mentioned in the summons for the appearance of the parties. Mason's Minnesota Statutes of 1927, Section 9015. Those pleadings may be amended at any time before or during the trial to supply a defense or omission in the allegations necessary to support the action or defense (Mason's Minnesota Statutes of 1927, Section 9027) and thereby remedy any defect that might originally appear. Middelstadt v. McIntyre, 55 Minn. 69.

Consequently, we believe that the justice should perform the ministerial duties of issuing a summons in a civil matter irrespective of the matters stated in the complaint, if the action is within his jurisdiction. To refuse to so do would be to deprive the complainant of his day in court. If it later appears to such justice, acting in his judicial capacity, that no cause of action exists, then it would be proper for him to so judicially determine and dismiss said action.

HAYES DANSINGBURG,
Assistant Attorney General.

October 31, 1940. 266b-4

26

Justice—Jurors' Fees—Taxing of—Criminal Cases—M27 § 9136.

Rice County Attorney.

You state a justice of the peace of Rice County has filed a claim for his fees and costs, including jurors' fees, with the county auditor pursuant to Section 9136, Mason's Minnesota Statutes of 1927. A jury was requested by the defendant and failed to agree on the verdict, whereupon the justice dismissed the case.

You ask: Are jurors' fees proper items of cost to be charged against

the county; also, may they be paid on auditor's warrants without being first allowed by the county board?

You do not say whether the case in question was a civil or a criminal one. The section cited refers to criminal actions, so we will assume the case to which you refer was a criminal one. Section 9136, supra, provides in part:

> "* * * and within ten days after the trial of any criminal action before him, such justice shall prepare an itemized statement of the costs taxed therein against the state and file the same with the county auditor. No bills for justice fees shall be **allowed by the county board** until such statement is filed as herein provided, and all fees collected by such justice have been forwarded as provided by law. * * *."

The question of the payment of costs in criminal proceedings before a justice where they have not been paid by the defendant has been before this department a number of times. The statutes are not clear, as stated in an opinion rendered the commissioner of game and fish on April 28th, 1931:

> "There are certain specific provisions calling for a jury in justice court in criminal cases where it is demanded by the defendant but no specific provisions for the payment of their fees where not paid by the defendant (Sections 9120-9126, Mason's Minnesota Statutes of 1927). Also provisions requiring the complainant to pay costs where prosecution was instituted without probable cause and through malice (9128 Id.) and for the assessment of costs against the defendant where judgment of conviction is finally affirmed (9134 Id. See also 9485 Id.)."

After referring to Section 9136, the opinion holds squarely:

> "We take it that the justice may present to the county board his bill for fees and costs in criminal cases instituted before him (where such costs have not been paid by the defendant) and if the claim be not allowed, may appeal to the district court from the disallowance thereof as provided by Section 646, Mason's Minnesota Statutes of 1927."

The opinion from which we have quoted was rendered eight years ago and has not been disturbed by any one of the several legislatures which have been in session since then or by the decision of any court. It still represents the views of this office.

Generally, on the question of whether compensation of jurors is taxable against a defendant on conviction, see 15 Corpus Juris, Page 330, and State ex rel. v. District Court, 130 N. W. 38 (Wis.).

ROLLIN L. SMITH,
Special Assistant Attorney General.

December 28, 1939. 266b-8

27

Municipal—Judge—Law creating municipal courts is not unconstitutional in its entirety because it contains a provision to the effect that the municipal judge thereof shall be a lawyer—L35, C253.

Otter Tail County Attorney.

You state that you are called upon as county attorney each month to approve claims for fees submitted by the clerk of the municipal court at New York Mills, Minnesota, which was created by Session Laws of 1935, Chapter 253. You call attention to an opinion of this office dated January 20, 1939, and addressed to the Hon. J. W. Huhtala, State Representative from Virginia, Minnesota, which opinion held that "legislation requiring a municipal court judge, or a special municipal court judge, to be an attorney at law, would be unconstitutional * * *." You state that you are in receipt of a letter from the village attorney of the village of New York Mills contending that the act creating the court in New York Mills is unconstitutional, and that no claims for fees to this court should be approved against the county. The claim of the village attorney is based on the opinion of January 20th rendered by this office.

You therefore ask:

> "Is Chapter 253 of the Session Laws of Minnesota for 1935 unconstitutional and the Court created thereby unconstitutional?"

As you indicate, Laws of 1935, Chapter 253, does not contain a severable clause as to constitutionality. However, the presence or absence of a severable clause is not controlling in determining the severability of an unconstitutional portion of a statute. The absence of such a clause, however, raises a presumption that the act is to be effective in its entirety.

> "The principles which underlie the application of the saving clause have been well established. In the absence of a legislative declaration that invalidity of a portion of a statute shall not affect the remainder, the presumption is that the legislature intends the act to be effective as an entirety. The effect of such a statutory declaration is to create, not the presumption of entirety in effect ordinarily accorded the statutes, but an opposite presumption of separability." 11 Am. Jur., Sec. 156.

Regardless of the saving clause, the general rule is stated in 11 Am. Jur., Section 152:

> "It is a fundamental principle that a statute may be constitutional in one part and unconstitutional in another part and that if the invalid part is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected."

Further, at Section 155 of the same authority we find the statement:

> "The question as to whether portions of a statute which are constitutional shall be upheld while other divisible portions are eliminated as unconstitutional is **primarily one of intention.** If the objectionable

parts of a statute are severable from the rest in such a way that the legislature would be presumed to have enacted the valid portion without the invalid, the failure of the latter will not necessarily render the entire statute invalid, but the statute may be enforced as to those portions of it which are constitutional. * * *

"The principles involved in determining severability on the basis of the legislative intention comprise the familiar rule that if the parts of the law are divisible and some of them are constitutional and others not, the constitutional provisions cannot be held valid if it appears that they would not have been adopted without the other part; the portion which remains after deletion must express the legislative will independently of the void part."

In the case of State v. Duluth Gas & Water Company, 76 Minn. 96, the court said at page 105:

"The test is, rather, whether the provisions are so essentially and inseparably connected and interdependent that the one may not operate without the other, or that it is impossible to suppose that the legislature would have passed the one without the other."

Other cases decided in Minnesota are gathered in the notes in 11 Am. Jur., Section 152.

Reference is made to the case of State ex rel. Paul A. Froehlich v. George J. Ries, et al, 168 Minn., page 11. In that case the court construed G. S. 1923, Section 247, which section provides that "Court commissioners shall be men learned in the law." Citing Article 7, Section 7, of the State Constitution, the court held that the legislature could not impose greater restrictions or exact other qualifications for eligibility to constitutional offices than are prescribed in the Constitution, and came to the conclusion that **that part** of the statute requiring court commissioners to be men learned in the law was unconstitutional. The court there by implication held that the unconstitutional portion of the statute was severable from the constitutional part.

I believe we can apply the same rule here. Accordingly, being governed by the test above set out and by the authority of Froehlich v. Ries, supra, both of your questions are answered in the negative. The law creating the court, and the court at New York Mills, are constitutional; and only that portion of the law requiring the judge thereof to be "a person learned in the law and admitted to practice as an attorney in this state" is unconstitutional.

EDWARD J. DEVITT,
Assistant Attorney General.

March 17, 1939. 307-g

Note: See State ex rel. Burnquist v. Welter, decided Mar. 7, 1941.

COURTS—Probate

28

Estates—Heirs—Missing—M40, § 8992-126.

Lac Qui Parle County Attorney.

You ask how to proceed under Section 8992-126, Mason's 1940 Supplement, in a case where money of a missing heir has been deposited with the county treasurer because the person entitled thereto could not be found and now has been missing and not heard from for more than seven years. You state that an application is being made to the probate court for disposition of the funds to the heirs of the person entitled to the money, and your question is whether the court may properly under that section direct the auditor to issue a warrant for the amount thereof payable to the heirs of such a person.

The proper procedure would be for some person who is entitled thereto to petition the probate court for administration of the estate of the missing heir whose absence for more than seven years was unexplained, as was done in the case of Bornemann v. Ofsthun, 175 Minn. 493, 221 N. W. 876.

If the probate court then appoints an administrator, the qualified administrator of such "missing heir" may then give the notice and proceed pursuant to Section 8992-126.

M. TEDD EVANS,
Assistant Attorney General.

July 22, 1940. 346b

29

Insane Persons—Restoration to capacity—Notice required in lieu of notice to former State Board of Control—L39, C270 § 8, C431, Art. 7, §§ 3 and 6, M40, § 8992-143.

Dakota County Attorney.

You refer to a proceeding in probate court of your county for restoration to capacity of a man previously committed to the state hospital at St. Peter as insane. This proceeding is governed by Laws 1939, Chapter 270, Section 8, amending the probate code, Laws 1935, Chapter 72, Section 143 (Mason's 1940 Supplement, Section 8992-143), which directs that notice be given to the State Board of Control if the person in question was under its control and has not been discharged by it. You ask to whom such notice should be given, the State Board of Control having been abolished.

From your statement I assume that the patient seeking restoration to capacity is at liberty, presumably on parole from the state hospital. If such

is the case, notice should be given both to the director of social welfare and to the director of public institutions. This is required because both directors have a measure of jurisdiction over such a patient on parole. The director of social welfare is charged with the duty of supervising such paroled patients, through the state board of parole, under Laws 1939, Chapter 431, Article 7, Section 6. The director of public institutions also has potential jurisdiction, under Section 3 of the same article, on account of the possibility that the parole may be revoked, and the patient returned to the state hospital.

If the patient were an actual inmate of the state hospital, he would be under the sole jurisdiction of the director of public institutions, under the section last above cited, and it would be necessary to give notice only to that director.

CHESTER S. WILSON,
Deputy Attorney General.

May 9, 1940. 246b-8

30

Psychopathic Personality—Commitment—Does not relieve criminal responsibility nor constitute a defense to the charge therefor—M40 § 8992-184c.

Swift County Attorney.

You state that you recently allowed a commitment to a state hospital of a person charged with carnal knowledge as a psychopathic personality.

You inquire whether or not this person should be brought back to your county on the opening day of court to be arraigned under the complaint.

Laws 1939, Chapter 369, the psychopathic personality act, in Section 3 thereof, provides as follows:

> "The existence in any person of a condition of psychopatic personality shall not in any case constitute a defense to a charge of crime, nor relieve such person from liability to be tried upon a criminal charge, unless such person is in a condition of insanity, idiocy, imbecility, or lunacy within the meaning of the laws relating to crimes and criminal procedure."

Under this section of the act such a person is not relieved from liability upon the criminal offense, nor does it constitute a defense.

JOHN A. WEEKS,
Assistant Attorney General.

November 1, 1939. 248b-3

31

Psychopathic Personality—Commitment—Warrants of to state hospital, Veterans' hospital—Amendment thereof and authority to parole after commitment—M40 §§ 8992-176, 8992-179, L39, C369.

Director of Department of Social Security.

You submit four questions relative to patients committed under Chapter 369, Laws of 1939, known as the "Psychopathic Personality Law."

1. "Has the Probate Court authority to issue dual warrants of commitment to the state hospitals and to the veterans hospital?"

Question one is answered in the affirmative. The 1938 Supplement to Mason's Minnesota Statutes, Section 8992-176, provides in part as follows:

"If the patient is found to be insane or inebriate, the court shall issue to the sheriff or any other person a warrant in duplicate, committing the patient to the custody of the superintendent of the proper state hospital, or to the superintendent or keeper of any private licensed institution for the care of inebriates or insane persons; provided, however, that such patients are required to pay the necessary hospital charge. If such patient be entitled to care in any institution of the United States in this state, such warrant shall be in triplicate, committing him to the joint custody of the superintendents of the proper state and federal institution. If such federal institutions be unable or unwilling to receive the patient at the time of commitment, he subsequently may be transferred to it upon its request. Such transfer shall discharge his commitment to the state institution and constitute a sole commitment to the federal institution. * * *"

Section 2 of Chapter 369, Laws 1939, provides in part as follows:

"* * * all laws now in force or hereafter enacted relating to insane persons, to persons alleged to be insane, and to persons found to be insane, shall apply with like force and effect to persons having a psychopathic personality, to persons alleged to have such personality, and to persons found to have such personality, respectively."

2. "If the court has such power and did not issue a dual commitment, can the record be amended and a dual warrant issued?"

Question two is answered in the affirmative. This authority is derived under the general powers of the court to correct or amend its processes.

3. "Provided the Veterans' Hospital will receive the patient, may we transfer when there is no dual warrant?"

There is no provision for such a transfer unless authorized in the commitment and it is necessary to amend the warrant as provided hereinbefore.

4. "Have we authority to parole if we see fit?"

Question four is answered in the affirmative. The 1938 Supplement to Mason's Minnesota Statutes, Section 8992-179, provides as follows:

> "Any insane, inebriate, feebleminded, or epileptic patient committed to the state board of control or any institution under its control, may be released to any person if such board consent thereto or if a bond to the State be filed with such board in such amount as it may fix, conditioned upon the care and safekeeping of the patient and the payment of all expenses, damages, and other items arising from any act of such patient."

JOHN A. WEEKS,
Assistant Attorney General.

November 21, 1939. 248b-3

32

Psychopathic Personality—Patient—Parole or discharge governed by same provisions as dangerously insane—L39, C369, M1927, § 4524; L39, C270, §8 (superseding M38, § 8992-143); M38, § 4523; M38, §§ 8992-179, 8992-180.

Superintendent Moose Lake State Hospital.

In regard to the parole or discharge of patients committed under the psychopathic personality law, Laws 1939, Chapter 369, it is my opinion that those matters are governed in all respects by the same provisions of law that apply to a person found to be dangerously insane. This results from the fact that under the definition of psychopathic personality given in Section 1 of the act, a finding of such personality involves a determination that the patient is dangerous to other persons.

In such a case the patient or anyone interested in him has a right to petition the committing court for release at any time (Laws 1939, Chapter 270, Section 8, superseding Mason's Minnesota Statutes, 1938 Supplement, Section 8992-143). A patient may be paroled, released, or discharged under the provisions of Mason's Statutes, 1938 Supplement, Section 4523, Mason's Statutes 1927, Section 4524, or Mason's Statutes, 1938 Supplement, Section 8992-179, provided, that an order therefor must first be obtained from a court of competent jurisdiction, as required by Mason's Statutes, 1938 Supplement, Section 8992-180.

CHESTER S. WILSON,
Deputy Attorney General.

March 19, 1940. 248b-11

33

Psychopathic Personality—Patient—Transfer to asylum for the dangerous insane—M27 §§ 4534, 4528.

Director Division Public Institutions.

You inquire if under the terms of Mason's Minnesota Statutes, Section 4534, you are authorized to transfer a psychopathic personality patient from the state hospitals to the asylum for the dangerous insane.

Mason's Minnesota Statutes, Section 4534, provides as follows:

> "Whenever any inmate of a state hospital or asylum for the insane or the school for feeble-minded and colony for epileptics, is found by the state board of control to have homicidal tendencies, or to be under sentence or indictment or information, he shall be transferred by the board to said asylum for the dangerous insane for safekeeping and treatment."

You will note that the foregoing act requires a finding by the state board of control (now department of social security) that the patient has homicidal tendencies or to be under sentence or indictment or information before such transfer can be made under this statute.

The foregoing section of the statute is not the exclusive means of commitment to the asylum for the dangerous insane. Under Section 4528 the state board of control may transfer to the asylum for the dangerous insane any patient found to be dangerous, in accordance with the provisions therein.

JOHN A. WEEKS,
Assistant Attorney General.

August 3, 1939. 248b-3

34

Psychopathic Personality—Witnesses—Fees payable on order of Probate Court—L39, C369, M40, §§ 8992-184a to -184c, 8992-177; M27, § 7009.

Hennepin County Attorney.

You state that in a proceeding under the psychopathic personality act, Laws 1939, Chapter 369 (Mason's Statutes, 1940 Supplement, Sections 8992-184a to 8992-184c, inclusive), the probate court appointed two medical doctors trained in psychiatry as examiners, and that the county attorney, prosecuting the case, called another psychiatrist as a witness in support of the petition. I take it that this psychiatrist was called to give his opinion as an expert, not merely to testify as a lay witness to facts which he had observed. You say that the probate court has taken the position that the fees of this witness are not payable out of the probate court fund but should be

paid out of the funds allotted for witness fees in district court. You inquire out of which fund the fees of the witness should be paid.

Apparently the probate judge is of the opinion that he has no authority to order payment of the fees in question out of funds at his disposal, and that payment should be made by order of the district court, as in case of an expert witness for the state in a criminal case in that court.

By the terms of the psychopathic personality act, proceedings thereunder are governed by the laws relating to insanity cases except as otherwise expressly provided. The act makes no express provision for payment of witness fees or other expenses. Hence reference must be made to the applicable provision of the probate code, Mason's Statutes, 1940 Supplement, Section 8992-177, reading as follows:

> "In each proceedings the court shall allow and order paid to each witness subpoenaed the fees and mileage prescribed by law, to each examiner the sum of $5.00 per day for his services and 15c for each mile traveled, * * *. Upon such order the county auditor shall issue a warrant on the county treasurer for the payment thereof."

No particular fund is specified by the statute. Fees ordered paid by the court under this provision are a general obligation of the county. Designation of a special fund therefor is merely a matter of accounting procedure adopted by the county authorities.

Mason's Statutes 1927, Section 7009, provides:

> "The judge of any court of record, before whom any witness is summoned or sworn and examined as an expert in any profession or calling, may, in his discretion, allow such fees or compensation as in his judgment may be just and reasonable."

In my opinion the above quoted provisions clearly authorize the probate court to order payment of all fees for witnesses, both lay and expert, in proceedings in that court under the psychopathic personality act, as well as in proceedings for the examination of other mental defectives authorized by the probate code. It is immaterial whether the witnesses are called in support of the petition or in behalf of the patient. The law makes no distinction. It recognizes that proceedings for the examination of mental defectives are not prosecutions or adversary actions, but investigations to determine whether or not the patients should be confined and treated for their own benefit and for the protection of society. If a patient does not require confinement, it is just as much to the interest of the public to have him released as it is to have him committed if he needs it. Public interest demands that the decision be based on a full hearing of all pertinent testimony, whatever it may show. Hence the law provides for the payment from the public treasury of the fees of all witnesses in such proceedings, no matter who calls them.

You are therefore advised that the fees of the witness in question in

your case are payable by the county on order of the probate court. The district court would have no authority in such a matter except in case of an appeal.

CHESTER S. WILSON,
Deputy Attorney General.

April 12, 1940. 248b-11

35

Psychopathic Personality—Witnesses—Fees to be paid psychiatrist subpoenaed as a witness—M27, § 7009.

Judge of Probate Court.

You state that in a psychopathic personality proceeding before your court it became necessary to subpoena a psychiatrist from the state hospital at St. Peter. You then inquire what witness fees may be paid the psychiatrist.

In my opinion Section 7009, Mason's Minnesota Statutes 1927, would apply to a proceeding before your court. That section provides:

> "The judge of any court of record, before whom any witness is summoned or sworn and examined as an expert in any profession or calling, may, in his discretion, allow such fees or compensation as in his judgment may be just and reasonable."

In the case of Bekkemo v. Erickson, 186 Minn. 108, 114, 242 N. W. 617, the court held that the fact that an expert witness is employed in the service of the state does not disqualify him from receiving compensation as an expert witness.

KENT C. van den BERG,
Special Assistant Attorney General.

June 1, 1940. 248b-11

CRIMINAL LAW

36

Delinquency—Neglected or delinquent children—Contributing to neglected or delinquent condition—Elements of offense—Prior adjudication of child's condition necessary—M27, § 8662.

Clearwater County Attorney.

In regard to the offense of contributing to the delinquency of a child, under Mason's Statutes 1927, Section 8662, it is clear from the language

of this section that before a prosecution will lie thereunder there must be a formal adjudication by the proper juvenile court that the child is neglected or delinquent.

Two classes of cases may arise under this section: (1) those where the conduct which contributed to the neglect or delinquency occurred before the adjudication of the latter, in which case the conduct of the offender would necessarily have a more or less direct relation to the particular conditions constituting the neglect or delinquency; (2) cases where the conduct which contributed to the neglect or delinquency occurred after the adjudication, in which case it is not essential that the conduct of the offender should have any such direct relationship, though it must, of course, encourage, cause, or contribute in some way to the neglected or delinquent condition of the child. An example of the latter class of cases is found in State v. Sobelman, 199 Minn. 232, 271 N. W. 484, with which you are probably familiar.

We do not have on file any stock forms of complaint for the offense in question. Cases vary so that it would be difficult to prepare a standard form. Generally speaking, the complaint should allege that the child has been found and adjudged a delinquent, giving the date and naming the court, and should set forth the essential facts of the conduct of the defendant whereby it is claimed he encouraged, caused, or contributed to the delinquent condition of the child. You do not state the circumstances of your case. If you would like to have us draw a complaint, please submit a full statement of the facts, and we shall be glad to prepare a proper form.

CHESTER S. WILSON,
Deputy Attorney General.

March 19, 1940. 840a-5

37

Extradition—Compact for cooperative effort and mutual assistance in crime enforcement and prevention—Relation of parolees to demanding state— L35, C257.

Honorable Harold E. Stassen,

Governor.

Sir:

You state that on September 24, 1937, as Governor of this state, you signed a compact effecting the procedure relative to the apprehension and return of parolees between this state and some thirty other states which signed the agreement. You inquire:

"(1) Under the terms of the compact is a formal requisition from the executive authority of the demanding state necessary before the

authorities of this state release him to the custody of the agent of the demanding state?

"(2) Is it necessary that a governor's warrant in extradition be issued by the governor of Minnesota?

"(3) Is the governor of Minnesota required either by law or well established custom to grant a hearing to the accused?

"(4) Is it necessary for the officer having custody of the accused to take the accused before a judge of a court of record and obtain a waiver of his right to sue out a writ of habeas corpus as provided in the Uniform Extradition Act enacted by the 1939 Legislature?"

The facts which caused this question to arise are as follows: One "X" was convicted of a felony in the state of Michigan and, after serving part of his time on such sentence, was placed on probation in the state of Minnesota. While in this state he violated the terms of his parole, and the state of Michigan is now demanding his return under a compact entered into by these various states covering the matter of parolees.

On June 6, 1934, Congress passed an act providing for compacts between states for cooperation in the prevention of crime, which act states:

"The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts." (C. 406, 48 State 909; U.S.C.A., Title 18, § 420.)

Pursuant to such congressional authority, the legislature of the state of Minnesota enacted Chapter 257, Laws 1935, which provides as follows:

"An Act Authorizing the Governor of the State of Minnesota to Enter Into Reciprocal Agreements with Other States for Supervision and Return of Persons on Parole or Probation.

"WHEREAS, the Congress of the United States of America has, by law, given consent to any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies;

"Be it enacted by the Legislature of the State of Minnesota:

"Section 1. **Governor may enter into reciprocal agreement.**—The governor of the state of Minnesota is hereby authorized and empowered to enter into compacts and agreements with other states through their duly constituted authorities, in reference to reciprocal supervision of persons on parole or probation and for the reciprocal return of such

persons to the contracting states for violation of the terms of their parole or probation."

The following is a copy of the compact entered into by various states of these United States:

"A Compact

"Entered into by and between all the States Signatory hereto, with the consent of the Congress of the United States of America, granted by an act entitled 'An Act granting the consent of Congress to any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and for other purposes,' effective June 6, 1934.

"The contracting states solemnly agree:

"(1) That it shall be competent for the duly constituted judicial and administrative authorities of a state party to this compact (herein called 'sending state') to permit any person convicted of an offense within such state and placed on probation or released on parole to reside in any other state party to this compact (herein called 'receiving state') while on probation or parole, if

"(a) Such person is in fact a resident of or has his family residing within the receiving state and can obtain employment there;

"(b) Though not a resident of the receiving state and not having his family residing there, the receiving state consents to such persons being sent there.

"Before granting such permission, opportunity shall be granted to the receiving state to investigate the home and prospective employment of such person.

"A resident of the receiving state, within the meaning of this section, is one who has been an actual inhabitant of such state continuously for more than one year prior to his coming to the sending state and has not resided within the sending state more than six continuous months immediately preceding the commission of the offense for which he has been convicted.

"(2) That each receiving state will assume the duties of visitation of and supervision over probationers or parolees of any sending state and in the exercise of those duties shall be governed by the same standards that prevail for its own probationers and parolees.

"(3) That duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of the states party hereto, as to such persons. The decision

of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state: Provided, however, that if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such a state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense.

"(4) That the duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all states parties to this compact, without interference.

"(5) That the governor of each state may designate an officer who, acting jointly with like officers of other contracting states, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact.

"(6) That this compact shall become operative immediately upon its execution by any state as between it and any other state or states so executing. When executed it shall have the full force and effect of law within such state, the form of execution to be in accordance with the laws of the executing state.

"(7) That this compact shall continue in force and remain binding upon each executing state until renounced by it. The duties and obligations hereunder of a renouncing state shall continue as to parolees or probationers residing therein at the time of withdrawal until retaken or finally discharged by the sending state. Renunciation of this compact shall be by the same authority which executed it, by sending six months' notice in writing of its intention to withdraw from the compact to the other states party hereto."

From the information we have, the following states have signed such compact:

State	Date	State	Date
Arizona	9-24-37	New Mexico	8-31-37
Arkansas	9-15-37	Ohio	9-17-37
Colorado	9-24-37	Oregon	9-14-37
Delaware	9-17-37	Pennsylvania	9-21-37
Illinois	9-22-37	Rhode Island	9-24-37
Indiana	9-13-37	Utah	9-20-37
Iowa	8-26-37	Vermont	9-13-37
Kansas	9-15-37	Washington	9-16-37
Maryland	9-24-37	Wyoming	9-24-37
Massachusetts	9-23-37	Virginia	9-22-38
Michigan	9-14-37	California	7- 7-39
Minnesota	9-24-37	Louisiana	9-13-39
Montana	9-14-37	Maine	7-21-39
Nebraska	9-24-37	Tennessee	6- 1-39
New Hampshire	9-17-37	West Virginia	6- 5-39
New Jersey	9-23-37		

Under the terms of the compact it appears that all that it is necessary for a demanding state to do in order to retake any person on parole or probation is covered by Section 3 of the compact, which waives all formalities except the necessity of establishing the authority of the officer representing the demanding state, and establishing the identity of the person to be taken. All legal requirements to obtain extradition of fugitives from justice are thereby expressly waived on the part of the states party thereto, as to such persons. The decision of a sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state.

This proceeding is separate and distinct from an extradition, and it is only necessary to comply with the terms of such compact. Consequently all of your questions are answered in the negative.

This opinion is limited to facts covered by the compact. It does not cover the case of a person paroled within a state, who thereafter flees to another state.

HAYES DANSINGBURG,
Assistant Attorney General.

March 4, 1940. 193a-4

38

Indictment—Abandonment—Desertion—Nonsupport—Venue of under facts stated—M27, §10136.

City Attorney, Minneapolis.

You ask whether an action for nonsupport under Section 10136, Mason's Minnesota Statutes of 1927, should be brought in Ramsey County where the husband resides, or in Hennepin County where the wife and children have resided for the past six months.

This has been a troublesome question for several years. See Opinions, No. 126, 1928 Report, and No. 45, 1934 Report. The difficulty started with the decision of State v. Justus, 85 Minn. 114, 88 N. W. 415, which is good law as far as it applies to the felony charge under Section 10135, but the dictum therein contained and the reason therein contained should not apply to cases under Section 10136, Mason's Minnesota Statutes of 1927. It should be noted that this decision was handed down in 1901, and that our present statutes are entirely different than the statute considered in that case.

We must bear in mind the distinction that exists between these two sections of the statute. Under Section 10135 there must be proof of some affirmative act or acts constituting desertion and proving the intent to wholly abandon. Under Section 10136 no proof of affirmative acts is necessary, but merely proof of omission, or failure to perform his duties of supporting minor children, or wife being in destitute circumstances.

We are of the opinion that the charge brought under the latter section of the statute, Section 10136, can properly be brought in Hennepin County, because the duty to support existed there and the failure to support occurred there.

The only Minnesota cases since the Justus case which are at all helpful are State v. Ford, 151 Minn. 382, 186 N. W. 812, and State v. Clark, 148 Minn. 389, 182 N. W. 452, neither of which bear directly on this question. However, since we have held in other rulings of this office that the physical presence of the defendant is not necessary, and since the offense is a continuing one, the defendant in your case has violated this statute daily during the time his family has resided in your county.

The weight of authority in other states is that, generally speaking, the husband owes the duty to support his family at the place where they reside, and that if he fails to support them, the offense is committed at that place, his constructive presence there being presumed for the purpose of establishing the venue. State v. Devoracek, 140 Iowa 266, 118 N. W. 399, and State v. Miller, 22 A. L. R. 788.

M. TEDD EVANS,
Assistant Attorney General.

November 16, 1939. 133b-1

39

Indictments—Larceny—As bailee—Borrowing car—M27, § 10358.

Big Stone County Attorney.

You ask for form of information in the case where a man borrowed a car for a short trip and then left the country and the car was later found abandoned many miles away.

While there is some authority, as you suggest, that the wrongful intent would relate back to the time of taking, you would still have some difficulty in satisfying the jury under the usual larceny statute because he got possession of the car lawfully in the first instance, while one of the elements of ordinary larceny is a wrongful taking.

We suggest that you charge him with the larceny as a bailee, under Section 10358, Subdivision 2, Mason's Minnesota Statutes 1927. The cases of State v. Comings, 54 Minn. 359, State v. Holton, 88 Minn. 171, and State v. Schoemperlen, 101 Minn. 8, will be helpful in determining what facts should be set forth in the information.

M. TEDD EVANS,
Assistant Attorney General.

September 22, 1939. 133b-45

40

Information—Under facts stated two offenses cannot be joined but can allege means in alternative for committing same offense—M27, § 10643.

Lac qui Parle County Attorney.

You ask if you can file an information for assault in the second degree under Section 10098, Mason's Minnesota Statutes of 1927, alleging in the alternative under subsection 3 that it was with intent to do grievous bodily harm, or (under subsection 5) with intent to commit a felony, to-wit: rape.

The former opinion of this office dated December 26, 1935, may be correct as far as filing two separate counts in the same indictment is concerned. However, it does not go far enough, and it appears to us that you would merely be doing what Section 10643, Mason's Minnesota Statutes of 1927, specifically provides for in one portion:

> "Where the offense may have been committed by the use of different means, the indictment may allege the means of committing the offense in the alternative."

State v. Hann, 73 Minn. 140, indicates that this may be done. Also see State v. Ekberg, 178 Minn. 437.

We do not see how defendant's affidavit, which was a part of his motion to withdraw his plea of guilty, could possibly be admissible as a part of the state's case. Of course, it can be used for cross examination and impeachment if he takes the stand. It is not in the form of a confession, nor could you lay a foundation to have it admitted as a confession. Possibly you can prove some of the same matter by oral admissions made by him to the sheriff.

M. TEDD EVANS,
Assistant Attorney General.

April 29, 1940. 133b-7

41

Jury Trial—Fee—Compel defendant to pay—Article 1, Section 6, Minnesota Constitution—M27, §232.

Olmsted County Attorney.

You call our attention to Section 232, Mason's Minnesota Statutes of 1927, referring to the provision in municipal courts which provides for a fee of fifty cents for each juror required, and ask whether or not this requirement applies in criminal cases when the defendant is well able to pay this fifty cents for each juror, and if so whether or not this requirement would be unconstitutional.

While you do not so state, it is our belief that the municipal court of the city of Rochester is organized under the general provisions of the law for municipal courts, as it appears in Section 215 to 254, Mason's Minnesota Statutes of 1927.

Section 6 of Article 1 of the Constitution of the State of Minnesota states:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy, public trial, by an impartial jury of the county or district wherein the crime shall have been committed * * *."

We do not believe that it was the intention of the legislature nor that they had the power to enact a law which would deprive a person of such constitutional right. To refuse to grant a defendant jury trial in a criminal case for his failure to pay a fee, irrespective of his financial circumstances, would be to disregard the constitutional provision heretofore cited.

This opinion does not refer to a jury trial with reference to a violation of a city ordinance.

HAYES DANSINGBURG,
Assistant Attorney General.

March 21, 1940. 260a-4

42

Prisoners—Board—Expense of when arrested by highway patrol for violation of highway traffic act—Right to charge prisoner for keep after serving part of sentence and then paying fine imposed.

Fillmore County Attorney.

You state that a village in your county has presented a bill for payment to the county board consisting of the cost of meals served to prisoners held in its jail pending trial or arraignment for offenses against the traffic laws of the state and charged under state law both by the highway patrol and by the local officers. You inquire if the county is obligated to pay for such meals by reimbursing the village irrespective of the officer who prefers the charge, it being understood that if the arrest is made by the highway patrol, you may seek reimbursement from the state for expenses of this type.

Section 2554, Sub-section 18(b), Mason's Minnesota Statutes, 1940 Supplement, states:

> "All fines, from traffic law violations, collected from persons apprehended or arrested by such employees, shall be paid into the state treasury and shall be credited to a separate fund hereby established for that purpose. Out of such fund shall first be paid to counties all costs and expenses incurred by them in the prosecution and punishment of persons so arrested and for which such counties have not been reimbursed by the payment of such costs and expenses by the person prosecuted,

and so much of said fund as shall be necessary for the making of such reimbursement is hereby appropriated therefor. Such payment shall be made by the state treasurer upon the claim of the county verified by the county auditor. On the first day of each calendar month the moneys remaining in such fund shall be credited to that part of the trunk highway fund which is set apart for maintenance purpose; and so much of said maintenance fund as shall be necessary for the salaries and maintenance of such employes is hereby appropriated for that purpose."

You will note that the payment is made to the county by the state treasurer upon a claim verified by the county auditor. Consequently, if a person is held in a village jail to answer for a traffic law violation charge, it would appear that the county should pay the village and seek reimbursement from the state treasurer under the above named statute where the person was apprehended or arrested by the highway patrol.

Where the person is held in a village jail pending trial or arraignment for a violation charged under the state law by local officers, it is our opinion that the charge should be paid by the county board upon a verified claim from the village.

You next inquire if a prisoner having elected to serve his sentence rather than pay the fine imposed, later changes his mind and pays his fine, whether or not the county can charge the meals to him for the number of days he was fed in jail as a condition of his release. We answer this question in the negative. This individual was sentenced in the alternative to pay a fine or serve a certain length of time in such bastile. If he elects to serve the sentence and later changes his mind and pays the fine, he has complied with the sentence imposed by the court and no additional fine can be levied or assessed against him, which, in effect, is what you would be doing if you charged for his care and keep during the time he was in jail in addition to the fine imposed by the court.

I also call your attention to Section 10856, Mason's Minnesota Statutes, 1927, which gives a prisoner a credit of $1.50 on any judgment for fine and costs when imprisoned in default of payment where such prisoner has been sentenced to hard labor in compliance with Section 10853 of said statutes.

HAYES DANSINGBURG,
Assistant Attorney General.

December 21, 1940. 559a

43

Prisoners—Sentences—Where to be served—L39, C71, M27, §§ 9934, 10824, 10818.

St. Louis County Attorney.

Chapter 71, Laws of 1939, merely repeals Chapter 207, Laws of 1935,

which created a receiving depot at St. Cloud Reformatory, and required all prisoners to be sentenced and sent there.

The following sections of Mason's Minnesota Statutes for 1927 are still in full force and effect in the absence of the above provision now repealed. Section 9934 provides that the sentence shall state the place where the sentence is to be served. Section 10824 provides that prisoners from 16 to 30 years of age on a first offense shall be sentenced to the Reformatory. All second offense prisoners or all prisoners over the age of 30 years are to be sentenced to Stillwater. Section 10818 gives the judge some further discretion in the matter.

The state board of control (now department of Social Security) still has the power at any time to transfer prisoners from one place to another, but the above sections and rules apply to the original sentence.

M. TEDD EVANS,
Assistant Attorney General.

April 4, 1939. 341k

44

Prisoners—Sentences—Suspending after commitment.

Warden, Minnesota State Reformatory.

You ask if the court has jurisdiction to make an order that you return a prisoner for further proceedings.

You refer to former opinions of this office, namely, December 31, 1924, and May 31, 1927. These opinions are correct, and hold that the court cannot usurp the powers of the pardon board, or board of parole, by suspending a sentence after commitment.

However, the court always has the right to grant a new trial; and also has an inherent power of correcting a judgment or sentence entered by mistake. In State v. Hughes, 157 Minn. 503, 195 N. W. 635, our court stated that the practice relating to new trials in criminal cases is the same as in civil cases. Citing Dunnell's Digest 2489. In the case of Ayer v. C. N. S. Railroad Co., 189 Minn. 359, the court states an order granting new trial after judgment has been entered, vacates a judgment, even though the motion did not ask for a vacation of the judgment. In the case of State v. Johnson, 146 Minn. 468, 177 N. W. 657, our Supreme Court held that even if the time for appeal had gone by, if the court ordered a new trial, such order is good because the state has no right to review by appealing from such an order.

M. TEDD EVANS,
Assistant Attorney General.

January 17, 1940. 341k-9

EDUCATION

SCHOOL DISTRICTS

45

Baccalaureate Services which do not advocate tenets of any creed or sectarian belief permissible in state schools.

The Governor.

You ask whether or not the holding of religious baccalaureate services in state schools is permissible under our law.

The general subject of teaching religion in schools was discussed at length by our supreme court in the case of Kaplan v. Independent School District of Virginia, 171 Minn. 142. The majority opinion in that case contains the statement that

> "so long as no pupil is compelled to worship according to the tenets of any creed, or at all, and no sectarian belief is taught, courts should not hold that there is any violation of the constitutional guarantee of religious liberty."

If at said baccalaureate services there is no advocacy of the tenets of any particular creed or sectarian belief, it would appear that no statutory or constitutional provision would be infringed by the holding of such services in our state schools.

J. A. A. BURNQUIST,
Attorney General.

March 20, 1939. 170f-4

46

Bids—Contracts—Busses—Lowest responsible bidder—M27, §§ 2846, 2847.

Attorney for School Board.

You state that the Renville School Board has invited bids for school busses; also that heretofore the district has operated two different makes of busses, one of which has proved more satisfactory than the other in that it consumes less gasoline and oil and requires fewer repairs.

You ask:

> "Is the school board permitted in opening the bids to take into account what they consider the best bid if not actually the lowest in figures, especially where there is no great difference in the bid but there is what they consider a material difference in the make?"

The pertinent statutes are, § 2846 and § 2847, M. M. S. '27, the latter expressly requiring such contracts to be let to the "lowest responsible bidder." This requirement is ordinarily held mandatory (3 McQuillin Mun. Corp., p. 859; II Dillon Mun. Corp., pp. 1202, 1208; 23 Fourth Dec. Digest, "Municipal Corps.," § 336).

Our court has commented on this principle in Kelling v. Edwards, 116 Minn. 484, thus:

> "Many statutes * * * contain this or some similar requirement * * * and the conceded rule is that such requirement is mandatory and unless it is complied with the contract will be illegal * * *. The determination of the responsibility of bidders calls for the exercise of deliberation and discretion. * * * 'Responsible' in such statutes imports not only financial responsibility but also integrity, skill and ability, and the likelihood of the bidder's doing faithful and satisfactory work."

In other words, the performance of more than a mere ministerial act is called for when the public authorities let a contract. Discretion is exercised. There is authority for the proposition that the lowest bid may be rejected if in the exercise of an honest discretion another seems to be better for the object to be accomplished (3 McQuillin Mun. Corp. 917).

The purpose of the law is to protect the public against unwise and injudicious contracts resulting from favoritism and dishonesty, and to secure the performance of public work upon the best terms and at the lowest possible cost (Victoria v. Muscoda, 279 N. W. 663 (Wis.)).

There are no opinions of our supreme court directly in point. I believe our court, when finally called upon to pass upon this question, will hold that where there is a clear showing—as is the case here—that one make of automobile is far superior for the purposes of the district than another and will better meet its performance requirements, that make may be purchased notwithstanding it is not the lowest in price (American La France v. New York, 281 N. Y. Supp. 519).

After all what is the lowest bid? If Make A is offered at one thousand dollars, and it is known it costs five hundred dollars a year to operate it, whereas Make B is offered at eleven hundred dollars, and it is known it costs two hundred fifty dollars a year to operate it, it would seem—all things considered—Make B was the lowest bid.

Accordingly you are advised that on the facts stated in your letter the board may award the contract to the make of car which will best meet the requirements of the district, notwithstanding the fact that it is not actually the lowest in price. It should, however, be prepared to show in court if required to do so the reasons which make the more expensive car the most desirable for the district.

ROLLIN L. SMITH,
Special Assistant Attorney General.

June 19, 1939. 707a-12

47

Board Authority—Easements—Granting of—M27, § 2815.

Lyon County Attorney.

You inquire as to the authority of the school board to grant an easement to a utility company or, in your case, to the R. E. A.

Section 2815, Mason's Minnesota Statutes of 1927, prescribes the powers of school boards. We are of the opinion that an easement is an interest in real estate within the meaning of that section and, accordingly, the school board has no power to grant an easement unless authorized to do so by vote of the electors. Previous opinions of this office dated May 26, 1925, and December 23, 1930, are in accord with this ruling.

You refer to an opinion of this office dated June 14, 1938, in which it was held that a school board could purchase a share in a R. E. A. association, provided no liability attached, and such purchase was necessary to obtain lighting facilities, and also holding that the school board might contract with such association for lighting facilities and for the purchase of electricity.

You suggest that it should follow from such opinion that the school board should be authorized to execute an easement. Such an interpretation seems an unwarranted extension of that opinion, since the express provisions of the statute above cited are to the contrary and must govern in this case.

M. TEDD EVANS,
Assistant Attorney General.

March 20, 1940. 161b-10

48

Board—Authority—Unorganized territory—May sell land without vote of electors—M27, §§ 2850-2866.

Commissioner of Education.

You ask for a reconsideration of an opinion of a previous administration dated October 6, 1937, which held that the board of education for unorganized territory could not sell a school site without a vote of the electors. To the extent that said opinion is inconsistent herewith, it is superseded.

It is our belief that Section 2858, Mason's Minnesota Statutes of 1927, which is Section 443 of the 1939 edition of the Minnesota School Laws, confers on the board of education for unorganized territory the power to sell property without a vote of the people. This section reads as follows:

"When not otherwise provided in this act the powers and duties of said board of education of unorganized territory shall be the same as those of school boards **and annual meetings** of independent school districts."

Thus, as it is nowhere otherwise provided in the act, it appears that the school board for unorganized territory has all the powers granted to an annual meeting of an independent district. Section 2815 (1), Mason's Minnesota Statutes of 1927 (Section 341, Sub-section 1, 1939 edition, School Laws), provides that a regular meeting (annual) or special of an independent district may sell school sites.

However, in the particular instance, regarding the site of School District No. 9, said county, we find that the deed of this school site dated September 19, 1925, contained the following reservation:

"It is agreed and understood by the parties hereto that if at any time the above described premises shall be discontinued for use for school purposes said premises above described shall revert to grantors on payment of purchase price."

It seems very clear from the statement in Mr. Bisek's letter that this real estate has not been used for school purposes for about nine years and that the school is being occupied as a residence and is badly run down and depreciated; that the board could give no title to these premises and that the former owners, or their heirs, still have the right to pay $15.00, which was the purchase price, and that thereupon the title would revert to the grantors named in the aforesaid deed.

J. A. A. BURNQUIST,
Attorney General.

March 8, 1940. 622i-7

49

Boards—Tie vote—Members present but not voting deemed to assent—Employing teacher—M27, §§ 2806, 2814.

Commissioner of Education.

You state that you have advised the president of the board of education of consolidated district number 43 at La Porte that where all six members of the board attended a meeting, and three voted in favor of employing "X" as a teacher, while two voted against such employment, and the other member remained silent, the proposition carried, and "X" was legally employed. You ask us to review your decision.

The school board of an independent district consists of six members. (Mason's Minnesota Statutes of 1927, Section 2806; Section 309, School Laws.) A majority of the board constitutes a quorum, subject to the provi-

sion that no contract may be awarded except at a meeting of which all members shall have had notice. (Mason's Minnesota Statutes of 1927, Section 2814; Section 321, School Laws.)

An opinion of this department written by Associate Justice Hilton when he was attorney general, dated March 17, 1909, published as number 259, Attorney General's Report of 1910, and abstracted on page 124 of the School Law Compilation, reads:

> "When a part of the members present refuse to vote at all, a vote may be legally decided by a majority of those actually voting, though they do not constitute a majority of the whole number present. This rule rests upon the principle that members present and not voting will be deemed to assent to the action of those who did vote."

This opinion cited 23 American & English Encyclopedia of Law (2nd) 592 as authority.

Subsequently a then Assistant Attorney General Phillips, following that opinion, wrote to County Attorney Wilson:

> "It seems to be established by judicial decision that where members present at a meeting, a quorum being present, fail or refuse to vote, they will be deemed to assent to the results of the vote of those who exercise their privilege of voting." Vol. 29, Cyc. of Law & Proced., page 1690, subdivision B; also same volume, page 1689, Sec. 3; State ex rel. Walden v. Vanousdal, 15 L. R. A. 832; State ex rel. Stanford v. Ellington, 30 L. R. A. 532; Abels, et al., v. McKeen, 18 N. J. Equity 462; State v. Parker, 32 N. J. L. 341; Commonwealth v. Wickersham, 66 Pa. St. 134; Attorney General v. Shepard, 62 N. H. Rep., N. H. 383; Richardson v. Union Congressional Society, 58 N. H. 187. (Opinion March 31, 1924.)

Ten years later a then Assistant Attorney General Frank answered the question:

> "Can a school board of six members elect a teacher by two members voting in favor of such teacher and the other four members remaining silent?"

in the negative, and also replied to the question:

> "Can a vote of three members elect a teacher when the other three members remain silent?"

with the answer, "No." (Opinion April 2, 1934.)

The opinion of April 2, 1934, made no reference to the two previous opinions holding otherwise. Furthermore, it cited no authority and gave no reasons. A copy of the opinion of April 2, 1934, was sent by this office to the superintendent of schools at La Porte, and accounts for the confusion on this subject.

In view of this situation, the staff has reconsidered the question and decided the two earlier opinions, to-wit, those of March 17, 1909, and March 31, 1924, should be adhered to.

They were in effect for twenty-five years, acquiesced in by many successive legislatures and never disturbed by any court. They have the support of the great weight of authority. 43 C. J., page 510, Section 782; Vol. 2 (Rev.), McQuillin Mun. Corp., page 567, Section 626.1. By reason of the practical construction given these statutes in the past, and the authority in support of the conclusions reached, you are advised that under the facts stated by you the school board members present, but not voting, are deemed to assent. Thus the action of the board in this case amounted to awarding a teaching contract to "X."

This opinion is limited to a situation where there is a quorum present and participating. Furthermore, it is based on your statement that the "continuing contract" of "X" had previously been terminated by positive action of the board, leaving it free to act in the matter of employing a teacher.

ROLLIN L. SMITH,
Special Assistant Attorney General.

June 27, 1940. 161a-16(b)

50

Bond Issue—Recreation fields—Improving and equipping—M40, § 1942.

Attorney, School District No. 9, Itasca County.

You state that independent school district No. 9 contemplates the issuance of $100,000 in bonds, of which $20,000 is to be used in the construction of a garage, and the balance for equipping and improving an athletic field, including the construction of a field house. This athletic field is to be on property already owned by the district. You ask whether or not bonds may be issued for such a purpose.

The pertinent statute is subdivision 4 of Section 1942, Mason's Minnesota Statutes of 1927, as amended by Chapter 223, Laws 1939. It authorizes school district bond issues for:

> "* * * **the purchase of sites for school houses**, and for defraying the expenses incurred or to be incurred in building, rebuilding, remodeling, repairing and furnishing school houses, teacherages and school garages, and installing heating, ventilating and plumbing plants in the same, and equipping schools with libraries, apparatus and other school furniture, and for the purchase of school busses and other equipment essential to the transportation of pupils."

In an opinion rendered April 3, 1939, to the state investment board, this department said:

> "The providing and equipping of playgrounds and athletic fields is a well recognized power of a school district. It has been uniformly held by this office over a period of years that school district funds may be used for such a purpose. * * *
>
> "* * * The question is whether the purchase of land to construct a recreation field is the 'purchase of a school site' within the law cited. Under modern conditions a recreation field would undoubtedly be considered as a requisite for a properly equipped school and should be construed as a proper investment for a school site. In my opinion the issuance of bonds for such a purpose is valid."

In line with that opinion, you are advised that the construction of a field house, meaning thereby, I assume, a building equipped with the usual gymnasium apparatus, on a school recreation or athletic field is one of the purposes for which the school district may lawfully issue bonds.

ROLLIN L. SMITH,
Special Assistant Attorney General.

November 28, 1939. 622b

51

Detachment—Petition—Area of land—"Four sections"—Meaning of—M40, §§ 2789, 2748.

Kanabec County Attorney.

You state that a petition was presented for the detachment of certain lands from a common school district and to have said lands annexed to another district under Section 2789, Mason's 1940 Minnesota Supplement. A hearing was held and objections were made to such detachment on the ground that it would leave the district from which the lands were being detached without four sections, as provided under Section 2748, Mason's 1940 Minnesota Supplement.

You inquire if the petition should be refused for the detachment of this land if after subtracting land occupied by roads and bodies of water, the balance left in the district would be less than four full sections of land.

It is the opinion of this office that the fact that part of the land is submerged, and part of the land is used for road purposes is immaterial. The requirement that each district have at least four sections of land must be considered as requiring the four sections as one unit, without subtraction of the areas submerged or used for highway purposes. In other words, the area of land to make up the four sections necessary for a school district

must include all public lands and waterways within its boundaries. Any other rule, it seems to me, would lead to hopeless confusion.

You then inquire whether the four sections of land referred to in Section 2748, Mason's 1940 Minnesota Supplement, should be regarded as land only listed on the tax rolls including tax forfeited lands. This office has previously held that nontaxable land is not to be excluded in computing the four sections. If the legislature had intended that only tax lands should be included within said limitation of four sections of land, they could easily have said so, but such is not the case.

HAYES DANSINGBURG,
Assistant Attorney General.

July 8, 1940. 166c-2

52

Detachment—Petition—Procedure in special district of Duluth—M27, § 2748.

Commissioner of Education.

You request an opinion in regard to proceedings brought under Section 2748, Mason's Minnesota Statutes of 1927, to set off territory from the city of Duluth to the Proctor School District.

You ask if the fact that the Duluth school district is coterminous with the city limits, and the fact that Duluth is a special district and has many special laws governing the same, would invalidate these proceedings.

I know of nothing in these special laws which would invalidate, or prevent such proceedings. See opinion dated August 27, 1931. But in line with the decision in School District 31, 134 Minn. 82, and other later Minnesota cases, holding the interests of both districts affected are to be considered, it would appear that the county commissioners, in acting on such a petition, should take into consideration all of the special laws affecting the school district, and also the effect of granting the petition on the welfare of the district.

If such petition comes to a hearing, the matter is left squarely to the county board for decision in their discretion and best judgment.

M. TEDD EVANS,
Assistant Attorney General.

May 31, 1940. 166c-9

53

Detachment—Tax Levy—Liability of for indebtedness of old and new district—M27, § 2748.

Carlton County Attorney.

You ask the following question:

> "When a freeholder petitions the county board for the removal of his real estate from one school district to another and the petition is granted, is his property subject to the regular tax levy of the district into which he was moved or is it exempt from any levy made for debt which was contracted by that district prior to the time that his property was added to the district?"

Such land, having been detached, is not subject to any levy for general expenses in the old district from that time on, but is subject for such levy as is necessary to retire principal and interest of outstanding bonds. See Mason's Minnesota Statutes of 1927, Section 2748, which reads in part:

> "* * * nor shall any change of districts in any way affect the liabilities of the territory so changed upon any bond or other obligation; but any such real estate shall be taxed for such outstanding liability and interest, as if no change had been made. * * *"

Conversely, the landowner does not assume the burden of bonded debt in the new district, and should be exempt from the levy for debt or bonds of the new district existing prior to the change, but is liable for the levy for general expenses and maintenance therein.

M. TEDD EVANS,
Assistant Attorney General.

November 14, 1939. 166c-5

54

Funds—Depositories—Collateral security—Eligibility of certain bonds—M27, § 1973-1; M40, § 7714.

Commissioner of Education.

The eligibility of collateral offered by school district depositories depends upon the following rules and statutes:

Under Section 1973-1, Mason's Statutes 1927, the depository may give the following collateral in lieu of a bond:

1. The bonds of any state or its agency. (Agency does not include cities. Former opinion No. 143, 1926 Reports.)

2. Notes secured by first mortgages (free from delinquent interest or taxes) within the county where the depository is located.

3. Bonds which are legally authorized investments for savings banks.

Class 3 includes bonds defined by Section 7714, Mason's 1927 Statutes, as amended in the Supplement, and includes the following:

1. Bonds or other interest-bearing obligations of the United States.

2. Bonds of any state which has not defaulted in any payment for ten years.

3. Bonds of any county, city, town, village, school, drainage, or other district created for public purposes in Minnesota; or any warrant, order, or interest-bearing obligation of such, provided the net indebtedness of such municipality shall not exceed ten per cent of its assessed valuation. Also bonds of any such county, city, town, village, school or drainage or other district in the United States, created according to law and for a public purpose, containing at least 3,500 inhabitants, whose bonded indebtedness does not exceed ten per cent.

4. and 5. Notes or bonds secured by mortgages in Minnesota, Wisconsin, Iowa, North or South Dakota, and Montana, under very strict conditions.

6. Bonds of any railroad, which are secured by first lien on a railroad within the United States.

7. Farm loan bonds issued by any federal land bank, etc.

8. Bankers' acceptances of certain kind and character.

9. Trust certificates of railroads.

10. Bonds of public utility companies.

11. Bonds and obligations of federal home loan banks.

Applying these tests to the list of securities submitted, we have no difficulty in approving federal bonds, the Rochester school bonds, or the State of South Dakota bonds, but the bond of City of Missoula, Montana and of Independent School District, Bingham County, Idaho, and the bond of Hamline County, South Dakota, would not be eligible unless accompanied by a certificate that each contains at least 3,500 inhabitants and that the total bonded indebtedness of each does not exceed ten per cent of its assessed value.

M. TEDD EVANS,
Assistant Attorney General.

August 23, 1939. 140f-6

See Laws 1941, C. 380.

55

Funds—Football Equipment—Purchase of out of recreational fund—M40, § 1933—9a.

Winona City Attorney.

You ask whether or not the board of education of Winona—created by Laws 1878, Chapter 155, amended by Laws 1887, Chapter 85, Laws 1889, Chapter 542, and Laws 1891, Chapter 332—may use regular school funds raised through taxation for the purchase of football equipment and supplies, e. g., jerseys, shirts, pants, socks, headgear, protectors and footballs.

Answer, no, subject to the exception noted below. Football and other athletic contests are extra-curricular activities. In a strict legal sense they do not constitute instruction. Expenses incident thereto are not a part of the cost of running the schools.

However, if the school district operates a program of public recreation and playgrounds as authorized by Section 1933-9a, et seq., the 1940 Supplement, it may expend school funds for the operation of such program.

In other words, such purchases cannot be made out of current school maintenance funds. If made at all they must be made as an incident to the operation of a program of public recreation.

This is in line with opinion of July 5, 1939, to Mr. A. B. Caldwell (159-B-11), holding that while school authorities may defray the cost of musical instruction out of current expense fund, they may purchase uniforms for members of the band only out of the recreational fund.

ROLLIN L. SMITH,
Special Assistant Attorney General.

May 31, 1940. 159b-1

56

Funds—From extra-curricular school activities—Custody of—M27 § 2817.

Department of Education.

You request our opinion on the following question:

> "May the School Board of an independent school district nominate or appoint a principal or teacher of the district as the custodian of funds arising from extra curricular activities, among which would probably be some activities such as are specified in G. S., Sec. 2817, Mason's '27 Code, without assuming general jurisdiction over such activities and funds, and bond the person or persons, and pay the bond premiums: or, must the School Board, in the event it desires to secure jurisdiction over such funds, do so strictly in accordance with said statute?"

We are of the opinion that, pursuant to the terms of Section 2817, Mason's Minnesota Statutes of 1927, if the board votes to assume custody of athletic and activity funds, it must do so strictly in accordance with the statute and see that such funds are deposited with the school district treasurer.

M. TEDD EVANS,
Assistant Attorney General.

July 29, 1940. 159a-16

57

Funds—School Band—Right of to purchase uniforms for—L37, C233 (M40 § 1933-9a).

Commissioner of Education.

You ask whether or not a school district may legally expend funds of the district for the purchase of uniforms for members of the high school band.

You add that in your opinion a school has the right to instruct pupils in the playing of band instruments and to that end to purchase band instruments inasmuch as they are necessary for proper instruction, but that uniforms, not being essential to such instruction, may not be purchased out of current expense funds, but may be purchased out of recreational funds in cases where a bona fide recreational program under Chapter 233, Laws of 1937, has been established.

Chapter 233, Laws of 1937, referred to by you, provides:

> "Any * * * school district, or board thereof may operate a program of public recreation and playgrounds; acquire, equip and maintain land, buildings or other recreational facilities; and expend funds for the operation of such program * * *. The facilities of any school district, operating a recreation program * * * shall be used primarily for the purpose of conducting the regular school curriculum and related activities, and the use of school facilities for recreation purposes authorized by this act shall be secondary."

It is a close question whether the purchase of uniforms for the high school band constitutes "recreational facilities" or is reasonably incidental to "operating a recreation program" within the meaning of the act cited.

A reading of it indicates a legislative purpose to authorize the acquisition of a recreational center, also the conduct of programs therein. If the band is to give concerts in this center, such an expenditure might be lawful. It is conceivable that the appearance of the high school band in uniform at a concert given in the center might contribute more to the enjoyment of the public than the appearance of the same band not in uniform. It might result in a better morale, and even in better music.

We have held that a school board may not expend funds derived from taxation for training athletic teams, or arranging contests (Op. Phillips Nov. 15, 1933). Again, that property reasonably necessary for physical training under an established curriculum may be leased by the school board, but if sought merely for recreational purposes it may not be leased (Op. McConnell June 23, 1925). (Physical and health education is expressly provided for by Chapter 323, Laws 1923). Also that class pins, and class colors, may not be purchased out of school funds (Op. McConnell Apr. 4, 1932) and that it may not make donations from proper public moneys to funds not under its control (Rogers No. 7, 1931).

School boards have limited statutory authority and it is established that unless power is expressly granted or necessarily implied in the exercise of the power granted it does not exist.

We agree with you that while the school authorities may offer musical instruction, and defray the expense thereof out of current expense funds, they may not purchase uniforms for the school band out of that fund because there is no express or implied authority for so doing.

We also agree that where a program of public recreation has been established under C. 233, L. 37, such uniforms may be purchased out of the recreational fund.

We believe a court would hold that the expense of uniforming the school band reasonably incidental to operating a public recreation program. It has long been the practice for such organizations to appear at athletic contests and school activities in uniforms. This practice prevailed when C. 233 supra was enacted, and we believe the effect of that act is to make the cost of purchasing such uniforms properly chargeable against the recreational fund. You are advised accordingly.

ROLLIN L. SMITH,
Special Assistant Attorney General.

July 5, 1939. 159b-11

58

Funds—Voluntary contributions by pupils—Collection and expenditure of —Minneapolis charter.

Commissioner of Education.

It appears that annually the sum of twenty-five cents is collected from each pupil in the Minneapolis schools as a special fee; that the money so collected in the aggregate amounts to a substantial sum; and that it is spent by the principal on such items as lantern slides, motion picture films, reference books, projectors, workbooks, and other materials of instruction, and teaching aids, although they are not such as are usually purchased with school funds.

You inquire if the collection of such fees from pupils is legal, if the title to the funds so collected is in the Board, and as to its powers to prescribe the methods by which such money shall be spent.

The letter submitted does not contain a copy of any resolution by the Board covering this matter, or disclose in detail the procedure that has been followed. As I understand the situation, the lantern slides, and other articles above mentioned are not bought by the school board, and are not sold or leased to the pupils by the Board.

In such circumstances there does not appear to be any statutory or charter authority enabling the board of education to make compulsory assessments against the pupils for the purpose of creating a fund through collection of a so-called "laboratory fee" for the purposes and under the conditions hereinabove mentioned.

The Minneapolis charter, however, provides that the Board of Education shall be capable, "of taking by gift any real or personal property and using, controlling and enjoying the same" and "may contract for and purchase text books, pencils, tablets, and such other school supplies needful for the schools of the district and provide for the free use of such text books, pencils, tablets, and other school supplies by the pupils of such schools, or the sale to them at cost."

If, therefore, the pupils voluntarily contribute so-called laboratory fees to the board of education, it could accept the money for the purpose for which it is given, and control its expenditure in accordance with the intentions of the donors. If, on the other hand, such contribution is made to the principal and not to the Board, the principal holds it in trust for the purposes for which the money is contributed.

The board of education through its general powers may prescribe rules and regulations under which voluntary payments may be made by pupils either to the Board, or to the teachers, or others hired by the Board, and by which the money so received is to be safeguarded, and used in accordance with the conditions of the gift.

J. A. A. BURNQUIST,
Attorney General.

June 6, 1940. 169

59

Liability Insurance for injuries received by pupils or patrons on playgrounds. Commissioner of Education.

You ask if the school district can pay for medical services for injuries received in physical education class, on the playgrounds, or in the science laboratory.

It may be stated as a general rule, that all play, classes, school activities and transportation, are a part of the governmental function of operating a school district. There is no liability upon the school district for injuries received by pupils or patrons. Mokovich v. Independent School District of Virginia, 177 Minn. 446; 225 N. W. 292. Since the school district is not liable for damages for the injury, the board has no authority to make voluntary payment for medical expenses, since school funds can only be expended in payment of claims for which the district is liable.

The following is a summary of decisions and opinions covering the matter:

Liability of school board and school districts for injuries:
School district in maintaining school buildings exercises governmental function, and is not liable in damages for its negligence in failing to disinfect its school building with result that teacher became infected with tuberculosis, following 49M106, 51NW814; 173M5, 216NW553; 177M454, 225NW-449.

School district is not liable at common law for injuries to a pupil which result from the negligent operation of a bus used in the transportation of pupils at public expense. 173M5, 216NW533.

A school district is not responsible for damages on account of an accident sustained on the school grounds. Op. Atty. Gen'l. Sept. 22, 1919.

A school district is not liable for damages or for medical attendance on account of injuries sustained by pupils while playing on the school grounds. Op. Atty. Gen'l., April 1920.

School board is not liable for damages due to pupil's carelessness or acts of other pupils. Op. Atty. Gen'l., April 13, 1920.

School district is not liable for injuries due to negligence of bus driver. Op. Atty. Gen'l., Dec. 4, 1922.

School district is without power to pay for medical services for pupil injured at school. Op. Atty. Gen'l., May 14, 1924.

School districts or individual board members are not liable for accidents on playgrounds or athletic contests. Op. Atty. Gen'l., Sept. 1, 1927.

Board cannot pay expenses of person injured at school play. Op. Atty. Gen'l., August 11, 1937.

We are informed that because of this situation many of the schools have joined the state athletic union, which maintains a fund to pay for the injuries to members of athletic teams. This is a very proper step in the right direction, and we might point out that many schools have a separate athletic fund, which is not restricted in use as are general funds which come from the taxpayer.

M. TEDD EVANS,
Assistant Attorney General.

March 27, 1939. 844f-3

60

Liability—Insurance policy—Provisions of—For damages resulting from operation of school busses—L37, C301 (M40 § 2816-8).

Commissioner of Education.

You raise several questions concerning the right of a school district to pay for liability insurance on its school busses.

In districts where the drivers own the bus and the school district hires bus and driver, it is proper to require the driver to furnish and pay for his own liability insurance. The difficulty arises in districts which own their own busses. This office has heretofore uniformly held that a school district has no legal authority to expend the taxpayer's money to provide insurance for the negligent acts of its employes. A school district is not liable, in the absence of specific statutory liability, for injuries to anybody resulting from the negligent acts of its employes. Allen v. Independent School District 17, 173 Minn. 5. Since the district is under no liability, it does not have the right to expend taxpayer's money to protect the private individuals.

We are aware of the practical difficulties, and hardships, which result by virtue of this legal principle, but this is a matter for legislative attention. Chapter 301, Laws of 1937 gave the school board the right to provide liability insurance "for the protection of school children in its respective district," and nothing further. As stated, there seems to be no way of obtaining insurance in which the liability, and protection, is limited to school children only, but this chapter did not go far enough to give the school district the right to pay for the ordinary automobile liability policy.

The policy described which provides that the insurer will not raise the defense that the school is not legally liable, and is engaged in a governmental function, is dangerous because if such defense were not raised a verdict, or judgment, might exceed the amount of the policy, and permit a liability or judgment to fall on the school district, which could not exist if proper defense were made.

The fact that the insurer obligates itself to pay for injuries to persons other than school children, thereby increasing the coverage and the rate, makes the expenditure for this premium unlawful.

You suggest that the same policy without any additional premium would protect the bus driver, members of the school board personally, superintendent and teachers personally; but we have already pointed out that the taxpayer's money cannot be spent for that purpose until the legislature has passed some act which authorizes such expenditure.

You further ask if such a policy of insurance has been purchased and in force for the full policy period of one year, does the school board have any right or obligation to recover from the insurance company the premium paid. We answer this in the negative. Ordinarily, even though a contract entered into was void or illegal, a recovery can be had on the implied con-

tract or **quantum meruit** if a benefit has been received. Because of Chapter 301, Laws of 1937, the school district did receive a lawful benefit to the extent that the school children were protected, which would probably prevent a recovery of premiums which have been paid.

M. TEDD EVANS,
Assistant Attorney General.

June 21, 1939. 844f

61

Newspapers—Fees for publishing school board proceedings—Folio—Meaning of—M27, § 2797, 10933, 10934.

State Printer.

You state that the newspaper publishers of the state are inquiring into the matter of fees for publishing school board meetings; that they call your attention to Section 406, page 169, Department of Education Bulletin, which provides that a folio equals 100 words.

You state that the section referred to in such bulletin is in conflict with the state printing law, which states a folio as a certain number of ems, depending upon the size of the type; and that the size of type used in such notices amounts to approximately 50 words to a folio. You request an opinion as to which governs as a basis for payment.

Section 406 supra (Mason's Minnesota Statutes of 1927, section 2797) refers to the publication of proceedings of boards of independent school districts and providing therefor states:

> "* * * provided, that not more than fifty cents per folio shall be paid for such publication."

Section 10933, Mason's Minnesota Statutes of 1927, provides:

> "The following words and phrases, used in the Revised Laws or in future legislative acts, shall have the meaning herein given, unless another intention clearly appears.
>
> "4. Folio—The word 'folio' shall mean one hundred words, counting as a word each figure necessarily used. If there be fewer than one hundred words in all, the paper shall be computed as one folio; likewise any excess over the last full folio."

Section 10939, Mason's Minnesota Statutes of 1927, provides the basis of measurement of type used in the publication of notices and forms required by law to be published in a newspaper in this state. Therein the various bases of measurement are set up, and what constitutes a folio is dependent upon the number of square ems and the kind of type used.

I call to your attention that section 10939 is chapter 484, section 1 of Laws 1921, and was passed a considerable length of time after the passage of subsection 4 of section 10933, Mason's Minnesota Statutes of 1927. The general rule is that the latter law supersedes and repeals a prior law in so far as it is inconsistent therewith.

In addition to the above reason for being of the opinion that section 10939 must govern, there is the additional fact that the provision of said section 10939 goes specifically to the basis of measurement in the publication of required notices. Such section indicates that the general definition of a folio, as set up in section 10933-4, is not applicable. The cost per folio is limited as set forth in section 2797, Mason's Minnesota Statutes, as previously stated.

HAYES DANSINGBURG,
Assistant Attorney General.

December 21, 1939. 277e

SCHOOL OFFICERS

62

Officers—Independent Consolidated District—Clerk and treasurer elected by voters—Right to vote as members of the board—M27, §§ 2806, 2807.

Yellow Medicine County Attorney.

You state that independent consolidated school district, Wood Lake, has a school board of four directors, and that the clerk and treasurer are elected by the voters in addition to the four members. You ask our opinion as to the right of the clerk and treasurer to vote as members of the board.

Section 221, School Laws, same as Section 3, Chapter 387, Laws of 1917, provides that after consolidation such new district shall have all the powers, duties and privileges conferred by law upon independent districts. We are unable to find any statute authorizing the procedure mentioned in your letter, and it seems to us that they should elect six members of the school board and that such school board would thereafter elect a chairman, a clerk, and a treasurer, as provided by Sections 2806 and 2807, Mason's Minnesota Statutes of 1927. Therefore, the clerk and treasurer should be members of the board and entitled to vote as such.

M. TEDD EVANS,
Assistant Attorney General.

November 14, 1940. 768b

63

Pupils—Religious Instruction—Compulsory attendance—Church—What constitutes—Carleton Bible Church—M27 § 3080.

Commissioner of Education.

The question arises as to what constitutes a "church," within the meaning of that part of the compulsory education law which excuses a child from attendance at school, "on such days as said child attends upon instruction according to the ordinances of some church." Mason's Minnesota Statutes of 1927, section 3080; School Law Compilation, section 829.

It appears that in a certain community, in addition to the usual organized churches with which everyone is acquainted, there is a group which claims to be a church. This group is "incorporated locally" as the Carlton Bible Church. The head of this organization claims to have a license to preach from "The Independent Fundamentalists of America," which is incorporated. This particular individual is probably capable of conducting a religious education class.

Our laws do not define the term "church." The rule is that words in a statute are to be construed in their ordinary popular sense, according to the common and approved usage of the language. 6 Dunnell's Digest, section 8968.

However, the word "church" is used in many senses. Sometimes it is used as referring to a building, or a place of worship; at other times, as referring to a creed or a congregation, or a parish or a religious organization. The term is one of very comprehensive significance and imports an organization for religious purposes for the public worship of God. There are many definitions, most of them having arisen in cases involving the exemption of church property from taxation under constitutional, and statutory provisions. 11 C. J. 762; 2 Words & Phrases, page 1152; 1 Words & Phrases, 5th series, page 933; 23 R. C. L. 419.

The fundamental aim of all statutory construction is, of course, to ascertain and give effect to the intention of the legislature as expressed in the language used. 6 Dunnell's Digest, 8940.

Just at what point each of the many religious denominations in this country became a church within the meaning of our laws is a close question. At the outset, each sect represented but an idea in the minds of its founders. Followers were attracted. They began to hold regular meetings, erected church edifices, sometimes provided for professional clergy, and eventually gained public recognition as religious organizations.

While our laws provide for the incorporation of religious societies, there is no basis for saying that incorporation is an indispensable characteristic of a church. Neither is size, nor membership determinative. Nor ownership, nor occupancy of a building a prerequisite. No question is raised here as to the motives, or good faith of the society in question. It is apparently

a small group, but is conducting religious services, and exercises the customary functions of a church.

Bearing in mind that freedom to worship according to the dictates of one's conscience is a distinguishing feature of our state and federal constitution, there is nothing in your brief statement to negative the claim of the Carlton Bible Church that it is a church within the meaning of our compulsory education law.

However, the question in the last analysis is one of fact, and it is beyond the province of the attorney general to determine questions of fact.

We can only suggest that you make a further investigation of this group, and then, in the light of such additional facts as may be developed and the observations made in this opinion, determine the question as an administrative matter.

ROLLIN L. SMITH,
Special Assistant Attorney General.

October 10, 1940. 169o

64

Pupils Saluting flag—Validity of requirement as to.—

Attorney for Board of Education.

We have to say the Supreme Court of the United States in Minersville School District v. Gobetis, 84 Law Ed. 993, decided June 3, 1940, reversed a decision of the federal district court for the eastern district of Pennsylvania, reported in 21 Fed. Supp. 581, which restrained enforcement of a school regulation requiring all teachers and pupils to salute the American Flag as a part of the daily exercises.

The Supreme Court of the United States said, "We must decide whether the requirement of participation in such a ceremony (saluting the flag and giving the oath of allegiance) exacted from a child who refuses upon sincere religious grounds infringes without due process of law the liberty guaranteed by the Fourteenth Amendment."

The court held it did not. The effect of its decision is to set at rest any doubt as to the power of a school board—given requisite legislative authority—to require pupils to salute the flag.

ROLLIN L. SMITH,
Special Assistant Attorney General.

September 14, 1940. 927

65

Pupils—State Agricultural Schools—State Aid—L35, C209 (M40 § 3028-4.)

Commissioner of Education.

You inquire as to the legality of payments of state aid to pupils in State Agricultural Schools made under Chapter 209 of the Laws of 1935.

After the enactment of this law, no acts or title of acts amending any statutes relating to state aid to schools expressly refer to said chapter. The last sentence thereof, granting aid to eligible pupils in State Agricultural Schools is nowhere expressly repealed or amended and it is not in conflict with any subsequent legislation on this subject.

In addition, in rendering this opinion, the practical construction given said chapter by governmental agencies for several years in administering the aid therein provided, and the fact that apparently the legislature had no intention of repealing the provision granting such aid have been given due consideration.

For the reasons herein stated, I am of the opinion that payments of state aid to pupils in State Agricultural Schools under Chapter 209, Laws of 1935, have been and will be valid until the legislature changes the law.

J. A. A. BURNQUIST,
Attorney General.

March 30, 1939. 168a

66

Pupils—Tuition—Non-Resident—Nearest Traveled Road, Meaning of—M38 § 2823

Commissioner of Education.

You refer to Section 2823 of Mason's 1938 Code providing that certain children, "residing more than two miles by the nearest traveled road from the school house" may attend school in an adjoining district and ask whether this means only public roads or also includes roads commonly used but not in fact public roads.

In my opinion "nearest traveled road" should be construed as if it read "nearest traveled public road," as distinguished from private roads which are not in any sense public highways. Whether or not the road in controversy is a public or private road very likely may be ascertained from an examination of the county records, or from the county highway engineer of the state highway department.

If the claim that it is a public road rests upon an alleged common law dedication, then other facts will have to be inquired into.

ROLLIN L. SMITH,
Special Assistant Attorney General.

May 23, 1939. 180d

ELECTIONS

BALLOTS

67

Candidates—Names—Descriptive words placed on ballot when names similar —M40, § 601-6 (7)j.

Secretary of State.

Regarding the filings of Lewis E. Lohmann for nomination on the Farmer-Labor ticket as attorney general, and of George H. Lommen for nomination on the same ticket as U. S. Senator, have to say as follows:

We have held that a candidate has a right to have the name he is generally known by—including a nickname—printed on the official ballot. Opinion March 15, 1926, to Forbest appearing in Election Opinions 1928 as No. 4. Inasmuch as Mr. Lohmann could have filed originally as "Lewis E. Scoop Lohmann," or "Scoop Lohmann," it would seem that no one could be prejudiced by permitting him to amend his filing affidavit at this time so as to have his name appear upon the official ballot in accordance with his desires. In the past the officer charged with the preparation of the ballots has permitted such changes up to the time of the printing of the ballots. Please observe that Mr. Lohmann's affidavit does not ask that this be done. It merely asks that the word "Senator" be prefixed to George H. Lommen's name on the ballot. If Mr. Lohmann wishes his nickname, "Scoop," to appear on the ballot, he should file with you a supplemental affidavit so requesting.

As to the right of George H. Lommen to have the title "Senator" prefixed to his name on the official ballot, you are advised:

Section 205.70, Election Laws (Mason's 1940 Minnesota Supplement, Section 601-6 (7)j provides that, "when the surnames of two or more candidates for the **same office** are the same, each such candidate shall have added thereto not to exceed three words indicating his occupation and residence." Note that this refers to the "same office."

Inasmuch as Mr. Lohmann and Mr. Lommen are not candidates for the same office the statutory provision does not apply. Furthermore, even though it did apply, the fact that the surnames are so nearly the same as to be misleading is not enough. The names must be identical. Ledin v. Holm, 203 Minn. 434.

It has been the uniform opinion of this office for many years that words descriptive of the profession of a candidate, such as doctor or colonel, may not properly be placed before a candidate's name upon the ballots. Opinion No. 6, Election Opinions 1928.

In an opinion rendered May 25, 1932, to the secretary of state, this office held that the designation "ex-representative" did not indicate the can-

didate's occupation within the meaning of the statute cited, but referred to an office formerly held by the candidate. Copy of that opinion is enclosed for your convenience.

It follows that the word "Senator" may not be placed before, or after candidate George H. Lommen's name on the official ballot.

ROLLIN L. SMITH,
Special Assistant Attorney General.

August 7, 1940. 28b-2

68

Candidates—Name—Use of word "Jr."

City Attorney, Minneapolis.

Where John Doe has adopted the suffix "Jr." as a part of his name, and has held himself out generally to the public under that name, he has a right to have it on the official primary ballot as "John Doe, Jr."

In the circumstances described by you, the father and son living together in the same house, and having identical names save for the fact that the name of one is followed by "Jr." and the name of the other is followed by the abbreviation "Sr.," the suffix would appear to be an integral and important part of the name; in fact as much a part of the name as a given name or middle initial. It distinguishes between the two. Huff v. State Election Board (Okla.) 32 P. (2nd) 290; 93 A. L. R. 906.

Generally speaking a candidate has the right to insist that his name appear on the ballot in such form as he prefers. He may use a nickname. He may use initials, or he may use a given name and a middle initial. This office has so held.

The purpose of a name is to designate a person, and this purpose is accomplished when the name is that by which he is known or called. National Life & Accident Co. v. Saffold, 144 So. 816 (Ala.); Kirk v. Bonner, 57 S. W. (2nd) 802 (Ark.).

The opinion to which you refer, to-wit, No. 5 of the Selected Opinions relating to Elections no longer represents the views of this office. You are, therefore, advised that the county auditor may accept an affidavit of candidacy by a person who signs himself "John Doe, Jr."

ROLLIN L. SMITH,
Special Assistant Attorney General.

April 20, 1939. 28b-2

69

"India tint" or county ballot—No change in heading or offices—M40, §§ 601-6 (7)e, i, j and s.

Brown County Attorney.

The new 1939 election code made no change in the heading or the offices included on the "India tint" or county ballot (formerly the blue ballot), provided for by Mason's 1940 Minnesota Supplement, Section 601-6 (7)e, or 1940 election laws, Section 205.65. As before, it should be headed "Ballot of Nominees to be Elected Without Party Designation." Mason's 1940 Minnesota Supplement, Section 601-6 (7)s; 1940 election laws, Section 205.79.

The names of candidates for congress go on this ballot in the first group of candidates. They should be printed with their party designation, if any, in the same order as the state party candidates, without rotation. Then follow the candidates for the various offices without party designation, rotated as provided by law.

The 1939 act made some other changes, shifting the position of the "X" marks from right to left, also changing the manner in which the various candidates are to be entitled, as will be seen from the 1940 Supplement, Sections 601-6 (7)i, and 601-6 (7)j, or 1940 election laws. (Sections 205.69 and 205.70. Election Laws.) No doubt these changes have been noted by the county auditor, since they conform with like changes made on the state ballot. However, these changes did not affect the heading of the India tint ballot or the offices to be voted for thereon.

See opinions of attorney general relating to elections, 1928 Edition, Nos. 1 and 2.

CHESTER S. WILSON,
Deputy Attorney General.

October 19, 1940. 28c-2

70

Judges—Recanvass of votes at school election—L39, C62 (M40 §§ 2793-1 and 2802).

Commissioner of Education.

After the judges and clerks of an annual school meeting have canvassed the ballots cast, and have submitted the same to the school board, as required by Laws 1939, Chapter 62, Section 1b (2), they are **functus officio**, and cannot again convene and revise their conclusions.

The general rule to be applied in situations of this kind is stated thus in 18 Am. Jur., "Elections," Section 256:

> "When a board of canvassers has fully performed its duty, proclaimed the result of the count according to law, and adjourned sine

die, **its duty must be considered as having been performed once and for all time.** The board is then deemed functus officio, so that the persons who composed it do not have any power or authority voluntarily to reassemble and recanvass the returns; * * *."

This is the rule which has been applied by this department at village and town elections, also at general elections.

Opinion 189, Election Opinions. No good reason is apparent why it should not be applied to school elections.

ROLLIN L. SMITH,
Special Assistant Attorney General.

June 1, 1940. 28c-7

71

Stickers—Use of—Candidate defeated at primary—M40, § 601-6 (7)i.

Village Attorney, Lanesboro.

You ask whether or not a candidate defeated for nomination at the primary may be elected to the same office by sticker at the November general election.

Answer, yes. Voters have a right guaranteed to them by the constitution to cast their ballots in favor of any eligible person for elective office in this state, irrespective of whether or not such person's name is printed upon the official ballot, and it is immaterial that the person for whom the voter desires to cast his ballot was a candidate at the preceding primary election. Opinion No. 186 of the Selected Opinions relating to election of 1928 still holds. In other words, if a defeated candidate for nomination should receive a majority of the ballots cast at the general election for such office he would be elected. A blank space is provided on the ballot for the writing in of names under each group of candidates for each office. See section 205.69, Minnesota Election Laws (Mason's 1940 Minnesota Supplement, section 601-6 (7)i). In this blank space voters may place a sticker containing the name of the candidate of their choice.

This statute carries out the mandate of article VII, section 7, of the constitution, which provides that any person eligible to vote shall be eligible to elective office.

ROLLIN L. SMITH,
Special Assistant Attorney General.

September 26, 1940. 28a-8

72

Town and village elections—Piling of ballots—Tally books—L39, C345.

Secretary of State.

You refer to C. 345, L. 39—the new election law codification—and ask what forms of ballot, tally books and what method of tallying votes shall be used at town, village and city elections.

Prior to the effective date of said C. 345, the canvass of votes in such municipalities was conducted by taking one ballot at a time from the ballot box until equal to the number of names on the poll list, and thereafter entering the vote on each ballot removed until all had been counted. Section 1043 M. M. S. 27; 1171 M. M. S. 27.

Furthermore, the use of the Australian ballot system at such elections was formerly optional, whereas now it is mandatory. Section 3, C. 2, P. 11, Chapter 345, Laws 1939.

1. The ballot to be used at such elections should be prepared by the town clerk or village recorder at the expense of the municipality, and should be printed on yellow tinted paper, but without the facsimile of the County Auditor's signature. The names of candidates should be arranged alphabetically and should not be followed by any political party designation. A sample ballot should be posted two days before the election. Section 4, C. 2, P. 11, C. 345, L. 1939.

2. There has been no change in the method of canvassing and tallying votes. One ballot should be taken at a time from the ballot box, as in the past. Section 14, C. 1, P. 11, C. 345, L. 1939. This section is a reenactment of Section 1043, M. M. S. 27. The new provisions requiring the "piling" of ballots at general elections, do not apply to town and village elections.

3. The new act contemplates the use of tally books at these elections. (Sections 9, C. 2, P. 11, C. 345, L. 1939), but there is no requirement that they be in the form of tally books required to be used at primary and general elections, by Sections 1 to 5, C. 9, P. 6, C. 345, L. 1939. These sections prescribe in detail the form of tally book which must be used at primary and general elections. They do not apply to tally books used at town and village elections. It follows that any form of tally book which gives the names of the candidates, with appropriate columns for the entering of the vote, would constitute a substantial compliance with the statute.

In construing Chapter 345, it is well to bear in mind the rules set forth in Section 2 of Part 12, among which is one which reads "the provisions of this Act, so far as they are the same as those of existing statutes, shall be construed as continuations thereof, and not as new enactments."

ROLLIN L. SMITH,
Assistant Attorney General.

August 28, 1939. 28a-3

CANDIDATES

73

Filing—Conviction of Crime—Affidavit by disqualified person—County Auditor's authority to leave name off ballot—M40 § 601-3 (1)b.

Grant County Attorney.

You state that "X" was convicted of a criminal offense and as a result lost his citizenship. It has not been restored. He has filed an affidavit of candidacy for the legislature with the county auditor. You ask whether or not this officer should receive this filing and place the candidate's name upon the official ballot.

Quoting from an opinion dated August 19, 1922 (No. 11, Election Opinions):

> "I doubt very much the authority of the auditor to take official notice of circumstances and events which might affect the eligibility of a nominee to hold office if elected. The auditor is governed by the affidavits of candidacy on file in his office. He is not endowed with authority to go behind the statements contained in such affidavits. He is not equipped as is a court to receive evidence and to determine questions of fact."

The law provides that any person "eligible and desirious" of being a candidate shall file an affidavit stating among other things, "that he is a qualified voter in the subdivision where he seeks nomination." Section 202.03, Election Laws (Mason's 1940 Minnesota Supplement, Section 601-3 (1)b).

"X" must have stated in his affidavit of candidacy that he is a qualified voter in the legislative district wherein he seeks nomination.

One convicted of **"treason or any felony"** and not restored to civil rights is not eligible to hold office and is not a qualified voter of the subdivision wherein he seeks nomination. Article VII, Section 2 of the constitution.

Furthermore, it is the general rule that one who would be ineligible to hold a public office has no right to be a candidate for election thereto since his election would be a nullity. 18 Am. Jur. 260; Jenness v. Clark, 129 N. W. 357 (N. D.).

A summary method of correcting the primary election ballot is authorized by Section 205.78, Election Laws (Mason's 1940 Minnesota Supplement, Section 601-6 (7)r. A court might, in a proper proceeding under this statute, enjoin the placing of "X's" name upon the ballot. Please observe that the constitutional disqualification extends only to persons convicted of "treason or felony." You merely state that "X" has been convicted of a criminal offense.

In view of the foregoing you are advised that the auditor is governed by "X's" affidavit of candidacy and should accept the same, if it is properly

executed, for filing in his office, and, unless thereafter directed otherwise by a court, should place "X's" name upon the primary election ballot.

ROLLIN L. SMITH,
Special Assistant Attorney General.

August 8, 1940. 184i

74

Filing—For two incompatible offices—

Itasca County Attorney.

You state:

> "On July 10th, 1940, a resident of Nashwauk, Minnesota, filed for Representative from the 52nd district, which comprises the County of Itasca. On August 1st, 1940, at approximately one minute to four o'clock P. M., just before your office closed for the day, a resident filed for the office of Clerk of Court, without first withdrawing as a candidate for Representative in the 52nd district."

You ask whether or not either, or both of these two filings are invalid.

Your inquiry is properly answered in the negative. Each filing is valid.

In an opinion dated February 10, 1926 (election opinions 1928), this office stated there was no general statute which prohibited a member of the county board from filing for sheriff, or which rendered him ineligible to that office. The opinion reads in part:

> "The fact that the two offices may be and probably are incompatible does not prevent him (the county board member) from running for the office of sheriff, and being elected thereto. Upon qualifying as sheriff, if he is elected, it would automatically vacate his office as a member of the board of county commissioners if the two offices are in fact incompatible."

Similarly, opinion dated March 12, 1928 (number 30, election opinions 1928), held that a member of the city council might be a candidate for mayor without first resigning, and that if elected mayor he would automatically upon qualification for that office vacate the office of alderman.

Again, in an opinion dated November 10, 1926, this office held that one person might be a candidate for town justice of the peace and village justice of the peace in a village not separated from said township at the same election, the opinion reading in part:

> "* * * the same person may not occupy both offices at the same time. However, I know of no rule of law which prevents the same man

running for two incompatible offices. If he is elected to each, he may hold only one. If he qualifies as to either office he surrenders such office upon qualifying for the other."

Our conclusions are in line with these opinions.

ROLLIN L. SMITH,
Special Assistant Attorney General.

August 5, 1940. 184

75

Filing—Primary Election—State Legislature—Applicant having less than six months' residence before general election ineligible. Article 4, Section 25, Constitution of Minnesota.

County Auditor, Dodge County.

You state that "A" who wished to file as a candidate for the nomination for representative in the legislature at the coming primary election, became a resident of the district which he seeks to represent some time in the early part of June of this year, so that at the time of the coming general election on November 5th he will have been a resident of the district for approximately five months, at any rate, less than six months. This being true, he would not be eligible to file, under the provision of the State Constitution, Article 4, Section 25, which provides as follows:

> "Senators and representatives shall be qualified voters of the state, and shall have resided one year in the state and six months immediately preceding the election in the district from which they are elected."

CHESTER S. WILSON,
Deputy Attorney General.

August 6, 1940. 911m

CORRUPT PRACTICES

76

Application of to Village Elections—M40 § 601-10 (i)j.

Village Attorney, Hibbing.

An opinion rendered by this department on November 17, 1930, held the Corrupt Practices Act, in so far as it can be reasonably made to do so, applies to village elections. That ruling followed others as far back as February, 1913. See opinions 45 and 46, Selected Opinions of the Attorney General relating to elections for 1928.

On numerous occasions the department has been requested to reconsider these opinions but has consistently adhered to them. The legislature has not seen fit to amend the law in this respect. No court has reversed the rulings mentioned.

There is much to be said in favor of holding said act does not apply in any respect to village elections.

Manifestly it is impossible to comply with all its provisions at a village election. For example, the Corrupt Practices Act (Laws 1939, Chapter 345, Part 10, Chapter 1, Section 20) requires a candidate for office to file an expense account, "on the first Monday in August, on the 10th day following the primary, on the 3rd Monday in October and on the 10th day following the election."

The date of the village election is December 5. The date of the village primary is not less than 10, nor more than 14 days preceding the village election (317-2, Mason's 1938 Minnesota Supplement). How can a person who may not know in August that he is to be a candidate at the December village election be expected to file an expense account in August? This feature of the Corrupt Practices Act simply is not workable at village elections.

Our court in Anderson v. Firle, 174 Minn. 333, held the Corrupt Practices Act had no application to town elections, and said:

> "Many of the acts or omissions therein defined as corrupt could not possibly occur in the election of township officers where there are no nominations, no official ballots, no provision for filing expense accounts, and no specific formalities called for. The other definitions which by any possibility might be made to apply to town elections are so few it ought to create doubt of the legislative intent to apply them to a town meeting with its elections."

And again at page 337 it said:

> "The act of 1912 deals so patently with national, state and city elections under the Australian ballot system that there can be no forced effort to subject the school and town meetings and elections provided for by other statutes to its provisions."

The decision cited holds squarely that the Corrupt Practices Act does not apply to the election of supervisors of townships of less than 5,000. The situation is not necessarily altered by the fact that the use of the Australian ballot system is now compulsory in towns and villages. See Laws 1939, Chapter 345, Part 11.

In Mathison v. Meyer, 159 Minn. 438, holding the Corrupt Practices Act did not apply to school district elections, the court said at page 441:

> "The original Corrupt Practices Act was Chapter 277, Laws 1895. Section 25 thereof expressly exempted from its application village, township and school district elections. When that act was carried forward into the revision of 1905, Section 25 was omitted. That omission

cannot be taken as expressing an intention to extend the provisions of the act to the elections theretofore expressly excepted. Under the rule of Becklin v. Becklin, 99 Minn. 307, so sweeping a change cannot result from so slight a change in phraseology.

"Aside from that, the provisions of the Corrupt Practices Act cannot be applied to school district meetings. Their tenor from first to last indicates a contrary intention. Our decision in Miller v. Maier, 136 Minn. 231, is not out of harmony with our holding here, for, in that case, the question was not raised. * * * Certainly, it was never intended by the legislature to apply to so simple and democratic a thing as the conventional annual meeting of a Minnesota school district the complex and multifarious provisions found in the Corrupt Practices Act. The very scheme of that legislation, as well as the language used in the expression of its purposes, makes such a result impossible."

The Corrupt Practices Act in its present form found its way onto our statute books at the extra session of 1912. See Chapter 3. It has not been substantially changed since then. In view of the previous rulings of this office, and the legislative acquiescence therein, and the failure of any court to hold otherwise, you are advised that the Corrupt Practices Act, in so far as it can reasonably be made to do so, applies to the approaching primary and village election in Hibbing.

Voters may not be transported to the polls. Campaign literature may not be distributed on election day. Campaign workers may not solicit votes within 100 feet of the polls. Other similar provisions are applicable. On the other hand, candidates are not required to file expense accounts. Note: See Laws 41 Chap. 51.

ROLLIN L. SMITH,
Special Assistant Attorney General.

November 22, 1939. 472e

Note: Modified in part by Laws 1941, C. 51.

77

Campaign cards—useful information on back—M40 § 601-9 (1)b.

Rice County Attorney.

You ask whether or not a candidate may print the local high school football schedule on the back of his campaign card. Your inquiry is answered in the affirmative.

I am not aware of any provision of the Corrupt Practices Act which might apply to this situation. The only section of the penal chapter which might be applicable is section 201.03, Minnesota Election Laws (section 601-9 (1)b, Mason's 1940 Minnesota Supplement), which prohibits a candidate from giving anything of value to a voter for the purpose of inducing

him to vote any particular way. Whether or not a card such as you describe is a thing of value is a question of fact which can only be determined in a court in a proper action.

In a broad sense everything has some value. Manifestly, information under some circumstances may be priceless. However, we believe the legislature here meant something having a monetary value, something readily salable, and almost the equivalent of cash. To say that information about the local football schedule, which per se has no value, is in violation of law when printed on the back of campaign literature for the convenience of football patrons, is to bring about a result which, to our mind, the legislature never intended. For many years candidates have printed the date of the primary, sometimes of the general election on their campaign literature. No question has ever been raised as to the legality of these practices. The inclusion of other information which may or may not be useful to the voter on campaign literature would seem to be in the same category.

ROLLIN L. SMITH,
Special Assistant Attorney General.

September 16, 1940. 627f-1

78

Irregularities—Effect—Candidate requesting the clerk to change his filing.

Village Attorney, Coleraine.

You state that a candidate for village office in Coleraine filed for trustee, paying the required fee, and later requested the clerk to change his filing to that of village president. The clerk complied but did not ask or receive an additional filing fee. The person who filed in this manner was elected village president.

You ask:

"Is his election subject to attack?"

Notwithstanding the irregularity described, the name of the person in question appeared on the official village election ballot as a candidate for village president. Electors who cast their ballots for him cast them for him for that office. Presumably, he has been duly proclaimed elected. The only way this result can be challenged is by an action in court. I doubt that a court in such an action would vitiate the election of this person because of the irregularity described. Generally, in this connection, see the article on "elections" in 18 Am. Jur. 169 at page 330.

In our opinion where a person is so elected as village president he is entitled to qualify and exercise the duties of that office unless prevented from so doing by a decree of court.

ROLLIN L. SMITH,
Special Assistant Attorney General.

December 15, 1939. 911d-1

79

Polls—Hours of voting—City—Conduct of municipal election in fourth class city—L. 39 C-345.

Jackson City Attorney.

You state that Jackson is a city of the 4th class organized under Article 4, Section 36 of the Constitution. Under the charter some officers are elected for one, others for two years at an annual election held the first Tuesday in April. (§§ 5, 7 and 8, C. 2)

It also provides that state laws regulating general elections, so far as applicable shall regulate city elections. (§ 9, C. 2).

The new election law codification—C. 345, L. 39—contains provisions which conflict with some in your charter. You ask to be advised which controls.

Before answering your questions let us emphasize (1) the effective date of C. 345 is August 1, 1939, and the act does not speak at all until then, and (2) the application of §§ 2 to 14, C. 4, p. 11, C. 345, L. 39, is limited to cities organized under C. 462, L. 21; see § 1, C. 4, p. 11, C. 345, supra. See State ex rel v. Nashwauk, 189 N. W. 593. Manifestly §§ 2 to 14, supra, have no application to the city of Jackson which is not organized under C. 462, supra.

The new election code is divided into parts, which are divided into chapters, which in turn are divided into sections. For convenience we shall abbreviate citations, thus: Section 2, Chapter 4, Part 11 will be written § 2-4-11. Taking up your questions in order:

1. We agree that the city of Jackson should continue to hold its annual elections in April, electing thereat the officers designated in its charter. By § 3-1-6 it is provided that city elections shall be held at the time provided by charter. By § 2-4-11 biennial city elections the first Monday in November in odd numbered years are provided for. As indicated above this last cited section has no application. By § 15-4-11 it is provided that 4th class city elections shall be held as "hereinafter provided unless otherwise provided by the law under which the city is organized and operating, or by the charter of the city if organized under the Constitution, Article 4, Section 36." It is enough to say it is, "otherwise provided," by the Jackson Charter.

2. The hours of voting at city elections in Jackson are from 7 a. m. to 8 p. m. Provision for this is made by § 1-8-6. The council may change these hours by following the procedure therein prescribed. As stated before § 2-4-11, fixing voting hours from 9 a. m. to 5 p. m. has no application. The committee on codification of election laws recommended that the hours of voting be made uniform for all elections. P. vi. Report Interim Committee. Even if your charter provided different hours I believe § 1-8-6 would control.

3. The hours of voting at special city elections in Jackson are the same as at regular city elections, to-wit, from 7 a. m. to 8 p. m. as stated above § 11-4-11 has no application.

4. Inasmuch as § 11-4-11 has no application to elections in Jackson there is no reason for construing its phraseology.

5. Five days published and posted notice should be given of regular and special city elections in Jackson. The controlling provision is § 18-4-11, and § 2-4-11, which requires 10 days posted notice has no application for reasons given above.

6. Judges of election should be appointed 25 days before regular and special city elections in accordance with § 2-6-6, for as indicated above § 9-4-11 has no application.

7. Designation of polling places at your city elections should be made by resolution or ordinance in accordance with § 18-4-11. That section is applicable unless your charter otherwise provides. See § 15-4-11. The other provision cited by you—§ 1-5-6—applies to general elections. While § 18-4-11 merely requires the council "To **select** and **designate**" polling places, the only way in which a council may act officially is by resolution or ordinance.

I do not believe one designation of polling places for all future elections would constitute a compliance with the statute. Your purpose might be accomplished by the adoption of a resolution before each election to the effect that polling places used at the last election "are hereby designated and selected for the coming election." I do not see how the adoption of a separate resolution in advance of each election may be avoided.

ROLLIN L. SMITH,
Special Assistant Attorney General.

July 5, 1939. 64f

80

Polls—Hours of voting—Municipal elections—Council's resolution fixing— M 40 § 601-6 (8).

Washington County Attorney.

You refer to section 206.01, Minnesota Election Laws, (section 601-6 (8), Mason's 1940 Minnesota Supplement) and you ask:

> "Does this section mean that said resolution may provide that the polls may remain open for as little a period as three hours (if the governing body so desires), and if so, does this period of three hours have to be within 7:00 A. M. and 8:00 P. M., or can the resolution provide in one case an earlier hour than 7:00 A. M. and another case, an hour later than 8:00 P. M.?"

The pertinent provision of section 206.01, supra, reads:

> "The governing body of any municipal corporation may, by resolution duly adopted prior to the giving of notice of election, designate the time, in no event less than three hours, during which the polls shall remain open for the next succeeding, and all subsequent **municipal** elections, to be effective until revoked."

In our opinion, this section authorizes the council to provide by resolution for not less than three consecutive hours of voting within the period between 7:00 A. M. and 8:00 P. M. at municipal elections.

It is to be observed that the quoted provision applies only to municipal elections and not to the state general elections in municipalities. As to the regular state election in cities of all classes and in villages and towns, the hours of voting are from 7:00 a. m. to 8:00 p. m., and there is no power vested in any board to change these hours. They are uniform throughout the state. Formerly this was not so. See section 305, Mason's Minnesota Statutes of 1927. Section 206.01, supra, consolidates and reenacts, in amended form, section 305, Mason's Minnesota Statutes of 1927, which was applicable to general elections, and section 1169, Mason's Minnesota Statutes of 1927, which was applicable to village elections.

ROLLIN L. SMITH,
Special Assistant Attorney General.

September 19, 1940. 472n

81

Permanent registration — Applicable to special primary election to fill vacancy in legislature—Voters may register for general election during the time when registration is closed for special primary—M 40 § 601-2 (2) 1.

City Attorney, Minneapolis.

You call attention to the fact that the governor has issued his writ directing that the vacancy in the state senatorship in the thirty-third senatorial district resulting from the death of the late Senator Anderson, be filled at the coming general election on November 5, 1940, and that a special primary to nominate candidates therefor be held October 29. You point out that under the permanent registration law voters may not register during the twenty days preceding an election. Laws 1939, chapter 345, part 2, chapter 2, section 13; Mason's 1940 Minnesota Supplement, section 601-2 (2) 1; Minnesota Election Laws 1940, section 201.18. Under this provision the last day for registering for the general election will be October 15. If this provision applies also to the special primary, the last day of registration therefor will be October 8.

You inquire:

(1) Whether the provision prohibiting registration during the twenty days preceding an election applies to the special primary election.

(2) If so, whether voters may register for the general election during the period from October 9 to 15, inclusive, notwithstanding the fact that registration for the special primary will be closed during that period.

Both questions are answered in the affirmative.

It is clear that the permanent registration law applies to all public elections held within the city of Minneapolis and the several election districts thereof, including state and municipal elections, general and special elections, and primary elections.

It has long been the established ruling of the attorney general's office that the closing of registration during the prescribed period before a particular election does not prohibit registration during that period for a subsequent election. See opinion 194, Attorney General's Report for 1928.

It follows that only voters who have registered on or before October 8 may vote at the special primary to be held October 29. However, voters may continue to register for the general election up to and including October 15, in spite of the fact that registration for the special primary will be closed earlier. The city clerk, as commissioner of registration, will have to keep separate all registrations received from October 9 to 15 inclusive, withhold them from the registration files for the special primary, and place them in the files after the special primary in time for use at the general election.

CHESTER S. WILSON,
Deputy Attorney General.

September 30, 1940. 183r

82

Primary—Legal Holidays—Monday when holiday falls on Sunday.

City Attorney, Winona, Minnesota.

You inquire whether February 13, 1939, is a legal holiday and whether your primary election can be held on said date by reason of February 12, Lincoln's birthday, falling on Sunday.

When a legal holiday falls on Sunday the following Monday does not become a legal holiday and consequently public business including a city primary election may be transacted on that day.

JOHN A. WEEKS,
Assistant Attorney General.

January 5, 1939. 276c

83

Referendum—Legality of taking at regular state election.

Yellow Medicine County Attorney.

You state that it has been proposed to take an unofficial referendum on building a $30,000 addition to the courthouse at the November general election. If taken, ballots will be distributed at the polling places without expense to the county. Some expense, however, would be incurred in counting these ballots. You ask whether or not the election machinery may be used for such a purpose, there being no statutory authority for such a referendum.

Answer, no. As you know, our statutes have established elaborate and rigid rules and regulations for the conduct of elections. Presumably, all these have a purpose and should be observed. Before an election they must be regarded as mandatory and their observance must be insisted upon and enforced. There being no authority for the taking of a plebiscite on a question of this character, the election officials should not take part in one if taken. They are charged with the conduct of the election, and should do only the things they are authorized by law to do, and should not assist in taking an unofficial vote on a question of public interest in the manner indicated. To do so might result in confusion and certainly would expose the participating officer to criticism. An election held without authority of law is void. State ex rel Windom v. Prince, 131 Minn. 399.

There is no reason, however, why such a referendum may not be taken on election day outside of the polling places, and without the aid of the election machinery, provided it is done in such a way as to leave no doubt in the minds of electors that it is unofficial.

ROLLIN L. SMITH,
Special Assistant Attorney General.

September 21, 1940. 185a

84

Special—Challengers—Question of incorporating as a village—Conduct of election—M-27 §§ 1114.

Washington County Attorney.

You refer to the approaching special election to be held in your county to vote on the question of incorporating an area near Lake St. Croix Beach as a village, and ask whether or not challengers may be appointed, and if so, by whom.

The conduct of an election on the question of incorporating as a village is governed by Section 1114, Mason's Minnesota Statutes of 1927,

which provides among other things, that three (3) inspectors appointed by the County Board shall act as judges of said election, and

> "* * * conduct the same so far as practicable in accordance with the laws relating to the election of town officers."

The statutory provisions relating to the election of town officers are found in Section 1028, Mason's Minnesota Statutes of 1927, et seq.

There is no authority in these sections for the appointment of voters representing different political parties or groups as challengers. All qualified voters have a right to be present throughout the election, as in case of a town meeting, provided they conduct themselves in an orderly manner and do not interfere with the balloting.

The inspectors of election—appointed by the County Board under Section 1114, Mason's Minnesota Statutes of 1927—act as judges of the election, and in case of a challenge,

> "* * * proceed thereon as in the case of challenges at general elections adapting the oath to the circumstances of the case." Section 1036, Mason's Minnesota Statutes, 1927.

For your guidance, I make these general observations about the conduct of the election:

1. The inspectors should proclaim the polls open in accordance with the posted notice of election. (1038)

2. The inspectors should appoint a clerk of election, instructing him to keep a poll list. (1041)

3. They should cause the polling place to be arranged so as to prevent confusion and disorder, and have peace officers in attendance, or available on short notice.

4. They should pass out ballots prepared in accordance with Section 1114, Mason's Minnesota Statutes of 1927, to intending voters.

5. It is the duty of the inspectors to challenge any intending voter who they have reason to believe is not entitled to vote. Any voter present may also interpose a challenge. Thereupon the inspectors proceed as at a general election. (1036)

6. In case of a challenge, the challenged person should be examined under oath by the judges, as provided by Mason's Minnesota Statutes, Section 421. Then, if the challenge be not withdrawn, the inspectors should submit this oath to the intending voter:

> "You do swear that you are a citizen of the United States, that you are 21 years of age, and have been a resident of this state for 6 months immediately preceding this election, and an actual resident of the territory proposed for incorporation for 30 days immediately preceding this election and that you are a qualified voter in said territory, and that you have not voted at this election?" (422)

A challenged voter upon taking this oath must be allowed to vote, otherwise not. See Section 422.

7. In determining qualifications of voters, the inspectors should follow the same rules as at general elections. See Section 368.

8. After a voter has marked his ballot with an "X" to indicate his choice, he should hand it to one of the inspectors, so folded as to conceal its contents. (1040, 1114)

9. Thereupon the clerk should enter upon the poll list the name and address of the voter, and if challenged, that fact, and whether or not he took the oath. (1041)

10. Forthwith one of the inspectors should deposit the folded ballot in a box provided for that purpose. (1041)

11. After those present and qualified have voted and at the hour specified for closing in the notice of the election, the inspectors by proclamation should declare the polls closed. (1038)

12. Thereupon the inspectors should publicly canvass the votes cast and this canvass should continue uninterrupted until completed. (1042)

13. The canvass should be conducted by taking one ballot at a time from the ballot box and counting until the number of ballots equals the number of names on the poll list, and if any are left in the box they should be destroyed. If two or more ballots are found to be so folded, it is apparent the same person voted them, and they should be destroyed. (1043)

14. The results of the canvass should be embodied in a certificate declaring the time and place of holding the election, that the inspectors have canvassed the votes cast thereat, and giving the number of votes cast both for and against the proposition, and this certificate should be signed and verified by at least two of the three inspectors, to the effect that the statements therein are true. The inspectors should publicly read the certificate and at once file it with the county auditor. They should also file with the auditor the poll list, also the ballots, placed in a sealed envelope and endorsed by the judges as in case of a general election. (Sec. 462) (1114, 1044)

That concludes the election.

ROLLIN L. SMITH,
Special Assistant Attorney General.

May 23, 1939. 182

85

Special—Existing registers—Use of—MS38 § 270-9.

Lincoln County Attorney.

You refer to Section 270-9, et seq., Mason's Supplement 1938, relating to elections and particularly call attention to the provision reading "existing registers of voters shall be used without making any new registrations."

Observing that other associated sections require an entry to be made after each name on the register indicating who voted at the primary and who did not, you ask whether the existing registers should be used at the special primary for reference or whether names of voters who cast ballots at the special primary should be entered on a separate poll list.

The sections to which you refer were derived from Chapter 297, Laws of 1929, which provides in detail for the calling and conducting of special elections to fill vacancies in certain offices. It is a comprehensive act and its provisions evince a purpose to use the machinery used at the preceding election. The same "polling places and election officials" are required to be used. Candidates file "with the same officers and pay the same fees" as do candidates at general elections. Ballots must conform, so far as practicable, with ballots at regular elections and, "existing registers shall be used without making any new registrations." Primary elections held under the act are governed by the laws relating to regular primary elections so far as applicable and necessary.

The feature of the regular primary election law, which requires the name of each voter who has cast his ballot to be checked upon the register after he has voted, must be complied with unless it is impracticable. We cannot say it is impracticable. The mere circumstance that when these "existing registers" are given to the judges for use at the special primary, they already have marks in the column headed "Primary Election" does not render compliance impossible. A different form of mark may be used at the special primary election.

It seems apparent that the legislature intended to obviate the preparation of a new register at a special primary election and we see no reason why your election officials should be put to the trouble and expense of preparing new registers of voters.

JOHN A. WEEKS,
Assistant Attorney General.

January 14, 1939. 183q

86

Towns—Annual meeting—Voting recess until afternoon—M27 § 1035, 1047.

Redwood County Attorney.

A town meeting necessarily has implied authority to adopt such reasonable rules and to take such action as may tend to make it more effectual as a self-governing body, subject, however, to the laws of this state.

It follows that if a meeting organizes between nine and ten A. M. by choosing a moderator, then because of the small attendance votes to take a recess for a reasonable length of time when a larger representation may be expected, the action is valid.

In fact such action would seem to better subserve the purposes of the law relating to town meetings than a policy of compelling it to remain in continuous session with only a small proportion of the voters present. The important thing is that no one entitled to vote be deprived of his right. The moderator cannot recess the meeting. It requires a vote of the electors present to do that. When reconvened at the hour specified, the proceedings must be conducted in strict accordance with Section 1035, Mason's Minnesota Statutes 1927.

You will observe that under Section 1047 a town meeting may be adjourned to any other time and from time to time for the purpose of transacting any town business except the election of officers. A recess for a reasonable time during the day of the town meeting is the inherent right of the meeting, as it is of any other self-governing body, and is not an adjournment.

ROLLIN L. SMITH,
Special Assistant Attorney General.

April 1, 1939. 437a-11

87

Villages—Date—Under Special Acts—L39, C345.

Village Attorney, Litchfield.

You state that Litchfield is a village operating under Spec. L. 1887, C. 27, as amended by Spec. L. 1889, C. 40. You ask whether those special laws or Secs. 7 and 8, C. 2, P. 11, C. 345, L. 1939—the new election code—controls as to (1) the time of election, and (2) the officers to be elected, at the next village election in Litchfield.

The special acts cited fix the date of your annual village election on the first Monday in April. Also, they provide for the election of a mayor, an alderman at large, a recorder, a treasurer, an attorney, a justice of the peace and a constable; whereas, the 1939 code fixes the date of the annual

election in villages on the first Monday in December in each year, and provides for the election of a treasurer, two constables, and a council composed of a president, a clerk, and three trustees, and in some cases an assessor and two justices of the peace. (Secs. 7 and 8)

You direct our attention to the fact that Sec. 1, C. 2, P. 11, C. 345, L. 39, provides that villages existing under special legislative charters shall continue thereunder,

> "* * * except that the provisions of General Statutes 1913 and any acts amendatory thereof * * * **relating to elections** in villages * * * shall apply to and govern all such villages organized under any general law. * * *"

You also invite our attention to the fact that Sec. 6, C. 2, P. 11, of said chapter provides:

> "* * * sections 7 and 8 of this chapter shall apply to all villages in this state organized under **any** of the laws thereof."

In construing a former village election law codification (L. 29, C. 413), this department said:

> "* * * the legislature apparently assumed that all villages in the state had a system of government including three trustees, a village president, and a village recorder, all of whom were elective officers, and all of whom were members of the council. * * *
>
> "There are, however, villages having an entirely different form of organization. For instance, the village of Litchfield has a village president who is not a member of the council, two aldermen from each of three wards, and a village recorder who is not a member of the council. The Village of St. Vincent has five trustees, instead of three, an appointive president, and an appointive recorder who is not a member of the council. In such villages it is impossible to work out an application of chapter 413 which would not mean an entire reorganization of the village government. Such a reorganization is not within the scope of the title of chapter 413 and therefore the act cannot be so construed."

Applying the reasoning in that opinion to the question presented, we do not believe chapter 345 can operate so as to abolish any existing office, create any new office, increase or decrease the number of village trustees, make any appointive office elective, or any elective office appointive, or change the powers or duties of any officer.

The title of the act is limited. To give the act any such effect would lead to a holding that it was unconstitutional as going beyond the scope of the title. Opinion 254, Report of 1930.

Furthermore, Sec. 2, P. 12 of said Chapter 345 provides:

> "* * * Whoever, when said repeal takes effect, holds an office under any of the laws repealed, shall continue to hold it according to the

tenure thereof, unless it is abolished or unless a different provision relative thereto is made by this act * * *"

We conclude, following the opinion cited, that if a village organized under a special law has the conventional plan of government including a council composed of an elective president, three elective trustees, and an elective recorder, so that there is no particular difficulty in applying the provisions of Chapter 345, then the village is controlled by it.

If, however, the village has an entirely different plan of organization, with a different number of trustees, and the difficulties in the way of applying chapter 345 are great and in some cases unsurmountable, then the village is controlled by the special laws under which it operates.

Some phases of the 1939 Election Code were made the subject of an article in the September 1939 issue of Minnesota Municipalities on page 329. The author thereof seems to agree with our conclusion, i. e., the title of the act is not broad enough to include a change in municipal structure. He believes the act applies to villages organized under special acts if feasible.

Change in the date of holding the election would not seem to alter municipal structure. Change in the officers to be elected would seem to do so.

Categorically answering your question you are advised that the date of the annual village election in Litchfield is now governed by Sec. 8, C. 2, P. 11, C. 345, L. 39, which fixes the first Tuesday after the first Monday as the day of such election; also that the offices to be filled thereat are those specified in the special acts under which the village is organized and operating.

ROLLIN L. SMITH,
Special Assistant Attorney General.

October 6, 1939. 472a

88

Voters—Qualification—Conviction of felony under federal law.

Sleepy Eye City Attorney.

You are advised that a person who has been convicted of a felony in Minnesota under federal law forfeits his right to vote. Article 7, Sections 2 and 7, Constitution of Minnesota.

This subject was discussed at length in opinion No. 399, 1934 report. Some offenses against the national prohibition act were misdemeanors, and some were felonies. Violations of federal law punishable by imprisonment for a term of one year or more are felonies.

It is the fact of **conviction,** not the fact of imprisonment which disqualifies a voter. If the crime carries a possible punishment of one year or more,

then a person convicted of such crime loses his voting rights. This is true regardless of the length of time he may actually serve. The civil rights of a person so convicted may only be restored by act of the president.

ROLLIN L. SMITH,
Special Assistant Attorney General.

April 3, 1939. 490d

89

Voters—Soldiers—Use of Absent Voters' Law—Eligibility of Soldiers to run for office.

City Attorney, Luverne.

You are advised:

1. A qualified voter who enlists in the United States army retains his right to vote at the September primary and November general election in Minnesota. Furthermore, he may exercise this right by proceeding under the Absent Voters' Act (the 1940 Mason's Minnesota Supplement, Section 601-4 (1) et seq., provided he is absent from the district in which he is entitled to vote on the day of the election. (Opinion of Donahue, September 9, 1920).

2. A qualified voter who enlists in the United States army does not thereby forfeit his right to vote in this state. Article 7, Section 3, Constitution of Minnesota.

3. A qualified voter who is a member of the Minnesota National Guard and is called outside of the state in military service will nevertheless retain his right to participate in the state primary and general election and to that end may proceed under the Absent Voters' Act.

4. A qualified voter who is a member of the Minnesota National Guard and who files for public office, and is thereafter called out of the state in military service is not thereby disqualified from election to office. His presence in the state during the campaign and on election day is not essential to a valid election. He still remains a legal voter and resident of the state during his military service and is therefore eligible to hold elective office, if otherwise qualified. The question of whether or not such a person will be able to assume office at the beginning of his term is an entirely different question, the answer to which will depend upon the circumstances existing at that time.

ROLLIN L. SMITH,
Special Assistant Attorney General.

August 5, 1940. 639e

LABOR

90

Bargaining—Conflict as to certification of bargaining agent between National Labor Board and State Labor Conciliator—State must yield—L39, C440.

Labor Conciliator.

You inquire whether when a company is engaged in interstate commerce and has asked the Division of Conciliation for a determination of a proper and exclusive bargaining agency under Section 16, Chapter 440, Laws 1939, the jurisdiction of your department would be superseded by the action of the National Labor Relations Board assuming jurisdiction of the case.

Section 16 (b), Chapter 440, Laws 1939, provides in part as follows:

> 'Whenever a question concerning the representative of employes is raised by an employe, group of employes, labor organization, or employer the labor conciliator or any person designated by him shall at the request of any of the parties, investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected * * *."

29 USCA, Section 151, the National Labor Relations Act, provides as follows:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

29 USCA, Section 152, subsection 6 defines "commerce" as follows:

> "The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country."

Subsection 7 defines the term "affecting commerce" as follows:

> "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

Section 159 provides in part:

> "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected."

Section 160 (a) provides as follows:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

In the event of conflict in administration of the State Labor Relations Act and the National Labor Relations Act in a matter properly within the scope of the national act, the state must yield (Wisconsin Labor Relations Board v. Fred Rueping Leather Co., 228 Wis. 473, 279 N. W. 673).

The national labor relations act cannot and does not supersede the Minnesota act as to labor relations which do not affect interstate commerce so as to bring them within the commerce clause. As to such relations, the police power of the state of Minnesota remains unimpaired, and it is beyond the competency of Congress to impair it. The state may regulate labor relations in the interests of the peace, health, and order of the state; and the federal government may regulate this relationship to the extent that, unregulated, it tends to obstruct or burden interstate commerce.

The authority of the federal government may not be pushed to such an extreme as to destroy the distinction which the commerce clause itself establishes, between commerce "among the several states" and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.

There can be no question that the commerce contemplated by the national act is interstate and foreign commerce in the constitutional sense. The definition "affecting commerce" is one of exclusion as well as inclusion. The grant of authority to the national board does not purport to extend to the relationship between all industrial employes and employers. Its terms do not impose collective bargaining upon all industries, regardless of effect on interstate or foreign commerce. It reaches only what may be deemed to burden or obstruct that commerce.

The principle is well established that actions which directly burden or obstruct interstate or foreign commerce or its free flow are within the reach of the Congressional power. Acts having that effect are not rendered null because they grow out of labor disputes (Texas & N. O. R. Co. v. Ry. Clerks, 281 U. S. 548, 570; Schlechter Corp. v. U. S., 295 U. S. 495).

It is the effect upon commerce, not the source of the injury, which is the criterion (Second Employers Liability Cases, 223 U. S. 51). Whether

or not a particular action does affect commerce in such a close and intimate fashion as to be subject to federal control and hence to lie within the control conferred upon the national board is left by the statute to be determined as individual cases arise (Labor Board v. Jones & O'Laughlin, 301 U. S. 1).

The Congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce.

Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for "its protection and advancement" (The Daniel Ball, 10 Wall. 557); to adopt measures "to promote its growth and insure its safety" (Mobile County v. Kimball, 102 U. S. 691); "to foster, protect, control and restrain" (Second Employers' Liability Cases, supra). That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it."

Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.

You also inquire if a petition is originally directed to you and later the jurisdiction is taken over by the National Labor Relations Board, are you entitled to a report from that board as to its findings and final determination.

I find nothing in the National Labor Relations Act which requires them to furnish copies of their findings and opinions to the public generally or to any state agency. However, such matters would be such that your office has a definite interest in them, and the national board's findings and orders are matters of public record, and it would seem that as a matter of courtesy they should be glad to furnish such findings and opinions upon your request.

You also inquire if there is any reason why you should conduct joint investigations and hearings with the National Labor Relations Board in the determination of a proper bargaining agency.

There is nothing in either the national or state act which authorizes joint hearings for the purpose of determining the proper bargaining agency. It appears from the national act that the board in the first instance has the right to determine if it has jurisdiction, and when this has been determined by the board, the only authority that may reverse it is the federal court.

JOHN A. WEEKS,
Assistant Attorney General.

July 20, 1939. 270

91

Children—Wages and hours—Enforcement of federal laws—Cooperative arrangement with federal agencies.

Industrial Commission of Minnesota.

You submit a copy of a joint regulation of the children's bureau and the wage and hour division of the United States department of labor, dated September 21, 1939, providing for the making of agreements with state and local agencies under which such agencies will make investigations and inspections for the purpose of enforcing the provisions of the federal laws relating to child labor and to wages and hours. The federal agencies concerned wish to negotiate such an agreement with your department or some other proper state agency. The regulation contemplates that in order to render the desired service for the federal government, the state will employ necessary additional help in accordance with certain requirements of the regulation, and that the federal government will reimburse the state from time to time for the salaries and other expenses incurred. In connection with the consummation of such an agreement, the regulation requires a statement from the attorney general or other authorized state officer to the effect that the agreement is valid under the laws of the state and that the state agency concerned has authority to enter into it in accordance with the regulation.

You inquire whether your department has authority to enter into an agreement as proposed by the federal agencies.

It appears that you already have a force of inspectors and other employees engaged in work under state laws of much the same nature as would be required by the federal government. We find no other state agency which is properly organized or equipped for such work. Hence, from the practical standpoint, your department would be the proper agency to render the proposed service, if authorized.

However, we are unable to find any authority under present state laws for the undertaking of such work by your department or any other state agency on the terms prescribed in the federal regulation. The state already carries on various activities with the aid of federal funds and more or less subject to federal control. However, so far as we can discover, no systematic activity of that kind has been undertaken without express authorization by state law. At any rate, no matter how desirable the proposed arrangement may be, we are obliged to advise you that in the absence of such authorization your department could not lawfully undertake it.

This conclusion is compelled by the general rule that a state agency may engage only in those activities which are expressly authorized by state law or are necessarily incident thereto.

A further obstacle arises in connection with the payment of the additional salaries and expenses which would be incurred. Our state constitution expressly prohibits the payment of any money out of the state treasury

except in pursuance of an appropriation by law. There being no appropriation for the purposes in question, the federal funds allotted for those purposes could not be handled through the state treasury.

Of course, as a matter of comity, it is eminently proper for any state agency, without express statutory authority, to cooperate with federal agencies as far as it can without conflicting with the proper discharge of its own duties and without incurring any substantial additional expense. Such is the policy of this office and of every other department of the state government, as far as we know. However, that kind of informal cooperation would hardly be adequate to meet the needs of the federal government in the present case.

You have suggested that if the proposed arrangement was not permissible under present state laws, the employees required for the new work might be appointed and paid directly by the federal government, and your department might arrange to supervise their work and cooperate with them. We see no objection to such an arrangement, provided it can be carried out so as not to conflict with the regular duties of your department and so as not to entail any substantial additional expenditure of state funds. However, if it appears after a trial that the arrangement is satisfactory and that the participation of the state is likely to be permanent, the matter should be submitted to the next legislature for action.

CHESTER S. WILSON,
Deputy Attorney General.

November 10, 1939. 270a-2

92

Closed Shop—Municipal Corporations—Contract with illegal—L39, C440.

Austin City Attorney.

You state:

"The municipal utilities of the City of Austin are operated by the Board of Water, Electric, Gas and Power Commissioners of the City of Austin pursuant to Chapter 11 of our Charter, of which you have a copy in your files. At the time our Charter was originally adopted, only water and electricity were municipally owned. Since then an amendment to our Charter was passed by adding a paragraph to Section 3 of Chapter 11, a copy of which amendment is herewith enclosed.

"Acting under this Charter provision as amended, in 1935 our Water and Light Board purchased the then existing gas distribution system of the Interstate Power Company and since October of that year has operated that system municipally. The Water, Electric, Gas and Power Department in turn has several subdepartments, one of which involves

the construction and repair, and relaying, of gas mains. Recently the Gas Construction Workers Unit of the CIO has presented the Board with a contract demanding, among other things, that the Board maintain a constant force in this Department the year around, whether the force is actually needed or not, providing for wages, seniority, and other similar matters. The contract also provides that any person employed in that particular department must join the CIO Union within one week after being employed or he will have to be discharged by the Board and further that if the employee be discharged by the Union from its membership, that the Board be required to discharge the employee in turn within one week. The contract further provides in one sentence that the Board retains the right to discharge an employee for wilful and continued neglect of duty or for drunkenness upon the job and immediately after that provides that such charges shall be proved to the satisfaction of the man's fellow workers."

You ask:

1. "whether it is legal under the Charter of the City of Austin or under the laws of the State of Minnesota for the Board to enter into a contract, by which membership in a certain labor organization is made a prerequisite to working for a public board of this nature" and

2. "whether the provision last above set forth in the contract does not take management of the affairs of the Board out of the hands of the Board as contemplated by our Charter and vest it in the hands of 'fellow employes.'"

In approaching the questions which you have submitted, we desire to call attention to the fact that this office has ruled that under certain conditions a closed shop contract between a union and a private employer is legal. See Attorney General's opinion to Labor Conciliator Haney dated August 24, 1939. The conclusion reached in that opinion has been sustained by the District Court of Mower County in the case of Zerby, et al. v. Fuel Economy Engineering Company. The questions which you submit, therefore, require a determination of whether the same rule applies to municipal corporations as applies to private employers.

> "The power (of municipalities) to make contracts may result (a) from the inherent power of a municipality to perform indispensable acts, (b) from express words in a statute or the charter, or (c) from what is implied as incident to the powers expressly conferred on the municipality by a statute or the charter."
>
> McQuillin Municipal Corporations (2d Ed.), Vol. 3, § 1269.

This places municipal corporations as employers in a different class from private employers so far as the power to contract as to employment, whether such employment be direct by it or by persons with whom it is doing business.

In searching for authorities upon the questions before us, we found that the question of muncipalities requiring bidders upon contracts with

them to use union labor has frequently been before the court, and the law relating to that subject is well established.

> "It has been held that municipal officials are without authority, in determining the lowest responsible bidder for a public contract, to discriminate between contractors employing organized and those employing unorganized labor, and to refuse such a contract to the lowest bidder because he does not employ organized labor exclusively; in other words, a municipality, in letting contracts, is without power to discriminate in favor of union labor."
>
> 110 A. L. R. 1407.

The leading cases by which the foregoing rule has been established are Adams v. Brenan, 177 Ill. 194, 42 L. R. A. 718, 52 N. E. 314; Miller v. Des Moines, 143 Iowa 409, 122 N. W. 226, 23 L. R. A. (N. S.) 815; Holden v. Alton, 179 Ill. 318, 53 N. E. 556; Marshall & B Co. v. Nashville, 109 Tenn. 495, 71 S. W. 815.

While the rule stated above and the authorities cited in support of it are not directly applicable to the precise questions now before us, they are of value in indicating the attitude of the courts toward the compulsory use of union labor on matters of concern to municipal corporations. As we have stated, the authorities are numerous upon the rule above stated, but there are not many cases which directly involve situations such as presented by the questions submitted by you to us. We have, however, searched for all authorities involving the direct questions submitted by you. We have succeeded in finding some such cases.

In two cases involving the employment of attorneys by municipal corporations, the same conclusion was reached by the respective courts. It was held in one case that "a municipal corporation cannot delegate discretion to its attorney to employ an assistant, if he think it necessary, and to fix the assistant's compensation." Knight v. Eureka, 55 Pac. Rep. (Cal.) 768. On page 769 the correct principle is stated to be "that the powers conferred upon a municipal corporation involving the exercise of judgment or discretion are in the nature of public trusts, and cannot be delegated to others." In the other case, City of Bowling Green v. Gaines, 96 S. W. 852, on page 855, the court uses the following significant language:

> "This wise purpose of the law would be entirely frustrated if the governing body of the municipality might, by ordinance, abdicate its discretionary functions and delegate them to some agent of its own choosing. The council are elected by the people to have charge of the financial affairs of the city, and public policy does not permit the discretionary duties, which the law has placed upon them for the benefit of the public, to be delegated to others."

It has been held that "a board of education cannot by rule restrict employment of teachers to such as are not members of certain organizations. Such rule clearly discriminates between certain classes and confers special privileges." McQuillin Municipal Corporations (2d Ed.), Revised Vol. 6,

§ 2598. This proposition is supported by the case of The People v. City of Chicago, 199 Ill. App. 356. The situation in that case is the converse of the situation submitted to us. In that case membership in a trade union was prohibited and employment was refused because of such membership. On page 362 the court said:

> "It may be conceded that the board has power to pass rules regulating its teaching force, and that generally such matters are within its exclusive discretion; but the board has no power to pass an unreasonable rule in violation of the statute or constitution. People v. Harrison, 223 Ill. 540.
>
> "Is the rule in question discrimination between different classes of citizens, conferring special privileges upon a class or group less than all? A majority of this court holds that it is."

The court, again, on page 363, said:

> "There is no more reason or justification for such a contract as this than there would be for a provision that no one should be employed except members of some particular party or church. In any such case it might be said that the board entertained a bona fide opinion that the members of some political party were more intelligent and better capable of performing the work, so that better results would be attained; or that the members of a church, on account of their higher standard of morality, would more faithfully and conscientiously carry out the contract."

While the facts in the case last above cited are the converse of the facts before us, the rules and the argument in support thereof as quoted above are equally applicable to the facts which we are considering.

The case last above cited and the case of Wagner v. Milwaukee, 177 Wisc. 410, are the expressions of the court in the cases which we have been able to find wherein the facts are most similar to those submitted to us. In the case of Wagner v. Milwaukee, supra, the city attempted to fix by ordinance a minimum wage scale in said city. Such minimum wage was "to be determined by the wage paid to members of any regular and recognized organization of such skilled laborers for such skilled labor." The ordinance was challenged as an unwarranted delegation to an outside body of the authority to determine such wage scale. We wish to draw attention now to the fact that we see no difference between delegating to a union the power to fix a wage scale to be paid by the city and the power to determine who shall be in the employ of the city. In holding the ordinance invalid the court said on page 417:

> "If one common council can lawfully bind itself and its sucessors to accept the judgment and discretion of an outside body in one particular instance representing organized labor, another common council may claim an equal right to bind itself and its successors to accept a scale for a maximum wage to be fixed by some other outside body which may be as much interested in keeping the returns to labor down as labor organizations are to keep them up. If the power to do the

former is recognized as legal and constitutional the right to do the latter cannot be denied. The language, the reason, and the logic of repeated former rulings of this court and of other courts plainly declare that any attempted vesting of the determination of such a legislative question in an outside body is an abdication, and not an exercise, of the legislative discretion that exclusively belongs to the common council itself."

While there have been no cases before the Supreme Court of the State of Minnesota involving the questions submitted to us, the principle is well established in Minnesota that "the delegated governmental powers of municipalities cannot be delegated by them." Dunnell's Minnesota Digest (2d Ed.), Vol. 4, § 6691. Among the cases cited in support of this proposition we quote from Jewell Belting Co. v. Village of Bertha, 91 Minn. 9, wherein the court on page 11 said:

"The authorities very generally hold that such a body (village council) cannot in any case delegate to a member or committee thereof functions or prerogatives of a legislative or administrative character, or involving the exercise of judgment and discretion. * * *

"It was held that the power so conferred required the exercise of judgment and discretion, and could not be delegated to a committee of the council, either in respect to establishing new lamps or discontinuing those already established. The reason for this rule is found in the fact that members of the council are chosen by the people to represent the municipality, charged with a public trust and the faithful performance of their duties; and the public is entitled to the judgment and discretion, in all matters where such elements enter into transactions on behalf of the municipality, of each member of the body upon which authority to act is conferred."

The provisions made by the legislature in the Labor Relations Act, Laws 1939, Chapter 440, are of significance in determining the questions before us. The act provides a method of determining the bargaining agent of employes for collective bargaining purposes. As before stated, this permits closed shop agreements with private employers under certain conditions. The legislature, however, saw fit to except the state and all political and governmental subdivisions thereof (which would include municipal corporations) from the provisions of said labor relations act. By this exception the legislature evidently recognized the principles enunciated in the cases above cited.

It is apparent that the effect of the proposed contract will be to delegate to a private organization functions which are reposed by law and charter provisions in the board of commissioners. Under the court decisions cited, this may not legally be done.

For the reasons stated above the answer to your first question is in the negative.

The second question which you submit has already been ruled upon by this office. It is governed by the same principles as your first question. See

opinion of the Attorney General to C. R. Reed, Superintendent of Schools, Minneapolis, Minnesota, dated March 23, 1939. In that opinion it was held:

> "The Minneapolis Board of Education has no legal right to delegate its discretionary power to an arbitration committee as suggested or otherwise. It may appoint a committee to confer with a like committee of the labor union to make proposals of adjustment, but the Board itself cannot legally surrender its governmental authority to others. Whatever action is taken must be that of the Board. For it to agree in advance to abide by the decision of the proposed arbitration committee would, in my opinion, be illegal."

It necessarily follows in answer to your second question that so far as discharge of employes is concerned the contract provides for an illegal delegation of power.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

February 28, 1940. 270

93

Closed Shop—Permitted under certain conditions—L39, C440 § 10(a).

Labor Conciliator.

You state:

> "The employer has had a contract for the previous year which contained the following clause:
>
> 'All employees of the company who are now members of the International Association of Machinists shall remain members.'
>
> "The union asks that the above clause be included in the new contract. The employer is willing to put it in provided it is not contrary to Section 10, Paragraph A of the Minnesota Labor Relations Act."

You ask if it is contrary to Section 10 (a) of the Minnesota Labor Relations Act to place such a clause in the contract between the union and the employer.

The following opinion is predicated upon the assumption that the International Association of Machinists includes the local union thereof and that such local union has been duly designated or selected for the purpose of collective bargaining by the majority of the employes of the employer submitting the question.

Presumably the doubt of the employer is caused by the following language in said Section 10 (a):

"* * * and such employes shall also have the right to refrain from any and all of such activities."

This language must be construed in the light of all of the provisions of the Labor Relations Act. In this connection we call attention to Section 12 (c):

"To encourage or discourage membership in any labor organization by discrimination in regard to hire or tenure of employment or any terms or conditions of employment; **provided, however, that this subsection shall not apply to the provisions of collective bargaining agreements entered into voluntarily by an employer and his employees or a labor organization representing said employees as a bargaining agent as provided by section 16 of this act."** **(Boldface ours.)**

An examination of the development of the language used in the act discloses that the original draft of the proposed Labor Relations Act was amended in committee by adding the following language:

"entered into voluntarily by an employer and his employees or a labor organization representing said employees as a bargaining agent as provided by section 16 of this act."

Clearly, the purpose of adding this language was to recognize the right of the employer and his employes or a labor organization representing said employes under said act to enter into a closed shop agreement. There would have been no reason to add the additional language quoted above unless it was for such purpose. We also must consider the fact that Section 16 of the act provides that the vote of the majority of the employes is sufficient to designate or select a representative for the purpose of collective bargaining. An agreement properly made by such representative is binding upon all employes. Section 11 (a) of the act makes it an unfair labor practice for any employe

"* * * to institute a strike if the calling of such strike is a violation of any valid collective agreement between any employer and his employes or labor organization and the employer is, at the time, in good faith complying with the provisions of the agreement."

All of these provisions can lead only to the conclusion that it was the intention of the legislature that the majority of the employes could bind all employes to a valid collective bargaining agreement even though the agreement provided for a closed shop.

It is our opinion that the last sentence of Section 10 (a) quoted above confers upon the employes collectively and not individually the right to refrain from organizing or bargaining collectively as provided in the first part of Section 10 (a).

Your question is answered in the negative.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

August 24, 1939. 270

94

Strikes—Arbitration—School Employes—Right to strike—Civil service status.

Minneapolis Superintendent of Schools.

You submit two questions.

The first is as follows:

> "In view of the fact that school janitors are civil service employes, charged with the responsibility for the safety of thousands of children, do they have a right to strike?"

Under our Minnesota law school janitors have a legal right to join a labor union. Strikes by such public employes can, in my opinion, be made illegal by state legislation and city ordinances. Rules of regulation by the Board of Education or the terms of the janitors' contracts may provide against strikes.

In the matter now under consideration there appears to be no state law, no city ordinance, no rule of the Board of Education or contract of employment that forbids strikes. No opinion of our Supreme Court or any other holding that such strikes are illegal as against public policy has come to my attention.

It is, however, obvious that there is no way of forcing men to remain in their positions of employment if they desire to leave them. Involuntary servitude, except as a punishment for crime, cannot be imposed upon any of our citizens. School janitors have therefore singly or by concert of action the power to refrain from work at any time they see fit, subject to the consequences accruing from the violation, if any, of their contracts of employment and to the loss of any civil service rights that they may have incident to said contracts.

Your second question is the following:

> "Can the Board of Education delegate its discretionary power to an arbitration committee of five, consisting of two members to be appointed by the Board, two by the janitors' union, and one to be elected by these four?"

The Minneapolis Board of Education has no legal right to delegate its discretionary power to an arbitration committee as suggested or otherwise. It may appoint a committee to confer with a like committee of the labor union to make proposals of adjustment, but the Board itself cannot legally surrender its governmental authority to others. Whatever action is taken must be that of the Board. For it to agree in advance to abide by the decision of the proposed arbitration committee would, in my opinion, be illegal.

J. A. A. BURNQUIST,
Attorney General.

March 23, 1939. 270d-9

95

Strikes—Notice may be suspended only by mutual consent of all the parties —L39, C440 § 6.

Labor Conciliator.

You state:

"Section 6 of the Minnesota Labor Relations Act (Laws 1939 Chapter 440) reads in part as follows:

'* * * any employees, representatives, labor organization, or employer may give notice of intention to strike or lockout, as the case may be, but it shall be unlawful for any labor organization, or representative to institute or aid in the conduct of a strike or for an employer to institute a lockout, unless notice of intention to strike or lockout has been served by the party intending to institute a strike or lockout upon the labor conciliator and the other parties to the labor dispute at least ten (10) days before the strike or lockout is to become effective.

'* * * It shall be the duty of all parties to a labor dispute to respond to the summons of the labor conciliator for joint or several conferences with him and to continue in such conferences until excused by the labor conciliator, not beyond, however, the ten day period heretofore prescribed except by mutual consent of the parties.' "

You ask:

"Is it proper and legal for the Conciliator to accept the temporary suspension of a strike notice?"

A careful study of the language contained in said Section 6 fails to reveal any authority for the suspension of a strike notice when once given, so as to extend the period during which such notice shall operate to prevent the strike beyond ten days from the date of notice of intention to strike except upon one condition, and that is that the extension shall be "by mutual consent of the parties." A notice on the part of one party to the dispute of a temporary suspension of a strike notice is not, in our opinion, compliance with the requirements of the statute. It is our opinion that the conciliator is authorized to accept a temporary extension of the period of time covered by a strike notice only when such extension is "by mutual consent of the parties." Such mutual consent should be in writing and filed with the labor conciliator. The length of the period of suspension of the strike notice should be stated definitely in such agreement and should not be made subject to any contingency. In other words the extension should be in writing and should be so definite in its terms that any one reading it would know the exact intention of the parties as to the duration of such suspension.

There are good reasons for these requirements. The calling of a strike affects the rights and interests of both employees and employers in various

ways. Hence there should be no room for misunderstanding as to the time when a strike may legally be called. The legislature undoubtedly had this in mind in framing the provisions above quoted.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

February 15, 1940. 270d-9

UNEMPLOYMENT COMPENSATION—(See Laws 1941, C. 554.)

96

Agriculture—Authority of director of employment and security to promulgate regulations defining the word—M38 §§ 4337-30 (c), 4337-30 (m).

Director Division of Employment and Security.

You inquire whether you have the authority to adopt the following proposed ruling or regulation:

"(1) The term 'agricultural labor' includes all services performed—

(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife.

(2) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm.

(3) In connection with the production or harvesting of maple sirup or maple sugar or any commodity defined as an agricultural commodity in section 15 (g) of the Agricultural Marketing Act, as amended, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs or waterways used exclusively for supplying and storing water for farming purposes.

(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables,

as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

As used in this regulation, the term 'farm' includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards."

Section 4337-30 (c), Mason's 1938 Minnesota Supplement, authorizes you to issue such rules and regulations as you may deem necessary or suitable in the administration of the act. Such rules and regulations may not be inconsistent with the act.

A valid regulation has the force and effect of law. Maryland Casualty Co. v. United States, 251 U. S. 342; United States v. Grimaud, 220 U. S. 506; United States v. Birdsall, 233 U. S. 223, 231. An invalid regulation has no effect and is a nullity. Manhattan Co. v. Commissioner of Internal Revenue, 297 U. S. 129; Miller v. United States, 294 U. S. 435, 439; Lynch v. Tilden Produce Company, 265 U. S. 315, 322.

A regulation which in effect amends the statute to which it applies is invalid. United States v. Two Hundred Barrels of Whiskey, 95 U. S. 571; United States v. Eaton, 144 U. S. 677. A regulation may not extend the statute nor modify its provisions. Campbell v. Galeno Chemical Co., 281 U. S. 599, nor may it restrict the terms of the statute. Helvering v. Powers, 293 U. S. 214, 224. In Manhattan Co. v. Commissioner of Internal Revenue, supra, the court said:

"And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable."

Conversely, if the regulation is consistent with the statute and is reasonable, it is valid. Fawcus Machine Co. v. United States, 282 U. S. 375. Interpretative regulations affecting general terms of the statute have been held to be appropriate. Lang v. Commissioner of Internal Revenue, 304 U. S. 264; Helvering v. R. J. Reynolds Tobacco Co., 306 U. S. 110.

Whether your prospective regulation complies with the principles above set forth is a matter for your determination. This regulation would seem to be consistent with the general concept of agricultural labor. See opinion of the attorney general to Hon. M. R. Cashman, March 10, 1939, and authorities therein cited.

I assume that your proposed regulation will be promulgated in accordance with the provisions of Section 4337-30 (m), Mason's 1938 Minnesota Supplement.

KENT C. van den BERG,
Special Assistant Attorney General.

March 1, 1940. 885

97

Agriculture—Nursery employes engaged in cultivation or growing operations not "employes" under act—L39, C440.

Labor Conciliator.

You submit the following question:

> "In the case where employees of a particular nursery are engaged in the actual planting, cultivating, and harvesting of various fruit, vegetable and flower plants, are such employees exempt from the jurisdiction of the Minnesota Labor Relations Act, as defined in Section 1, Paragraph (c) of the act."

The provision to which you refer excludes persons employed in agricultural labor from the definition of "employe" under the act.

This office has previously ruled on the application of the State Unemployment Compensation Act to nursery employes in an opinion dated March 10, 1939, from which I quote the following:

> "Except as the particular facts in a given case may be such as to demand a different finding, it is my opinion that generally speaking an employe of a nursery or an employe of a florist is an agricultural laborer within the meaning of the Minnesota Unemployment Compensation Act, so long as the particular employe is engaged in the cultivation of the soil, plants, shrubbery or other products of that nature."

This is in harmony with the rule followed by federal authorities in the application of the Federal Social Security Act, as well as by the authorities of most states with respect to their unemployment compensation acts and other laws. No sound reason appears why the same rule should not be applied with respect to labor relations laws.

Accordingly, you are advised that nursery employes who are engaged in work pertaining to the cultivation of the soil or the growing of trees, shrubs, or plants are not within the provisions of the Minnesota Labor Relations Act.

CHESTER S. WILSON,
Deputy Attorney General.

July 20, 1939. 270

98

Definition of weekly benefit amount does not mean adjusted weekly benefit amount to the next higher multiple of $1.00, but does mean the actual weekly benefit amount—M40 § 4337-26E.

Department of Social Security.

You inquire whether the phrase "weekly benefit amount" as used in Section 4337-26 E, Mason's 1940 Supplement, means the actual weekly

benefit amount increased to the next multiple of $1.00 in those cases in which the said amount is not a multiple of $1.00. Section 4337-25, Mason's 1940 Supplement, provides two rather complex formulae by which to determine weekly benefit amounts. The result is to be "computed" or increased the next higher multiple of $1.00 in those cases in which the multiple is not $1.00. Subsection C provides a formula by which to determine the total amount of benefits in one benefit year and quotes the same clause in reference to adjusting the result to a multiple of $1.00. The apparent reason for this adjustment is to facilitate the accounting and bookkeeping of the department.

Section 4337-26 sets forth certain prerequisites to eligibility for benefits. Subsection E thereof provides that an individual shall be eligible for benefits only if the commission finds that "he has during the base period earned wage credits for employment by employers equal to not less than thirty times his weekly benefit amount."

In my opinion the weekly benefit amount referred to in subsection E means the actual weekly benefit amount and not the result after increasing the weekly benefit amount to the next higher multiple of $1.00 which for convenience will be referred to as the adjusted weekly benefit amount.

Section 4337-22 provides that as used in this act, unless the context clearly requires otherwise:

> P. 'Weekly benefit amount'—an individual's 'weekly benefit amount' with respect to any particular week of total unemployment means the amount of benefits computed in accordance with the provisions of Section 5 (4337-25) of this Act, which he would be entitled to receive for such week, if totally unemployed and eligible."

Section 4337-25 B provides that the individual's weekly benefit amount shall be an amount equal to 1-25th of his total wage credits for employment by an employer or employers during that quarter of his base period in which such total wage credits were highest. The act then provides for an adjustment in case such amount is more than $15 or less than $5, the effect of which is not here material. This constitutes the weekly benefit amount, not the result obtained after increasing this amount to the next higher multiple, for the act expressly provides:

> "And if **such weekly benefit amount** is not a multiple of $1.00 shall be computed to the next higher multiple of $1.00."

In other words, the legislature has recognized the distinction between the actual weekly benefit amount and the adjusted weekly benefit amount. See also Section 2 of subsection B, and subsection C. In each case where the legislature intended to employ the adjusted weekly benefit amount, it has expressly provided that the actual weekly benefit amount is to be raised to the next higher multiple of $1.00. Such phrase was not attached to the words "weekly benefit amount" as used in Section 4337-26 E. Consequently, it must necessarily follow that the legislature intended that for the purposes of Section 4337-25 the result to be used is the adjusted weekly

benefit amount, whereas for the purposes of determining eligibility as provided in Section 4337-26 E, the result to be used is the actual weekly benefit amount.

It is inconceivable that the legislature intended a provision used to facilitate the administrative bookkeeping in a law of great complexity, should also intend that such provision should create an additional restriction to eligibility for benefits under the law. Such would be the result if any other construction were adopted, for as pointed out in your inquiry, in the case of an individual with total earnings during his base period of $417.10, and whose highest quarterly earnings were $330.37, 1-25th of the highest quarterly earnings during his base period would be $13.21, which amount not being a multiple of $1.00 would be computed to the next higher multiple of $1.00, or $14, the weekly benefit if the individual is otherwise eligible. If $13.21 is considered to be his weekly benefit amount for determining eligibiliy such requirements would be satisfied, for 30 times $13.21 equals $396.30, which is less than the total earnings in his base period. However, if the weekly benefit amount is to be determined on the adjusted weekly benefit amount of $14 per week, he would not be eligible.

It is our duty, if possible, to construe legislative enactments in a manner as to meet with the legislative intent which must always control. This is so even though construction necessarily modifies the literal meaning of the words.

Minnesota Farmers Mutual Insurance Co. v. Smart, 204 Minn. 101.
Edberg v. Johnson, 149 Minn. 395.
Levant v. Burns, 200 Minn. 191.
Puerto Rico v. The Shell Company, 302 U. S. 253.
Holy Trinity Church v. United States, 143 U. S. 457.

The fact that as a result of this construction the phrase "weekly benefit amount" is used with different meanings in the same act (actual weekly benefit amount and adjusted weekly benefit amount) does not militate against this construction for it is not at all unusual that identical words or phrases are used in a different sense in the same statute. These words or phrases must be construed whenever possible so as to render them consistent with the purpose of the law. This was recognized by the court in Atlantic Cleaners & Dyers v. United States, 286 U. S. 427, 432, in which the court said:

> "* * * Most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section. * * * Where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed.

"It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance."

In Feder v. Goetz, C. C. A 2d Circ., 264 Fed. 619, the court, in construing the bankruptcy act, said:

"There is no rule of construction which prevents us from holding that the word 'intent' * * * means actual intent in the fourteenth section even though it were well established that constructive intent is sufficient in the third section."

In Helvering v. Stockholm, 293 U. S. 204, the court construed the word "obligation" differently as used in different places in the same act.

See also:

Louisville & N. R. Co. v. Gaines, G. C. N. D. Tenn., 3 Fed. 267.
State v. Knowles, 90 Md. 646, 45 Atl. 877.

It is therefore my opinion that an individual otherwise eligible to benefits is entitled to those benefits even though the amount paid him, when because of its increase to the next higher multiple of $1.00, is more than 1-30th of his total wage credits earned during his base period.

J. A. A. BURNQUIST,
Attorney General.

March 9, 1940. 885

99

Merit Rating—Employer whose former employee was disqualified when benefit year commenced—M40 §§ 4337-27, 4337-24.

Director Division of Employment and Security.

You inquire:

"Does your opinion dated October 18, 1939, also apply to disqualifications which occurred prior to April 22, 1939, the effective date of the amended act, but with respect to which the benefit year **commenced prior to April 22, 1939?**"

It must be kept in mind that for the purposes of determining the 1941 rate of tax you must look to the unemployment compensation act as amended by the 1939 legislative session. In my opinion of October 18, 1939, I stated:

"* * * Section 4337-24, subsection (C) (1), 1938 Supplement to Mason's Minnesota Statutes of 1927, as amended by Chapter 443, Laws 1939, Section 3, expressly provides that in determining the contribution rate of each employer for the year of 1941, and each year there-

after, the commission shall resort to the employment experience of the particular employer for the three immediately preceding completed calendar years. Under this section the computation of the employer's contribution for the year of 1941 and thereafter will, in certain cases, be based upon events which occurred prior to the effective date of the 1939 amendment. Section 4337-27, 1938 Supplement to Mason's Minnesota Statutes of 1927, as amended by Chapter 443, Laws 1939, Section 6, provides that in making the computation based upon the three years prior experience, the commission may not take into consideration benefits paid on wage credits earned for employment with an employer who would fall within the limits of this section for the purpose of determining that employer's future contribution rate under Section 4337-24, subsection C, supra."

On the basis of the above opinion, it is my opinion that the date upon which the benefit year of any employee commences is immaterial to the determination of an employer's 1941 tax.

KENT C. van den BERG,
Special Assistant Attorney General.

April 24, 1940. 885

100

Social Security Act—Municipalities not "employing units"—are excluded from the act—M38, §§ 4337-22 (6), 4337-29.

City Attorney, Minneapolis.

You have submitted the following inquiry to this office:

"Kindly advise whether or not the City of Minneapolis can apply for unemployment insurance under the State Social Security Act and, if so, whether they can apply for only part time employes or must it include the entire payroll of the City of Minneapolis."

Section 4337-22, Paragraph (6) of Subdivision H., Mason's 1938 Supplement as amended by Chapter 443, Laws 1939, provides that:

"The term 'employment' shall not include:

(a) Service performed in the employ of this State, or of any political subdivision thereof, or of any instrumentality of this State or its political subdivisions."

Section 4337-29, Paragraph (2) of Subdivision C., Mason's 1938 Supplement to Mason's Minnesota Statutes 1927 provides that:

"Any employing unit for which services that do not constitute employment as defined in this Act are performed, may file with the commission a written election that all such services performed by individuals in its employ in one or more distinct establishments or places of busi-

ness shall be deemed to constitute employment for all the purposes of this Act for not less than two calendar years."

The last quoted section refers to any "employing unit." The question is, therefore, whether a municipality comes within the definition of "employing unit" contained in the act.

Section 4337-22 (e) of Mason's 1938 Supplement to Mason's Minnesota Statutes 1927 reads as follows:

> " 'Employing Unit' means any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company, or corporation, whether domestic or foreign, or the receiver, trustee or successor thereof, or the legal representative of a deceased person which has or subsequent to January 1, 1936, had in its employ one or more individuals performing services for it. * * *"

The phrase "any individual or type of organization" is, under the rules of statutory construction, limited and restricted by the more specific language contained in the definition. The use of the words "corporation, whether domestic or foreign" would indicate an intention to include private corporations and to exclude municipal corporations. If the legislature had intended to include municipalities or other state political subdivisions within the definition, language similar to that used in describing such governmental agencies in the defining of employment as hereinabove quoted would undoubtedly have been chosen.

For the reasons stated, municipal corporations are, in my opinion, not included in the terms defining an "employing unit," and the act does not apply to the City of Minneapolis.

In view of the aforesaid it is unnecessary to discuss other reasons which might preclude the application of the act to municipalities or other political subdivisions, such as the lack of statutory authority to incur liability for taxes and penalties imposed by the act, possible conflicts arising under civil service enactments and other legal complications as to part-time and full-time employees suggested in your inquiry.

J. A. A. BURNQUIST,
Attorney General.

October 6, 1939. 885

101

Rates—Employer whose former employe was disqualified under law, where the overt act giving rise to a disqualification occurred prior to April 23, 1939—M40, §§ 4337-27, 4337-24.

Director Division of Employment and Security.

You state:

"Under date of September 25, 1939, you rendered an opinion addressed to me relative to the disqualification provisions contained in **Section 4337-27, A., B.,** and C. as amended by Chapter 443, Laws of 1939, stating that in your opinion this Division cannot legally charge the account of the employer whose former employe was disqualified under subsection A., B., or C of Section 4337-27 because of the language contained in A. and B. reading as follows:

'Benefits paid on wage credits earned for employment with such employer shall not be considered in determining any individual employer's future contribution rate under 1938 Supplement to Mason's Minnesota Statutes of 1927, Section 4337-24, subsection C as amended by this Act.' "

You ask:

"* * * Does the above quoted provision of the law and your opinion rendered pursuant thereto apply to cases where the overt act giving rise to the disqualification occurred prior to April 22, 1939, the effective date of the amended act, but the benefit year commences after such date?"

In my opinion, the above quoted principle of law applies in each and all cases involving the determination of an employer's future contribution rate or merit rating regardless of the date on which the overt act giving rise to the disqualification occurred. Section 4337-24, subsection (C) (1), **1938 Supplement** to Mason's Minnesota Statutes of 1927, as amended by Chapter 443, Laws 1939, Section 3, expressly provides that in determining the contribution rate of each employer for the year of 1941, and each year thereafter, the commission shall resort to the employment experience of the particular employer for the three immediately preceding completed calendar years. Under this section the computation of the employer's contribution for the year of 1941 and thereafter will, in certain cases, be based upon events which occurred prior to the effective date of the 1939 amendment. **Section 4337-27, 1938** Supplement to Mason's Minnesota Statutes of 1927, as amended by Chapter 443, Laws 1939, Section 6, provides that in making the computation based upon the three years prior experience, the commission may not take into consideration benefits paid on wage credits earned for employment with an employer who would fall within the limits of this section for the purpose of determining that employer's future contribution rate under Section 4337-24, subsection C, supra.

Section 13 of Chapter 443, Laws 1939, which provides:

"This act shall take effect and be in force from and after its passage, unless otherwise specifically provided therein, but shall not affect the rights to benefits of any individual for whom a benefit year has been established in accordance with provisions of law in force prior to the effective date of this act, and until the expiration of said benefit year so established, the rights to benefits of any such individual shall be in accordance with the provisions of law in force at the time of commencement of such benefit year, unless otherwise specifically provided therein; provided, however, that waiting period credits established within a period commencing 13 weeks immediately preceding the effec-

tive date of this act and ending two weeks after such effective date, shall have like effect as if established within the first two weeks immediately following such effective date."

does not militate against the above construction. The new tax based upon the merit rating does not go into effect until 1941. In computing that tax the 1939 amendment expressly provides that events which in some cases will have occurred prior to April 22nd shall be used as a basis upon which the future contribution is to be computed. The act also expressly provides that of those past events which may occur within the experience of an employer the commission may not consider benefits paid or wage credits coming within the provisions of Section 4337-27. It would, therefore, seem that the only possible construction which might be placed upon this act is that the date of the overt act giving rise to the disqualification is not material for the purposes of determining the applicability of those provisions of the 1939 amendment herein mentioned.

KENT C. van den BERG,
Special Assistant Attorney General.

October 18, 1939. 885

102

Rates—Future rates based on benefit experience for years 1941, et seq., —Base period—Definition of—M40, §§ 4337-24c (2), 4337-22R.

Director Division of Employment and Security.

You inquire:

"In connection with the matter of determining employer contribution rates under the employer experience rating provisions of the Minnesota Unemployment Compensation Law, Section 4337-24 C. (2), effective January 1, 1941, the question has arisen: Should the beneficiary wages for compensation experience for each of the calendar years immediately preceding 1941 be determined in accordance with the definition of 'base period' now contained in the unemployment compensation law, adopted April 22, 1939, Section 4337-22 R."

In determining the rate of contribution for 1941, you employ the formulae prescribed in Section 4337-24 C, Mason's 1938 Supplement, as amended by Laws 1939, Chapter 443, Section 3. It is, therefore, my opinion that the terms of the formulae therein prescribed should be defined by Section 4337-22 R, Mason's 1938 Supplement, as amended by Laws 1939, Chapter 443, Section 1, rather than by the definitions contained in the earlier law.

KENT C. van den BERG,
Special Assistant Attorney General.

November 19, 1940. 885

103

Reemployment—Necessary to remove disqualification—Employer's account not to be charged with benefits paid where individual separated from employment, individual subsequently reemployed and then becomes unemployed—Employment is limited by definition—M40, §§ 4337-27, 4337-22.

Director Division of Employment and Security.

You inquire:

> "Can I, as Director of the Division of Employment and Security, adopt a rule under Section 4337-30 C prescribing that an unemployed individual in order to remove the disqualification must have been employed in subsequent employment for at least a period of one week and then unemployed from such subsequent employment through no fault of his own to entitle him to benefits?"

Section 4337-27, Mason's 1938 Supplement to Mason's 1927 Statutes, as amended by Section 6, Chapter 443, Laws of 1939, provides the only limitations under which an individual may be disqualified. If you were to adopt the above regulation, you would in effect be adding a further limitation, namely: that any individual who immediately prior to his most recent employment was unemployed due to circumstances disqualifying him for benefits, shall be disqualified from benefits unless his most recent employment shall have continued for a duration of one week. So far as the present provisions of the statute refer to "most recent employment" only, such a regulation would constitute a change in the substantive law. The legislature is the only agency of the state which may effect such a change.

You may, however, inquire into whether an individual's alleged most recent employment was in fact an actual employment or whether it was a mere device to circumvent the law pertaining to disqualifications. This question would arise after a claim for benefits had been filed under Section 4337-28, Mason's 1938 Supplement to Mason's 1927 Statutes, as amended by Section 7, Chapter 443, Laws of 1939. Subsection F of Section 4337-28 provides:

> "The manner in which disputed claims shall be presented, the reports thereon required from the claimant and from employers, and the conduct of hearings and appeals shall be in accordance with the regulations prescribed by the commission for determining the rights of the parties, whether or not such regulations conform to common law or statutory rules of evidence and other technical rules of procedure. * * *"

Under the authority of this section, it is my opinion that you could adopt a regulation to the effect that reemployment for less than a specified reasonable period by one who immediately prior to that reemployment was disqualified for benefits, shall be presumed to be a sham employment for the purpose of circumventing the disqualification provisions of the law, and shall not operate to reinstate the employe in his right to benefits un-

less he produces some material evidence of his good faith and of the actuality of his employment. Whether the minimum period of one week which you suggest is reasonable or not is a question of fact for your determination. Such regulation would give an opportunity for dispute in each case wherein the period of reemployment was less than the specified minimum period.

You then inquire whether the account of the employer from whose employment an individual has been separated under circumstances set forth in subdivisions A, B or C of Section 4337-27, should be charged with the benefits paid in cases where the individual has subsequently been employed and then unemployed through no fault of his own.

Both subsections A and B of Section 4337-27, as amended by Section 6, Chapter 443, Laws of 1939, contain the following provision:

> "* * * Benefits paid on wage credits earned for employment with such employer shall not be considered in determining any individual employer's future contribution rate under 1938 Supplement to Mason's Minnesota Statutes of 1927, Section 4337-24, subsection C as amended by this Act."

In my opinion you may not so charge the account of the employer whose former employee was disqualified under subsection A or B.

The above quoted provision is not found in subsection C of the above section. However, it is my opinion that the same rule will apply. The intent and purpose of the legislature in passing Section 4337-24, C, Mason's 1938 Supplement to Mason's 1927 Statutes, as amended by Section 3 of Chapter 443, Laws of 1939, which section provides for merit rating, was to encourage the stabilization of employment and to more equitably allocate the costs of unemployment compensation among employers. Under the merit rating provisions, the employer who avoids layoffs pays a proportionately less tax than the employer who has a large turnover in his employment. To permit a lay-off by a subsequent employer to injure the merit rating of the former employer would, in my opinion, defeat the legislative intent and purpose as evidenced by the merit rating provision of this law.

You further inquire:

> "Will the disqualification imposed by Section 4337-27 A, B, or C be removed by subsequent services performed in employment in a foreign state but definitely not 'employment' within the meaning of Section 4337-22 H (2)?"

Section 4337-22, 1938 Supplement to Mason's 1927 Statutes, as amended by Section 1, Chapter 443, Laws 1939, provides that the definitions therein set forth must be used "unless the context clearly requires otherwise." If an individual's most recent employment ceased because of circumstances which would not disqualify him under Section 4337-27, then that most recent employment will remove his earlier disqualification. I can find nothing

in the context of Section 4337-27 which clearly requires a definition of employment different from that set out in Section 4337-22. Consequently, it is my opinion that your last inquiry should be answered in the negative.

KENT C. van den BERG,
Special Assistant Attorney General.

September 25, 1939. 885

104

Unlawful Acts—Subject to criminal prosecution—L39, C440 §§ 11, 13. M27 §§ 9922, 10047.

Ramsey County Attorney.

You ask:

(1) Whether the matters which are herinafter stated constitute such unlawful acts, and

(2) If so, are the offender or offenders subject to criminal prosecution?

(3) "Is it unlawful and therefore a violation of the criminal laws for any person, officer or member of any labor organization to stop any motor vehicle truck upon any of the public roads, streets or highways of this state, or upon the premises of any business establishment, for the purpose of compelling or attempting to compel the owner or employee operator thereof to join a labor organization against his will, under threat of preventing such owner or employee operator from either proceeding further with his truck, loading or unloading the same at any place or business establishment within the state unless such owner or employee operator consents to and does join such labor organization and to pay a large substantial initiation fee and monthly payments thereafter without regard:

(a) To whether such owner or employee operator is a resident of this state and regularly or casually engaged.

(b) To whether such owner or employee is a resident of the state, residing outside of the Metropolitan centers and regularly or casually engaged.

(c) To whether such owner or employee is a resident of the state, residing within the Metropolitan centers and regularly or casually engaged."

The pertinent sections of the Labor Relations Act are the following:

"Section 11. It shall be an unfair labor practice:

* * *

"(f) For any person to interfere in any manner with the operation of a vehicle or the operator thereof when neither the owner nor operator of said vehicle is at said time a party to a strike,

"(g) For any employe, labor organization or officer, agent or member thereof to compel or attempt to compel any person to join or to refrain from joining any labor organization or any strike against his will or any threatened or actual unlawful interference with his person, immediate family or physical property, or to assault or unlawfully threaten any such person while in pursuit of lawful employment.

"(h) The violation of subsections (b), (c), (d), (e), (f), and (g) of this section are hereby declared to be unlawful acts.

* * *

"Sec. 13. It shall be unlawful for any person at any time to interfere with the free and uninterrupted use of public roads, streets, highways or methods of transportation or conveyance or to wrongfully obstruct ingress to and egress from any place of business or employment."

Before entering upon a discussion of the question involved, we wish to point out that in your question 3 there are two separate and distinct situations set forth. The first involves actions which take place upon "any of the public roads, streets or highways of the state." The second involves actions which may take place upon the premises of any business establishment. It will be necessary to deal with these separately.

We shall first discuss the questions which have been raised in the light of the provisions of Section 11, paragraph (f). If "neither the owner nor operator of said vehicle is at said time a party to a strike," then it is an unlawful act to interfere in any manner with the operation of a vehicle or the operator thereof whether it be upon any of the public streets or highways or upon the premises of any business establishment or elsewhere. If there is interference within the meaning of said paragraph (f), then under the provisions of paragraph (h) such action is unlawful, and a violation would be a misdemeanor within the meaning of Mason's Minnesota Statutes of 1927, Section 10047. The punishment for the commission of such an act is prescribed by Section 9922 thereof. Whether the stopping of a motor vehicle truck under any given set of circumstances is an interference within the meaning of said paragraph (f) is a question of fact which must be determined in each individual case, first by the prosecutor when he determines if a complaint should be issued, and second by the court or jury in determining if an offense has been committed. It is not a question for the determination of which this office can lay down any general rule other than that indicated above.

Your attention is called also to the language contained in Section 11, paragraph (g), which is set out in full hereinabove. This paragraph is of general application and this is so irrespective of whether the conduct complained of has anything to do with interference with the operation of the motor vehicle. Whether the conduct referred to in your request for an opinion constitutes an offense under said paragraph (g) is a question of fact in each individual case which must be decided in the first instance by the prosecutor before he issues a complaint and then, if the complaint is issued, by either the court or jury in determining the guilt or innocence

of the accused. If the circumstances in any individual case are such as to constitute a violation of paragraph (g) then a misdemeanor will have been committed which is punishable under Sections 9922 and 10047 above referred to.

Referring now to Section 13 of the Minnesota Labor Relations Act, we wish to point out that the language in this section is restricted to certain localities in its operation. It also defines two distinct kinds of offenses. Interference with the free and uninterrupted use of public roads, streets, highways or methods of transportation or conveyance constitutes one class of offenses. Wrongfully obstructing ingress to and egress from any place of business or employment constitutes another class. In the facts submitted you refer to the loading or unloading at the place or business establishment. If this interference is upon the premises of the place or business establishment, then it will not come within the provisions of said Section 13 unless it obstructs ingress to or egress from the place of business or employment. It is probably unnecessary to point out that a person who is upon the premises of any place or business establishment in disregard of the rights of the owner is a trespasser and can be dealt with under other sections of law if he is committing an offense thereunder. In considering Section 13 we must again point out, as we have in discussing Section 11, that whether or not the stopping is an interference is a question of fact which must be determined first by the prosecutor when he decides if a complaint is to be issued and then by the court or jury in determining the guilt or innocence of the accused. These are purely questions of fact upon which this office cannot pass.

We have quoted above paragraphs (a), (b) and (c) in which you enumerate different circumstances. In our opinion it makes no difference where the owner or employe operator resides or whether he is regularly or casually engaged in operating a motor vehicle.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

August 11, 1939. 270d-7

105

Workmen's Compensation—Insurance required—Foreign or alien employes —M38, § 4272-2.

Industrial Commission of Minnesota.

Relative to a contractor working on a PWA project at Sunnyrest Sanatorium at Crookston, you say:

> "The question with reference to which your opinion is required is whether or not a North Dakota employer who is insured by the North Dakota Workmen's Compensation Fund can hire men and perform work

in the State of Minnesota without additional coverage. You will note that the North Dakota Workmen's Compensation Bureau blank dated May 1st, hereinbefore referred to, gives the employer the right to perform work in the State of Minnesota because of the fact that he has paid additional money into the North Dakota Workmen's Compensation Fund for this purpose and that additional coverage is not necessary.

"The Industrial Commission has heretofore recognized the right of outside employers to perform work in Minnesota with employes who were hired in the state in which the business was localized without securing Minnesota coverage. However, in cases where the employer desires to hire men in Minnesota and perform work in this state, the writer is of the opinion that it is necessary for the employer in such case to secure compensation coverage with an insurer licensed to do business in the State of Minnesota.

"In this case your attention is called to Section 4289 of the Minnesota Workmen's Compensation Law which provides in part as follows:

"If the employer shall insure to his employes the payment of the compensation provided by this act in a corporation or association authorized to do business in the state of Minnesota, and approved by the insurance commissioner of the State of Minnesota, * * * then, and in such case, any proceedings brought by an injured employe or his dependents shall be brought directly against the insurer, and the employer or insured shall be released from any further liability."

The State of North Dakota, while it carries compensation insurance, is not licensed to carry workmen's compensation insurance in the State of Minnesota, and not being authorized to insure such liability in this state, the employes hired in the state to work here would not be protected by the workmen's compensation insurance under the laws of North Dakota. Such employes could not acquire jurisdiction in this state to sue for compensation in North Dakota.

Chapter 287, Laws of 1935, North Dakota, provides:

"The Workmen's Compensation Bureau is hereby authorized and directed to carry compensation insurance on all employees now engaged or who may hereafter be engaged in the State of North Dakota Recovery Work Projects where premiums for such insurance is paid from funds furnished by the Federal Government, and to calculate and determine the rates for such compensation insurance on a statewide experience basis."

The employes of a North Dakota contractor and residents of that state doing work in Minnesota, may be covered by the North Dakota laws if the employer has complied with the laws of that state. We attach hereto a copy of Chapter 286, Laws of 1935, North Dakota, of which part of Section 4, subsection 10-i provides as follows:

"* * * but no compensation shall be paid on account of injuries occurring outside of the State of North Dakota, nor because of death

due to an injury occurring outside of the State of North Dakota, unless such employee is an appointive peace officer of any county in this state, receiving injury or meeting with death outside of the State of North Dakota in the course of his employment, or unless the employer and the Bureau shall have previously contracted for insurance protection for employees while working outside of the State in the employment in which the injury occurred. Providing that no such contract, with the exception as herein stated, shall be issued to any employer unless his principal plant and main or general office is located in North Dakota, and at least two-thirds of whose entire payroll is used or expended for work performed in the State of North Dakota, and appeals relative to the injuries received under such insurance outside of the State of North Dakota shall be triable in the District Court of Burleigh County, North Dakota."

The certificate of premium payment, * * * No. 942587, dated May 1, 1939, by North Dakota Workmen's Compensation Bureau, to cover risk 3060, Erection and Installation of Sheet Metal, and 3036 extra territory—State of Minnesota, issued to Cecil C. Chappell, Chappell Sheet Metal Works, Valley City, North Dakota, * * *

does not comply with the requirements of the laws of Minnesota. In our opinion, every employer must insure payment of compensation with some insurance carrier authorized to insure such liability in this state, or obtain an order from the Industrial Commission exempting and permitting self-insurance as set forth in Section 4272-2, et seq., of 1938 Supplement to Mason's Minnesota Statutes for 1927.

VICTOR H. GRAN,
Assistant Attorney General.

June 21, 1939. 523a

MUNICIPALITIES

106

Agricultural Societies—Fairs—Policing grounds—Conducting dances and maintaining a skating rink—M27 § 10161, M40 § 7885.

Winona County Attorney.

You inquire:

"Does a Fair Association have authority to police own grounds?"

See section 7885, Mason's 1940 Minnesota Supplement, giving such association authority so to do.

However, the jurisdiction of the society over the control of the fairground is not exclusive. The sheriff, or any other duly authorized peace officer, has the same rights and duties to see that the law is obeyed on the fairground as in any other instance. Therefore, it is very advisable to work

in conjunction with the sheriff of the county as well as the county attorney. I would advise that as far as possible the services of the sheriff be used in such cases, as he is familiar with criminal law and procedure.

In regard to the licensing of the roller skating rink, this depends upon the city ordinance in question, of which we have no knowledge.

You further inquire whether the fair association can conduct a dance and maintain a skating rink in their own buildings on the fairground, which fairground is within the city limits of St. Charles, without obtaining a license from the city.

Section 10161, Mason's Minnesota Statutes of 1927, states:

> "A public dancing place, * * * 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. A public dance, * * *, shall be taken to mean any dance wherein the public may participate by payment, either directly or indirectly, of an admission fee or price for dancing * * * and shall include any manner of holding a dance which may be participated in by the public through the payment of money, directly or indirectly. * * *"

Consequently, it will be necessary for the association to secure a dance permit under such statute as there are no exceptions in the definition, except under Section 10163, Mason's Minnesota Statutes of 1927, which states that where the public dancing place is owned by the municipality and such dance is given under the supervision of public authorities of such municipality no permit is necessary. The public dancing place to be operated on the fairground is not owned by the municipality and the dance is not given or held under the supervision of the public authorities of the municipality.

HAYES DANSINGBURG,
Assistant Attorney General.

July 15, 1940. 772c-4

BIDS

107

Election ballots and supplies—Printing of—Awarding contracts for—M40, §§ 991, 993-1.

Lincoln County Attorney.

You ask whether or not election supplies—the estimated cost of which will exceed $500.00—may be purchased by a county without first advertising for bids, and in that connection you refer to Laws 1939, Chapters 5 and

246. (Chapter 5 is Section 991 and Chapter 246 is Section 993-1, the 1940 Supplement.)

Chapter 5 applies to counties of less than 75,000 inhabitants; Chapter 246 to those of more than 75,000 but less than 225,000. The population of Lincoln county, according to the 1930 census, is 11,303. Figures for the 1940 census have not been officially published. Consequently, Chapter 5 is applicable. It amends Mason's Minnesota Statutes of 1927, Section 991, and provides that in counties of the population specified:

> "* * * no contract for work or labor, or for the purchase of **furniture, fixtures, or other property,** or for the construction or repair of roads, bridges, or buildings, the estimated cost or value of which shall exceed five hundred dollars, shall be made by the county board without first advertising for bids or proposals in some newspaper of the county. * * *"

Chapter 5 first appeared on our statute books as Laws 1903, Chapter 186, which applied to counties of less than 75,000 and prohibited the letting of contracts, in excess of $500.00,

> "* * * for goods, wares, merchandise or materials or furniture and fixtures, or any contract for any work or labor to be performed in and about the construction, alteration or repair of any county building. * * *"

without first advertising for bids.

Chapter 186 was carried into the Revised Laws 1905 as Section 618, and the phraseology was changed to read contracts for,

> "* * * work or labor, or for the purchase of furniture, fixtures or other property, or for the construction or repair of roads, bridges or buildings, * * *."

This was carried into General Statutes of 1913 as Section 1091, and into Mason's Minnesota Statutes of 1927 as Section 991.

Section 991 was amended by Laws 1933, Chapter 69, so as to change the classification of counties to which it applied.

Chapter 69 was amended by Laws 1939, Chapter 5, so as to make it applicable to counties of less than 75,000.

The expression, "furniture, fixtures, and other property," has been in the code since 1905.

Thus the question presented resolves itself into whether or not ballots and election supplies which a county auditor is required to procure are "furniture, fixtures, or other property," within the meaning of Section 991, as amended. Under the rule of ejusdem generis we think not.

There is no other statute governing the situation. Section 662, Mason's Minnesota Statutes of 1927, is not applicable. It provides that the county

board shall annually let by contract the publication of its official proceedings.

This department in an opinion rendered June 3, 1930, construing Section 662, said:

> "It should be borne in mind that where the statute provides that a certain named county officer should provide for the publication of a notice, the county board would have no right to dictate to him in what paper the publication should be made."

The opinion expressly held that publication of the delinquent tax list was left to the county treasurer and the county board was without power to contract for such publication; also that publishing notice of exipration of time for redemption from tax sales could not be included in a contract with the county board, and further that publishing notices in connection with the division of land for taxation purposes was a matter for the auditor, and not for the board.

The opinion closed, "When these various notices are excluded there still remains a considerable quantity of official printing under the direction of the county board and we believe that by proper advertisement for bids a valid contract could be made for the doing of this work during the current year."

It follows that for our purposes, Section 662 may be disregarded.

Section 205.76, Election Laws, (601-6 (7) p, the 1940 Supplement) provides:

> "The auditor of each county shall have printed a sufficient number of separate primary election ballots, varied as may be necessary for the several districts and wards. * * * Before any printer is awarded any contract for printing such ballots he shall be required to furnish a good and sufficient bond in such sum as the official awarding such contract shall designate, which shall not be less than $1,000, nor more than $5,000, conditioned that he will print such ballots in conformity with the law and such instructions. * * *"

Clearly it is contemplated that a contract shall be let for the printing of the ballots to be used at the primary election. However, there is no requirement that such contracts be publicly let after an advertisement for bids.

In the act relating to counties of more than 75,000 inhabitants (Section 993-1, the 1940 Supplement) it is provided that, "no contract for the purchase of **supplies, materials or equipment** in excess of $500 shall be made without first advertising for bids."

It is to be observed that this phraseology differs from that used in Chapter 5, which refers to contract "for the purchase of furniture, fixtures or other property." Election ballots and supplies might be deemed, "supplies and materials" within the meaning of Section 993-1, supra. They

could not be deemed "furniture, fixtures or other property" within the meaning of Section 991, supra.

There are many practical reasons why a county auditor should not be required to solicit bids publicly before awarding a contract for printing ballots and election supplies. Mistakes in the preparation of the ballot might be fatal. It is more important that the ballots be printed accurately and speedily than that they be printed by the lowest bidder. It is quite likely the legislature gave the auditor considerable latitude in this regard for reasons such as this.

You are, therefore, advised that the county auditor of Lincoln county, a county of less than 75,000 inhabitants, is not required to advertise for bids for printing the primary election ballots and other election supplies, but that he must require the printer to whom the contract is awarded to give a bond as provided by Section 601-6 (7) p, the 1940 Supplement.

ROLLIN L. SMITH,
Special Assistant Attorney General.

June 12, 1940. 707a-7

108

Electric Energy—Necessity for advertising in purchase of—L1885, C145, Sec. 51; M1927, 1199.

Hallock Village Attorney.

You ask:

> "Is the Council of the Village of Hallock required to advertise for bids before executing * * * a contract for electric energy?"

It appears that the energy is to be used for the village pumping station and for lighting the village streets. You state that Hallock is organized under the 1885 village laws. The only provision of the 1885 village laws of which I have knowledge which requires any kind of advertising for bids is that contained in Laws 1885, Chapter 145, Section 51, which states in part that:

> "All contracts for village improvements, except expenditures of road and poll tax, shall be let to the lowest responsible bidder, after public notice of time and place of receiving bids therefor."

In my opinion the purchase of electricity is a purchase of a commodity, and not a contract for village improvements within the meaning of Section 51. No advertising for bids is required. I may say, in passing, that villages organized under the 1905 act must comply with the provisions of Mason's Minnesota Statutes of 1927, Section 1199, which requires that all contracts involving an expenditure of $100.00 or more must be let to the

lowest responsible bidder after public notice of the time and place of receiving bids. See Casey vs. Telephone Co., 202 Minn. 510.

You also ask:

> "Is it necessary for the village of Hallock to advertise for filing of bids in connection with the granting of a franchise to an electric light and power company to furnish electric energy to the village and to the inhabitants of the village?"

It appears that the franchise is not exclusive and does not exceed a period of fifteen years.

This question is also answered in the negative. I can find no authority requiring advertising for bids as a condition precedent to the granting of a franchise by the village.

EDWARD J. DEVITT,
Assistant Attorney General.

December 3, 1940. 707a-15

109

Highway projects—Tying of bids on separate projects as one unit.

McLeod County Attorney.

You state that the county board advertised for bids on a considerable number of road projects. The advertisement contained no provisions relative to tie bids. At the time of the lettings, some of the bids were submitted purporting to tie up two or three projects. The board disregarded the ties and accepted the lowest bid on each project. By doing so, two projects out of the three submitted by a single contractor whose purported tie bids on three jobs were accepted, the two being the lowest bids, and the one rejected not the lowest bid on that project.

You inquire as to whether the board acted in accordance with their authority in so doing.

It appears from the facts as stated in your letter that the board advertised for bids on a number of road projects and considered each project as a separate or particular unit of work. That at the opening of the bids it was discovered that some bids were tied on various units and I take the facts to mean that two projects out of three submitted by one contractor were taken from a tie bid on the three, which two were the lowest bids, and rejected the third of the tie bids.

It would appear that the bidder on the combined projects as one unit of work was not complying with the advertisement for bids in that he did not have a separate bid in for each of the several projects and that to

accept the bids two of the three bids that were tied together on the three projects would be to permit the bidder to untie his bids.

It is our opinion that after the bids were opened said bidder should not be permitted to change the terms and conditions of his bid as originally submitted and that the county board could only accept the bid as made by him which, as previously stated, appeared to be a tie bid for the three projects as one unit. To untie the bids would amount to a change in the terms thereof. See McQuillin on Municipal Corporations, Vol. 3, Section 1332; City of Chicago vs. Mohr, 74 N. E. 1056, State vs. Board of Commissioners, 11 Neb. 484; 9 N. W. 691; Fairbanks, Morse and Company vs. City of North Bend, 94 N. W. 537.

It further is our opinion that to permit the acceptance of a tie bid is not giving an equal chance to all bidders, as they were not all bidding on the same thing. If the board was to accept tie bids, that should be stated in the proposal calling for bids and give each bidder an opportunity to bid on the same conditions.

HAYES DANSINGBURG,
Assistant Attorney General.

June 22, 1940. 707a-7

110

Legal Notices—Personal property tax list—Publication of—Rate of compensation for—M27 § 2073-1.

Stearns County Attorney.

You inquire as to whether it is necessary for the county treasurer to ask for bids for the publication of the personal property tax list and to award the printing to the printer submitting the lowest bid, under Section 2073-1, Mason's Minnesota Statutes of 1927. Said Section 2073-1 provides as follows:

> "The county treasurer of each county in this state which now has or hereafter may have, less than 150,000 inhabitants, shall cause to be published once between January 1st and February 1st of each year in a legal newspaper published in the county that portion of the current personal property tax list which pertains to personal property taxes in cities, villages, towns or assessment districts nearest the place where said newspaper is published, so far as practicable, the portion of said list to be published in the respective newspaper to be fixed and designated by the county treasurer. Provided further, that whenever and wherever any city or village is situated in more than one county, that portion of the current personal property tax list which pertains to personal property within said city or village, shall be published, so far as practicable, in any legal newspaper published within the cor-

porate limits of said city or village, and any such publication shall be of the same force and effect as if published in any legal newspaper within the county."

This law gives sole power to the county treasurer to designate the newspaper or newspapers in which such list shall be published, the only restriction being the necessity of apportioning the list where there are several newspapers in different localities. The county board has nothing to do with the designation of a newspaper or newspapers for this purpose and has no control over the expenditure made therefor so long as the rate therefor does not exceed that fixed by law. The county board cannot, by undertaking to call for bids and designating newspapers for the publication of the personal property tax list, divest the county treasurer of the authority that the statute gives him.

The fee to be paid for legal publications is prescribed by the legislature and the statute makes the contract with respect to the rate of compensation effective in the absence of an express contract therefor.

We know of nothing in the law requiring the county treasurer to call for bids for the publication of the personal property tax list.

HAYES DANSINGBURG,
Assistant Attorney General.

December 29, 1939. 421a-10

111

Parking Meters—Necessity for advertising under city charter.

City Attorney, Stillwater.

You ask as to the necessity of the city council advertising for bids in the purchase of parking meters.

A nationally known parking meter company has made a proposal to the city contemplating the installation of parking meters in Stillwater without any cost or obligation to the city except that when the meters have taken in a sum of money, 60% of which is sufficient to pay the agreed purchase price of the meters, the 60% is to be turned over to the company and title to the machines vested in the city of Stillwater. During such time, 40% of the income from the parking meters is the sole profit of the city. All cost of installation of the machines is to be borne by the seller, the city having the right at any time before said machines are paid for to order them taken from the streets. In such event the city still retains the 40% of the income from the machines from date of installation until time of removal.

Under the plan it would be the responsibility of the city to prohibit overtime parking by ordinance or otherwise. The amount to be paid as purchase price of the machines is much in excess of (the charter limitation of) $500.00. The city does not take any money from its own treasury

to pay for the machines, this being done solely from the income from the machines.

Your charter, Article XIII, Section 272, provides that all contracts for commodities, or services to be furnished to or performed for the city, involving an expenditure of more than $500.00, must be made according to a procedure set up in the charter. The words "commodities" and "service" as used in Section 272 are defined as including all labor, materials or other property, and all lighting and other service, and all local or public improvements. The word "contract" as used in Section 272 is to be construed as including every agreement, in writing or otherwise, by which any commodities, labor or service are to be furnished to or done for the city, and every transaction whereby an expenditure is made or incurred on the part of the city.

Sections 273, 274, 275 and 276 set up certain procedures which are to be followed in the letting of contracts. Section 277 provides, in part, that after plans, specifications and the proposed contract have been filed, or when the council has determined to proceed with any improvement, and a public hearing has been had:

> "The Council shall direct the City Clerk to advertise for bids for doing or furnishing said commodities, labor or service in accordance with such contract, plans or specifications. Such advertisement shall be published in the official paper and in such other manner as the Council may direct. All advertisements for bids shall clearly state that such bids are to be received and opened and read, at a public meeting of the Council, in the Council Chamber, upon a certain day and hour, and in said advertisements there shall be reserved the right of the City to reject any and all bids."

In subsequent sections of Article XIII, Sections 278 to 292, specific procedure is set up for the acceptance of bids, the execution of contracts, conditions thereof, bonds and other pertinent matters. Section 292 provides:

> "Any contract made in violation of the provisions of this article shall be absolutely void, and any money paid on account of such contract by the City, may be recovered by the City, without restitution of the property or the benefits received or obtained by the City thereunder."

As you indicate in your letter, the charter framers perhaps did not contemplate the kind of contract now sought to be made when they drafted Article XIII of your charter. However that may be, the words of the charter are specific in including all contracts for commodities or services to be furnished or performed for the city. No exception is made for cases such as this where the entire purchase price is paid for from income from the commodity purchased. I do not think there is any doubt but that the contemplated purchase is a purchase of commodities within the meaning of the charter definition, and that your city must comply with the provisions of Article XIII in the purchase thereof.

EDWARD J. DEVITT,
Assistant Attorney General.

November 19, 1940. 707a-4

112

Rental of equipment—Court House improvements—M27, § 658—M40, § 991.

Winona County Attorney.

Your first question states that the county has properly advertised for the submission of bids relative to the making of certain improvements to the court house; that the bids were opened at the time and place specified in the advertisement; that a vote was taken concerning the bids and the lowest bid received two votes, two board members present not voting and the fifth member of the board being absent. You further state the bids were not rejected and inquire if the board can consider these bids at its next regular meeting without advertising.

Section 658, Mason's Minnesota Statutes of 1927, states:

> "* * * A majority shall constitute a quorum, and no business shall be done unless voted for by a majority of the whole board, * * *."

It is apparent that a majority of the board did not vote on this proposition, and hence a motion to accept the bid did not carry.

It would seem that the county board has a reasonable time within which to accept these bids without readvertising. What is a reasonable time is a question of fact, upon which this office cannot pass. If the board has reason to believe that if new bids were called for a lower price would result due to some intervening cause or factor since the original bids were called for, they should reject the previous bids and readvertise. In the absence of such facts it is the opinion of this office that in this case it is not necessary to readvertise for bids.

Your second question assumes that the county board has rented a rock crusher for one month for $450 and that the freight on said rock crusher is $100. You then inquire if such rental is in violation of Section 991 of Mason's 1940 Minnesota Supplement.

It is our opinion that the cost of the rental of the rock crusher is $550, $450 thereof being for rental and $100 thereof being the expense of shipping, which is still a part of the rental agreement, and under which agreement the lessor is to furnish the crusher at the point it is to be placed in operation. Consequently we believe bids should be called for to comply with Section 991 of Mason's 1940 Minnesota Supplement.

HAYES DANSINGBURG,
Assistant Attorney General.

May 6, 1940. 707a-7

CONTRACTS

113

Officers—Interest in—Charter provisions—M27 § 10305.

City Attorney, Le Sueur.

You make reference to the case of Mares v. Janutka, 196 Minn. 87, 264 N. W. 222. You state further that Le Sueur is a fourth class city operating under the provisions of Chapter 45 of the Special Laws of 1891 and that the charter of your city provides that officers should not be interested in contracts with the city. You then ask:

> "Does the case of Mares v. Janutka hold that in spite of charter prohibition city officers can be interested in contracts with the city?"

Your question is answered in the negative. Regardless of the decision, I believe that your charter provisions, as well as the provisions of Section 10305 of Mason's Minnesota Statutes of 1927 which affixes criminal liability for the making of such contracts, are just as effective now as before. By no means does the Mares case authorize city officers to enter into merchandise contracts with the city and recover payment thereon. The case merely brings municipal corporations into the same classification as private corporations with reference to their liability for paying the reasonable value for merchandise used by such municipal corporation. I believe the court takes cognizance of the argument you present at the bottom of page 91 (in the State report of the case), and the court says:

> "Plaintiffs' argument to the effect that permitting recovery here is a roundabout way of upholding an invalid contract, thereby enabling a municipality to do indirectly that which it cannot do directly, is forceful. But that very argument was fully considered in First Nat. Bank v. Village of Goodhue, 120 Minn. 362, 366, 139 N. W. 599, 601, 43 L. R. A. (N. S.) 84, where this court said:
>
> " 'We are unable to assign a good reason for differentiating between the private and the municipal corporations as respects the rule of justice and common honesty. The private corporation in a case of this kind would not be heard to dispute its liability, nor should a public corporation be permitted to do so where, as in the case at bar, there is no question of fraud or collusion, and no concerted purpose between the village officers and plaintiff intentionally to evade or violate the law.' "

The matter is quite clear after reading the summation of the different citations contained on page 92 of the Minnesota Report.

I am therefore definitely of the opinion that Mares v. Janutka does not authorize a city officer to sell merchandise to the city. The provisions of your charter and the criminal statute (Sec. 10305) are still effective.

EDWARD J. DEVITT,
Assistant Attorney General.

May 18, 1939. 90e-5

114

Officers—Interest in Depositories—County Treasurer, director of bank wherein county funds are deposited—M27, §§ 778, 990, and 10305.

Wright County Attorney.

You ask for an opinion on the following question:

"Can a county treasurer act as director of a National Bank in his county wherein the county deposits funds?"

We answer this in the affirmative for the following reasons. The county treasurer has no voice in designating depositories. This is done by the county board of audit, conisting of the chairman of the board, clerk of court and county auditor. Depository bonds are approved by the board of county commissioners.

This brings such members of the board of county commissioners and aforementioned officers within the prohibitions of sections 778, 990 and 10305 of Mason's Minnesota Statutes, 1927.

However, the case of County of Marshall v. Frederik Bakke, 182 Minn. 10, 234 N. W. 1, seems to express a holding that the county treasurer is not within the provisions of those sections, as relates to depository banks, for the reasons stated in the following portion of the opinion:

"In the case at bar, after the designation of the bank as depository and the approval of the depository bond, with neither of which acts the county treasurer had any part, he was under the law required to deposit county funds in the bank; and hence his making such deposits were neither unlawful nor could the same be said to be his voluntary acts subjecting him to the penalties of § 990. We cannot adopt a construction of this section so that when a depository contract is made between a county and a bank by the designated authorities pursuant to the statutes such contract is to be held void if perchance some clerk or deputy of a county official, or a county official who has had nothing to do with the making or approval of the contract, happens to own a share of stock in the bank."

M. TEDD EVANS,
Assistant Attorney General.

July 21, 1939. 90b-2

115

Officers—Interest in—Insurance—Sale of to city by treasurer—M40, § 10305.
City Attorney, Northfield.

You quote Section 15, Chapter III, of your home rule charter reading:

"No officer elected or appointed to office under the provisions of this charter, shall be a party to, or interested in, any contract in which the city is interested made while such officer is holding office;"

and you state that your city treasurer is agent for a fire insurance company which issued a policy on a city building prior to the time the treasurer assumed office, and that the policy has been rewritten from time to time to the present. You ask whether or not the prohibition cited applies to a renewal of the policy at this time and in this connection add that if there is a renewal the treasurer, as agent, will receive the usual commission.

In addition to your charter provision, Section 10305, Mason's 1940 Minnesota Supplement, must also be considered. Briefly, it prevents any public officer from voluntarily becoming interested directly or indirectly in any contract with the political subdivision he serves.

This office has held uniformly over a period of years that a village clerk while holding office may not write insurance for a village (opinion August 5, 1920); also that a council member is under the same prohibition (opinions April 2, 1913, and June 14, 1917). Quoting from an unofficial opinion of July 20, 1939,

> "We have held on numerous occasions that municipal judges, city clerks, village treasurers, city attorneys, aldermen and other public officials could not sell insurance or surety bonds to the city or village during the time they held public office. We have even held that city officials may not sell contractors' bonds to a contract firm which had secured a contract for the construction of a city building. All of these cases, however, were instances in which the public officials received a commission from the sale of insurance or bonds, or where they shared in the profits of the agency making the sale."

According to your statement, the city treasurer shares in the commission on a renewal of this policy. It follows that if the policy is renewed, the treasurer is technically interested in a contract with the village. In our opinion, under such circumstances, there is a violation both of your charter provision and of the state law referred to.

ROLLIN L. SMITH,
Special Assistant Attorney General.

March 19, 1940. 90e-3

Note: See Laws 1941, C. 228, as to school boards and cooperatives.

116

Officers—Interest in—Insurance—School property—M27 § 3006, 990, M40, § 10305.

City Attorney, Rochester.

You ask for an opinion on the following:

> "I would like an opinion as to the legal right of the Board of Education to contract with the agent of an insurance company for insurance in connection with school property, which agent is an alderman

of said city and as such city official would necessarily be entering into a contract with the school board for such insurance.

"May I refer you to Section 10305, Mason's 1940 Minnesota Supplement, and to the city charter of Rochester, Section 25, and Chapter 10."

We have read Section 25 and Chapter 10 of your city charter and are unable to find anything therein that would give the city council any authority over the school board in the matter of making contracts. Since Rochester is a special school district and since Chapter 10 of the charter requires the city council to approve certain tax levies made by the school district, the question is not entirely free from doubt. But otherwise the school board is independent of the city council, and since said contracts do not depend in any way upon the city council for ratification or approval, we are of the opinion that Section 10305 does not apply to a member of the city council so as to prevent him from selling insurance, as an agent, to the school district. See Marshall v. Bakke, 182 Minn. 10, 234 N. W. 1.

There are some articles which a city officer, state or county officer or school officer cannot sell to a school district, to-wit, "books, apparatus or furniture, used, or to be used, in any school with which he is connected." See Section 3006, Mason's Minnesota Statutes of 1927.

We are therefore unable to see anything illegal in the transaction you suggest.

Section 990, Mason's Minnesota Statutes of 1927, places further restrictions upon county officers, but this, of course, does not apply to your situation.

M. TEDD EVANS,
Assistant Attorney General.

August 25, 1940. 90c-5

117

Officers—Interested in—Relief orders—Issued by member of council—M38 § 10305.

Swift County Attorney.

You state and ask:

"Under section 10305 I would like your opinion as to whether or not this section is violated in the following cases in a County operating under the Township system of relief:

"1. Village Council members issue relief orders for groceries with instructions that they will only be honored at a store operating by a member of the Council.

"2. A member of the Council takes part in issuing relief orders and honors the relief orders in his store at the customary retail price.

"Would your answer be otherwise if such a storekeeper only charged the wholesale price and received no profit from filling such orders?"

Section 10305, Mason's 1938 Supplement, provides as follows:

"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 making any such sale, lease, or contract, and every employee 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: provided, however, that any village or city council, town board, or school board, of any town, village or city of the fourth class, otherwise having authority to designate depositary for village, city, town or school district funds, of any town, village, or city of the fourth class, may designate a bank in which a member of such board is interested as a depositary for village, city, town or school funds of any town, village or city of the fourth class by a two-thirds vote of such board."

I am of the opinion that the section is violated under the facts set out in questions 1 and 2.

Our answer would not necessarily be otherwise if the storekeeper charged the wholesale price and received no profit from filling such orders. The statute is directed against any public officer becoming "interested" in any such contract. It is possible that a public officer could be "interested" in such a contract and at the same time not make an immediate money profit therefrom. The fact that the storekeeper charged only the wholesale price would not justify us in necessarily concluding that he was not interested in the contract. His interest therein might arise by virtue of the fact he was thereby able to dispose of surplus stock, increase his sales record, increase the number of his customers, enhance his prestige in the community, or incur the favor of the customer so that he might profit in some future sale.

The statute should not be construed too technically but neither should it be limited to cases of only money profits. Each case requires its own determination. There is no hard and fast rule to govern all situations.

EDWARD J. DEVITT,
Assistant Attorney General.

October 27, 1939. 90a

BONDS

118

Issuance of excess of—Charter limitations—Excluding outstanding bonds under facts stated—Sewage disposal plant—L33, C341.

City Attorney, South St. Paul.

You state your charter provides:

> "No bond shall be issued by the city of South St. Paul, or under its authority, if by such issue the aggregate outstanding bonded indebtedness of such city shall be made to exceed ten (10) per cent of the assessed valuation of the taxable property of such city according to the last preceding assessment for the purpose of taxation; * * *."

You add that pursuant to Laws 1933, Chapter 341, the city of South St. Paul, a city of the third class, issued bonds for the cost of a sewage disposal plant under the provisions of section 18-a of said law, which section authorizes the issuance and sale of such bonds without a vote of the electors and outside of any limitation established upon the amount of bonds that may be issued by such municipality.

You further state that the city of South St. Paul now desires to issue bonds for the construction of a trunk sewer, and that if the bonds issued and sold for the sewage disposal plant are to be taken into consideration in arriving at the limitation of the 10% of the assessed value as set forth in chapter 9, section 4 of the city charter, the issuance and sale of the proposed bonds will exceed such limitation and hence be unauthorized.

You inquire if, in arriving at the outstanding bonded indebtedness of such city to determine whether or not the present outstanding bonded indebtedness and the contemplated bonds to be issued for the construction of such trunk sewer shall exceed ten per cent of the assessed valuation of the taxable property of such city according to the last preceding assessment for the purpose of taxation, it is necessary to take into consideration the $600,000 bond issue for the sewage disposal plant.

We can find no statutory or charter provision allowing the issuance of bonds in excess of ten per cent of the assessed valuation of the taxable property of your city which authorizes the exclusion of the sewage disposal bonds in arriving at such ten per cent. Hence, it would appear that the city has no authority to issue such bonds by excluding the $600,000 sewage disposal plant bond issue in arriving at such indebtedness.

On the other hand, if the sewer construction anticipated could be considered an integral part of the sewage disposal plant, then it would be our opinion that section 18-a, chapter 341, Laws 1933, would be authority for issuing the same irrespective of the limitation found in chapter 9, section 4 of your city charter. This is a question of fact upon which this office cannot pass.

Section 18-a states in part that the state board of health is authorized and empowered to establish rules and regulations for the treatment of sewage and industrial waste that is grossly polluting a watercourse common to a sanitary district. If the state board of health should direct a construction of the trunk sewers anticipated to be built it would follow that the construction of such sewer would be covered by chapter 341, Laws 1933, and hence bonds could be issued therefor irrespective of any charter limitation under the authority granted in section 18-a.

HAYES DANSINGBURG,
Assistant Attorney General.

September 13, 1940. 36c-8

119

Issuance—For repair of waterworks system—M27, §§ 1935, 1938, 1938-3, 1938-4, 1941, 1942, 1943, et seq., 1959, et seq.

Village Attorney, Monticello.

You ask as to the authority of the village of Monticello to issue bonds to defray the cost of two new water tanks.

Bonds can only be issued in an amount which, with existing obligations, will not exceed the net indebtedness of the village as fixed by law. Mason's Minnesota Statutes of 1927, Section 1942. For method of computing the net indebtedness, see Mason's Minnesota Statutes of 1927, Sections 1935, 1938, 1938-3 and 1938-4.

A five-eighths vote is required. Mason's Minnesota Statutes of 1927, Section 1941.

For an informative article on municipal bond procedure in Minnesota, see 20 Minnesota Law Review 583.

Procedure for the sale of bonds is contained in Mason's Minnesota Statutes of 1927, Section 1943, et seq.

A separate and distinct procedure for issuance and sale of bonds to the State Board of Investment is contained in Mason's Minnesota Statutes of 1927, Section 1959.

It is permissible to use money now in your water fund for the purpose of buying these tanks or assisting in the purchase thereof.

EDWARD J. DEVITT,
Assistant Attorney General.

August 22, 1940. 44b-17

120

Sale—By popular subscription—Form of notice—M40, § 1944-1, L35, C121.

Cottonwood County Attorney.

You state that Jeffers, a village of 600 population, organized under the Laws of 1885, voted at a special election to issue bonds to the amount of $6,000.00 in payment of a proposed community hall. Also, it is planned to sell these bonds by popular subscription as authorized by Laws 1935, Chapter 121 (Mason's 1940 Minnesota Supplement, Section 1944-1).

If the council wishes to sell these bonds by popular subscription, it should proceed under Section 1944-1, Mason's 1940 Minnesota Supplement, giving one published notice of public sale ten days prior thereto. A notice in the following form would, in our opinion, be sufficient.

NOTICE OF PUBLIC SALE OF BONDS
OF VILLAGE OF JEFFERS

Notice is hereby given pursuant to the 1940 Supplement to Mason's Minnesota Statutes of 1927, Section 1944-1, that at.....o'clock in the.....noon of....., 1940, at....., in the village of Jeffers, State of Minnesota, subscriptions to an issue of $6,000.00 of bonds of the village of Jeffers, Minnesota, bearing date and in the denominations and maturing and bearing interest as indicated:

Date	Denomination	Maturity	Rate of Interest
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....

will be received from the general public in accordance with a resolution duly adopted by the city council dated....., 1940, and on file in the office of the village recorder of said city and available for inspection.

Dated at Jeffers, Minnesota, this.....day of....., 1940.

.....
Village President.

Attest:

.....
Village Recorder.

It may be you will wish to insert other provisions in this notice, particularly those provisions which would promote sales. The important thing is that the notice be published the proper length of time and that prospective buyers have made available to them all information they desire about the bonds.

ROLLIN L. SMITH,
Special Assistant Attorney General.

August 22, 1940. 44a

CHARTER COMMISSION

121

Charter Commission—Submission of original charter more than six months after appointment of commission—M27, § 1271, Cons., Art. IV, § 6.

Village Attorney, St. Louis Park.

You state that on June 9, 1939, the District Court of Hennepin County obtained a charter commission for the village of St. Louis Park, as provided by Article IV, Section 6 of the State Constitution, and Section 1271, Mason's Minnesota Statutes of 1927. All the members appointed qualified promptly after appointment and commenced the work of drafting a charter. No charter, however, was submitted to the village until May, 1940. During the winter of 1940 the court appointed two additional members of the commission to fill the vacancies caused by the death of one member and the resignation of the other.

You inquire whether or not the proposed charter is valid in view of the fact that it was not submitted within the six months' period after the appointment of the commission, as required by Article IV, Section 6 of the State Constitution, and Section 1271, Mason's Minnesota Statutes of 1927.

This question has given us considerable difficulty, and after reading the cases it is our opinion that the suggestion made by you, to secure a declaratory judgment or some other judicial determination of the question, would be proper. This is in accordance with the customary recommendation of this office in similar cases.

The cases generally are more or less divided. One line of cases holds to the effect that where the statute specifies the time at or within which an act is to be done, it is usually held to be directory, unless time is of the essence of the thing to be done, or the language of the act shows that the designation of the time was intended as a limitation of the power or right. See Burkley v. City of Omaha, 92 Neb. 803, 167 N. W. 72; State ex rel. Kobes v. Grimm, 115 Pac. 230, 212 N. W. 437; Mead v. Jasper County, 322 Mo. 1191, 18 S. W. (2d) 464; State ex rel. Inf. Gentry v. Lommar, 316 Mo. 721, 291 S. W. 457; Sheldon v. Sheldon, 134 At. 904, 100 Equity 24; State ex rel. Huff v. Graves, 13 N. E. (2d) 599, 277 N. Y. 115, reversing 293 N. Y. S. 59; Brenner v. Bruckman, 3 N. Y. S. (2d) 265; Nekowski v. Newman, 136 S. W. (2d) 808; State v. Industrial Commission, 289 N. W. 769.

On the other hand there are some cases holding that the statute clearly directing time for doing a particular act is not directory. State Highway Commissioner of New Jersey v. Repole, 1368-464, 111 N. J. L. 462; Petition of Fayette County Commissioner, 137 At. 237, 289 Pac. 200.

For a general discussion of Minnesota law see Rambeck v. LaBree, 156 Minn. 310, which sets up the general rule in Minnesota, and Hedquist v. Sundquist and Co., 178 Minn. 524.

Except for the language in the case of State ex rel. Lowe v. Barlow, 129 Minn. 181, we would feel that the statute in question could be consid-

ered as directory. While this case does not decide this question, apparently the court had some doubt as to it in view of the fact they did not comment upon it.

It is to be noted, although there may be no connection between the two, that Section 1299, Mason's Minnesota Statutes of 1927, waives the six months' requirement where there is in existence a home rule charter which is to be amended or a new charter submitted to replace such original. This could lead to the conclusion that the legislature set a definite period within which the board of freeholders should present the original charter to the chief magistrate, and once the original charter was adopted there was not a necessity of a definite six months' period in the case of an amendment or the submission of a new charter to replace the old. However, as stated, we believe your suggestion of getting a judicial determination of this question highly proper.

HAYES DANSINGBURG,
Assistant Attorney General.

July 25, 1940. 58i

DRAINAGE

122

Ditches—Right to clean out outlet in foreign state—L. 1925, C. 415, § 88.

Martin County Attorney.

You state:

Judicial drainage ditch No. 10 lies wholly within Martin county. A number of the property owners affected by this ditch and who were assessed for benefits at the time the ditch was constructed, have petitioned the county board to have this ditch repaired, which repairing does not contemplate improvement except to restore a part of the ditch, as nearly as producible, to the same condition as when originally constructed sometime ago. The cost of this repair work will not exceed thirty per cent of the original cost of construction of such ditch. The water from this ditch empties into a water course running into the state of Iowa, and eventually empties into some lake. To obtain results and make the ditch effective, it will be necessary to deepen the water course for a distance of something like one mile to the state of Iowa. The people in the state of Iowa are not interested in deepening the water course in their state for the reason it does not benefit them in any way. They probably would have no objection to having the water course deepened if they could have it done without expense to them. Practically all the expense incurred in connection with the repair of the ditch will have to be raised by an assessment against the property affected by the ditch when originally constructed.

You inquire if Martin county would have authority to expend any money in deepening and widening this water course in the state of Iowa, thus enabling the judicial ditch in your county to properly function, said ditch not being able to properly function without deepening the water course in the state of Iowa.

You call to our attention sections 6840-85 and 6840-88, Mason's Minnesota Statutes of 1927, which is chapter 415, Session Laws of 1925. It is our opinion that section 85 of chapter 415 does not apply in this case because the ditch has already been established for some time and that said section 85 is only applicable in the original establishment of such ditch. You will note that subsection (b) of section 85 provides that in the final order establishing said drainage system, the jobs of deepening and constructing this drainage system shall not be advertised, let or sold until such purchase of the needed right-of-way in such adjoining state has been in all things completed.

It is our opinion that section 88, chapter 415, Laws 1925, gives any county in this state which has a drainage system extending into an adjoining state authority to join with the board or tribunal of such adjoining state and enter into a joint contract with such board or tribunal for widening, deepening, straightening, changing or repairing any drainage system extending into such adjoining state. Said Section provides that each municipal subdivision is to pay such portion of the cost and expense as they agree upon, and in case benefits of the land in adjoining state are not sufficient to pay cost of construction, then such board or court in this state is given authority to contribute sufficient funds to the political subdivision of the other state for that political subdivision to do this work in question.

It is apparent that a mistake was made in the last sentence of section 88, in that as it now reads this section gives a county board or court in this state authority to authorize and direct the proper county or counties of such drainage system in such adjoining state to contribute funds to complete the construction, etc., in such adjoining state. It then goes on providing that, before this shall be done, it must appear that such work will benefit the lands in this state sufficiently to warrant such contribution. In other words, it clearly was the intention of the legislature to authorize one county in this state to contribute to the proper municipal subdivision in another state so that such political subdivision in the adjoining state may go ahead and do this work.

We know of no authority whereby Martin county could do such work in Iowa if legal proceedings were necessary, except as provided in section 88, chapter 415, Laws 1925, which did not appear to be applicable.

Assuming that it will not be necessary to take any legal proceedings in the state of Iowa, such as those necessary in connection with obtaining the right from the property owners to do such work, and that there is no objection by the proper officials in the state of Iowa to the widening of this stream, and if the widening of the stream as an outlet is an essential feature of your drainage system and necessary to make the Minnesota system work, and you can further justify the assessment to the Minnesota

property for all of the benefits, we can see no objection to Martin county doing such work under these conditions.

I might add that the question is not free from doubt, and the final analysis may be a question that would have to be decided by the court if contested. However, under the conditions above stated, we are of the opinion that it would be possible to do this work as an incident to the necessary functioning of your drainage ditch.

HAYES DANSINGBURG,
Assistant Attorney General.

September 5, 1940. 150c

FIRE DEPARTMENT

123

Service—Authority to contract for out of the city limits—Workmen's Compensation Law—Coverage of—City firemen fighting fire in Wisconsin—L. 29, C. 232, § 1.

State Fire Marshal.

You ask:

> "* * * if the fire department of the city of Winona may, pursuant to direction of the city council fire committee, respond to calls in the neighboring state of Wisconsin, and if in so doing the firemen would be entitled to the benefits of the (Workmen's) compensation act."
> Your question is answered in the affirmative.

Laws 1929, Chapter 232, Section 1, authorizes the city council, or other municipal body having control of the fire department, to direct its fire department to tend and serve fires outside the limits of the municipality, either within or **without the state.** Section 2 of the act authorizes the municipality to contract for the compensation to be paid. Section 3 of the act provides that all municipal firemen attending and serving fires outside the limits of the municipality "shall be considered as serving in their regular line of duty as fully as if they were serving within the limits of their own municipality."

Firemen serving within their own municipalities are entitled to the benefits of the workmen's compensation act.

You are therefore advised that employes of the Winona fire department are entitled to the benefits of the workmen's compensation act when serving at fires in the state of Wisconsin.

EDWARD J. DEVITT,
Assistant Attorney General.

January 18, 1940. 688a

124

Civil Service—Several inquiries answered—M40 §§ 1933-23 to 1933-41; 1933-48 to 1933-63 (d).

St. Louis Park Village Attorney.

Your several questions with reference to the firemen's and the policemen's civil service acts are restated and answered seriatim:

> "(1) What is the respective jurisdiction of the department head and the Council and the civil service commission over discipline and discharge?
>
> "(a) May the commission by rule permit the filing of charges by the mayor or a member of the council?
>
> "(b) What authority does the commission have over suspensions for not longer than 60 days?"

The provisions of the police civil service law and the provisions of the firemen's civil service law are very much the same. The firemen's civil service law is now contained in Mason's 1940 Minnesota Supplement, Sections 1933-23 to 1933-41, inclusive. The police civil service law is contained in Mason's 1940 Minnesota Supplement, Sections 1933-48 to 1933-63 (d), inclusive. Citations which follow are in each case to Mason's 1940 Minnesota Supplement. Where two statutes are cited, the lower numbered citation refers to the firemen's civil service law and the higher numbered citation refers to the police civil service law.

(a) The statute authorizes the filing of charges "by a superior officer or by any member of the commission." (1933-35; 1933-58) In those cases where, by charter or statute, the mayor is the head of the police or fire department, he would be authorized to file charges since he is "a superior officer." There is no provision authorizing the commission to promulgate a rule permitting the filing of charges by a member of the council.

(b) The commission, by statute, is given authority over the suspension of employees for periods not longer than 60 days (1933-29; 1933-52); and is to provide for such suspension by rule (1933-30 (i); 1933-53 (i)). A superior officer also has the authority to suspend a subordinate for a reasonable period not exceeding 60 days for the purpose of discipline or pending the investigation of charges. (1933-31; 1933-54)

> "(2) To what extent may a civil service commission established under statute be supplanted by home rule charter?
>
> "(a) May the charter substitute a comprehensive civil service system for all departments, including fire and police, where fire and police commissions already exist?
>
> "(b) May the charter provide for the combining of police and fire commissions which have been previously established under statute?

"(c) May the charter abolish existing commissions if it provides no other formal merit system as a substitute?"

(a) Your question then is one of determining whether or not the establishment of a civil service system in a municipality is a matter of local concern within the scope and power of the municipality to regulate, or if the passage of an enabling act by the legislature authorizing the creation of civil service commissions in all municipalities of the state, except cities of the first class, may be interpreted as the establishment of a legislative policy requiring uniform civil service commissions established under the general laws.

As a general rule, home rule charters may embrace any subject relating to the orderly conduct of municipal affairs, and may properly include such subjects as the right of eminent domain in laying out and improving streets, the presentation and allowance of claims, the terms of contractors' bonds, vacation of streets, liability for defective streets and sidewalks, the government of city schools and libraries, and the licensing and regulating of employment. Dunnell's Digest, Section 6538. It is well established that home rule charters must be in harmony with and subject to the constitution and laws of the state. Such charters may not contravene the public policy of the state as declared in its general laws. The rule is stated in Dunnell's Digest, Section 6539, that:

> "* * * The provisions of home rule charters upon all subjects proper for municipal regulation prevail over the general statutes relating to the same subject-matter, except in those cases where the charter contravenes the public policy of the state, as declared by the general laws, and in those instances where the legislature expressly declares that a general law shall prevail, or a purpose that it shall so prevail appears by fair implication, taking into consideration the subject and the general nature of the charter and general statutory provisions. * * *"

In this instance the legislature has not expressly declared that the general civil service laws shall prevail over civil service systems established by charter. On the other hand, there are many arguments which by fair implication would lead us to the conclusion that the legislature in passing enabling acts authorizing the creation of civil service commissions in most of the municipalities of the state has declared a public policy contemplating the existence of a uniform police system and a uniform firemen's system throughout the state. The enforcement of laws and the putting out of fires are undoubtedly matters of state concern as well as of local concern. I can find no precedent, either in Minnesota or in any other states, which would sustain a definite answer to this question. However, we are inclined to the view that if the charter provides a comprehensive civil service system, including the fire and police departments, which is substantially comparable to the systems now authorized to be created by the statutes, that the state public policy expressed in those statutes will be satisfied. Your question, as above explained, is answered in the affirmative, but this does

not obviate the necessity of complying with the statutes (1933-40; 1933-63 (b)) as to discontinuance.

(b) Yes. See answer to (2) (a) supra.

(c) No.

"(3) May the council provide that the firemen's civil service commission act also as the police civil service commission?"

The answer to this question is doubtful. We answer it in the negative. This office has previously held that it could not be done. 1934 Reports of the Attorney General, opinion 76. It is to be noted that the firemen's civil service law provides that:

"Whenever any city or village has a civil service commission, the council may provide that such commission be vested with the powers and duties of the police civil service commission, as set forth herein." (1933-63)

This police civil service act was enacted in the same session of the legislature as the firemen's civil service act, but at a later date (April 23, 1929). What is the significance of this section? Did it mean (when using the term "civil service commission") the firemen's civil service commission, which was authorized to be created by Laws 1929, Chapter 57, passed March 11, 1929? Or did it mean to apply to Laws 1917, Chapter 358, which law authorizes the creation of a civil service commission upon vote of the electors in cities of the fourth class? It is urged that there is no other law authorizing the creation of a civil service commission in a **village** except the firemen's civil service law, and that, therefore, the legislature contemplated authorizing any city or village which had established a firemen's civil service commission to vest in that commission the powers and duties of the police civil service commission. This argument is tenable, but an examination of the legislative chronology of the two bills does not bear it out. It is not otherwise apparent that such was the legislative intent, since, from the same premise it cannot be argued that if a police civil service commission had first been established, there is any similar authority in the firemen's civil service law to authorize the vesting in the police civil service commission the powers and duties of the firemen's civil service commission. We choose to recognize the section as authorizing the council to vest the powers and duties of the police civil service commission in the civil service commission authorized to be created by Laws 1917, Chapter 358, and not in the firemen's civil service commission.

"(4) What is the civil service commission's jurisdiction over leaves of absence? Does it have power to grant individual leaves itself or may it merely provide by rule when leaves may be granted, for how long, and the effect of leave upon the status of the employee, leaving to the administrative officer the granting of leaves in individual cases?"

The civil service commisison, having absolute control and supervision over the employment, promotion, discharge and the suspension of all firemen and policemen, has exclusive jurisdiction over leaves of absence and

may promulgate rules providing for such leaves of absence, the period thereof, and the effect upon the status of the employee. I am of the opinion that it may grant individual leaves of absence when in its judgment such is justified.

After having prescribed rules governing leaves of absence, the mechanics of abiding by the rules may be supervised by the administrative officers or heads of the departments.

> "(5) Must special policemen, appointed for an occasional evening's work, be selected from civil service registers? May special police officers for dances be appointed without regard to such registers?"

The law here is not clear, either. But it would appear that special policemen appointed for an occasional evening's work need not be selected from civil service registers, and special police officers appointed to police dances may be appointed without regard to such registers. The civil service law is silent as to the appointment of special policemen and police officers who serve in occasional or temporary capacities. It is true that the law vests in the commisisons the absolute control and supervision over all officers employed and employees of the police departments, but it is doubtful if a special policeman appointed for occasional work, such as the policing of public dances, is an officer within the meaning of the civil service law. The law should be clarified so as to definitely include or specifically exclude such special police officers.

> "(6) What is the relation of volunteer firemen to firemen's civil service commissions? May there be (1) entirely excluded from the classified service; (2) considered as the lowest class in the classified service, from which promotion is made to the positions of part time or full time firemen? May the commission by rule limit appointments to paid positions to members of the volunteer department?"

Volunteer firemen may be entirely excluded from the classified service; they may be considered as the lowest class in the classified service from which promotion is made to the positions of part-time or full-time firemen, and the commission, by rule, may limit appointments to paid positions to members of the volunteer fire department. It is not affirmatively apparent that the legislature intended to include volunteer firemen under the civil service law. The act (1933-29) vests in the commission control and supervision over all officers and employees, and is especially made to apply to the chief, assistant chief, inspectors, fire wardens, electricians, engineers, auto mechanics, clerks, and other persons **exclusively** engaged in the fire prevention and protection service in said city or village. The term "exclusively" as therein used, may have two meanings. It may have been used so as to include in the civil service law all engineers, auto mechanics, clerks, and others who spend all of their time in fire work in the municipality and who do not divide their time between, let us say, the fire department, the police department, and other municipal work. Or the term may have been used with the intention of excluding volunteer firemen, since admittedly they are not "exclusively" engaged in fire prevention and protection service. Here, again, it is not clear what the legislature intended, but we are inclined

to view the statute as one which excludes volunteer firemen from the classified service.

"(7) May an ordinance requiring all officers and employees to reside within the municipality during their employment with it be validly applied to policemen or firemen under the jurisdiction of civil service commissions without a rule of the commissions to the same effect?"

As has previously been stated, the absolute control and supervision over the employment, promotion, discharge and suspension of all firemen and policemen is, by law, vested in the commission. This would seem to vest in the commission the authority to prescribe, by rule, that employees in order to work for the municipality should maintain their actual residence within its territorial limits. However, the mayor or council is still vested with authority and responsibility of fighting fires and enforcing the laws and local ordinances, and in carrying out that responsibility it would be reasonable, in the interests of convenience and efficiency, for the council, by ordinance, to require that employees live within the city.

"(8) Does the mayor or president have the power to veto a resolution adopting civil service for policemen or firemen?"

No provision is made in the statute for a veto by the mayor or president of a resolution adopting civil service for policemen and firemen. However, the statutes (1933-25; 1933-48) provide that the resolution establishing the commission is to be adopted by a vote of a majority of all the members of said council and

"be approved by the mayor of such city or the president of such village council."

We have previously held that in the adoption of a resolution establishing a police civil service commission, the foregoing provision of the police civil service law prevails over a charter provision authorizing the passive adoption of ordinances and resolutions without the mayor's signature where he has failed to sign them within five days after presentation to him. In effect, therefore, the mayor does have the power to veto a resolution adopting civil service, since his affirmative action approving the resolution is required.

EDWARD J. DEVITT,
Assistant Attorney General.

March 11, 1940 785e-2

125

Fire Protection—$500 limit on yearly expenditures for forest fire protection—M27 §§ 4031-11, 1027-1 et seq.

Attorney for Town of Fayal.

You inquire concerning our ruling that the $500 limitation on expendi-

tures contained in Section 4031-11 is not a limitation on expenditures made for general fire protection pursuant to Sections 1027-1, et seq.

Mason's Minnesota Statutes of 1927, Section 1027-5, is irrelevant to this inquiry. Our opinion was directed to the single point of a town's authority to expend (not levy) a sum larger than $600 per year for general fire protection.

In the following paragraphs we detail our interpretation of Section 1027-5. As an aid to closer consideration of that section, it has been divided below into its two clauses:

> "Nothing in this act shall be construed so as to modify, abridge, or repeal Chapter 407, Laws of 1925. * * *"

This would appear to be a clear legislative direction that all provisions of the 1925 act (especially Mason's Section 4031-11, which is pertinent here) shall continue in full force and effect, irrespective of the 1927 act (Sections 1027-1, et seq.). This clause, independently considered, cannot fairly be interpreted to incorporate into the 1927 act any part of the 1925 act, which relates only to protection against forest or prairie fires. The clause is, however, limited by the remainder of the section:

> "* * * except that the levy of any tax authorized hereunder shall in no event exceed the amount of tax authorized in any one year, pursuant to Section 11 of Chapter 407, Laws 1925."

We construe this clause as relating solely to the matter of taxation for fire protection, and particularly to the limitation upon the levy of such taxes.

As we read the 1925 and 1927 acts, it is contemplated that two separate funds may be established: the first, under the 1925 act to be known as the "Fire Fund" and to be used only for protection against and extinguishment of forest and prairie fires; and, the second, under the 1927 act to be used for general fire protection. A separate levy must be made for the respective funds.

Before 1927, the $3,000 levy limitation contained in Section 11 of the 1925 act was solely applicable to the levy for the "Fire Fund" therein authorized for forest and prairie fire protection and extinguishment. The second clause of Section 1027-5 (1927 act) now constitutes the $3,000 levy limitation as the maximum sum which may be levied under both the 1925 and 1927 acts. In our opinion the language of that clause cannot be interpreted to incorporate into the 1927 act the $500 limitation on expenditures which is specifically limited by the 1925 act to expenditures from the "Fire Fund," moneys from which may only be withdrawn pursuant to Section 4031-11 "to take necessary precaution to prevent the starting and spreading of forest or prairie fires and to extinguish the same."

Accordingly, funds properly expendable by the town for general fire protection include not only the amount levied and collected in the current yeai

but also any balance carried over in the general fire fund. Expenditures for forest fire protection would, of course, be additional and would be limited to a maximum $500 in one year.

FREDERICK O. ARNESON,
Special Assistant Attorney General.

October 21, 1940. 916b

126

Relief Association—Authority to expend premium tax moneys for purpose of construction of building—M38 §§ 3723, et seq.

City Attorney, Glencoe.

You state that the Glencoe Fire Department Relief Association has approximately $7000.00 on hand accumulated from the premium tax obtained through the operation of Mason's Minnesota Statutes of 1927, Section 3723, as amended, and that it is the desire of the fire department to construct a two story building. It is contemplated that the first floor will be rented out for commercial or store purposes. The second floor thereof would be used as a meeting room for members of the fire department.

You ask:

"Could funds arising under Section 3723 be used for this purpose?"

Mason's 1938 Minnesota Supplement, Section 3726 provides:

"Such amount shall be kept as a special fund and disbursed only for the following purposes:

"(2) For the equipment and maintenance of such department and for construction, acquisition or repair of buildings, rooms and premises for fire department use or otherwise."

I interpret the above statute to mean that the association may use funds derived from the premium tax to build, acquire or repair any necessary buildings, rooms or premises. I do not think it authorizes the association to construct a building for the express purpose of renting part of it for commercial use. The association is not authorized to go into the real estate business.

However, if the association should own a building and if some part thereof was not necessary for the use of the association it would be authorized to rent out such portion thereof as would not be needed for immediate use of the association. Or, if it is contemplated that within a reasonable time the entire building will be needed for the uses of the association, I am of the opinion that the association could construct such a building as you describe and temporarily rent out so much thereof as is not immediately necessary.

EDWARD J. DEVITT,
Assistant Attorney General.

January 18, 1940. 198b-10a

HIGHWAYS

127

Angle-parking—On state highways permissible only with consent of Highway Commissioner—As to state highways, state statute prevails over charter provision giving city control over city streets—Commissioner's power to establish angle-parking zones is a constitutional delegation of power by the legislature—L39, C430.

City Attorney, Crookston.

Your several questions are stated below with our answer following each:

1. May the City of Crookston by ordinance or sufferance legally permit angle-parking on a city street which is part of a State Trunk Highway in the absence of approval by the Commissioner of Highways?

Our answer is in the negative. The Constitution of the State of Minnesota established the trunk highway system of the state and vested control over the system in the State of Minnesota. As between the provisions of your city charter and the general laws of the State relating to trunk highways, the latter must prevail.

> "Any city or village in this state may frame a charter for its own government as a city consistent with and subject to the laws of this state. * * * The legislature may provide general laws relating to affairs of cities * * * which shall be paramount while in force to the provisions relating to the same matter included in the local charter herein provided for. But no local charter, provision or ordinance passed thereunder shall supersede any general law of the state defining or punishing crimes or misdemeanors."—Art 4, Sec. 36, Constitution of the State of Minnesota.

Laws 1939, Chapter 430, Section 14 clearly prohibits angle-parking on trunk highways without the consent of the Commissioner of Highways. The pertinent clause reads:

> "Such exception (i. e., where angle-parking is permitted by local ordinance) shall only apply to a state trunk highway after approval by the commissioner."

2. (a). To what legal compulsion might the City of Crookston, its council or officers be subject in the event of violation of Laws 1939, Chapter 430?

It is to be assumed that officers of your city will comply with the state law, and particularly so when they have been specifically instructed as to its interpretation. Without attempting to detail the penalties confronting those who participate deliberately in an illegal act, it is sufficient to state that such action constitutes a breach of their oaths of office, which malfeasance in office renders the offenders subject to removal.

(b). If the council undertook to pass an ordinance permitting angle-parking without the consent of the Commissioner of Highways, would each angle-parker be liable to prosecution for violation of the aforesaid Section 14 of Chapter 430, Laws 1939?

We answer this question in the affirmative.

3. Is not the delegation of power to the Commissioner of Highways to permit or refuse to permit angle-parking an unconstitutional delegation of legislative authority?

Our answer is in the negative.

> "The principle is repeatedly recognized by all courts that the legislature may authorize others to do things which it might properly, but cannot conveniently or advantageously, do itself. * * * The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and the conferring an authority or discretion to be exercised under and in pursuance of the law. * * *"

> "The legislature * * * had the undoubted power to fix these rates at whatever it deemed equal and reasonable; but what are equal and reasonable rates is a question depending upon an infinite and ever-changing variety of circumstances. What might be such on one road, or for one district of traffic, may not be such on or for another. What are reasonable one month may not be so the next."—State v. Chicago, M. & St. P. Ry. Co., 38 Minn. 281, 37 N. W. 782. Cf. also State v. Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134, 46 L. R. A. 442, 77 Am. St. 681; State v. Great Northern Ry. Co., 100 Minn. 445, 111 N. W. 289, 10 L. R. A. (N. S.) 250; Williams v. Evans, 139 Minn. 32.

The Commissioner of Highways is charged with the primary duty of maintaining state trunk highways as safe thoroughfares. His consent, or refusal to consent, to the designation of a portion of a state trunk highway as an "angle-parking" zone will depend upon a variety of circumstances which may vary widely in a comparatively brief space of time: quantity of traffic, width of highway, cross traffic, physical features of the highway, and the like.

The discretion vested in the Commissioner to determine such factors and apply the law was, in our opinion, an entirely proper and constitutional delegation of authority by the legislature.

4. Assuming the Commissioner's approval to have been withheld, and assuming further that it can be demonstrated to a certainty that these streets are of sufficient width to permit of angle-parking without impeding vehicular traffic, may the city resort to any proceeding to compel approval by the Commissioner?

Whether the Commissioner has improperly exercised his discretion is always a question of fact. The factors you have mentioned almost certainly would be relevant to your particular case, but there probably are other fac-

tors which also require consideration. You of course are familiar with the usual rule that where discretion is granted to a public officer the courts will interfere only in a clear case of abuse of that discretion.

5. Where the State constructed or maintains only the center eighteen feet of a street which is approximately 58 feet wide, how far does the regulatory and supervisory power of the Commissioner of Highways extend?

We are of the opinion that the regulatory and supervisory power and authority of the Commissioner extends from property line to property line on either side of a thoroughfare designated a state trunk highway.

Section 14 of the 1939 act provides:

> "Such exception shall only apply to a state trunk highway after approval by the commissioner."

Once a public thoroughfare is designated a part of the state trunk highway system, such thoroughfare becomes a state trunk highway. The Highway Traffic Regulation Act defines a "highway" in subdivision (28) of Section 2720-151:

> " 'Street or highway.' The entire width between property lines of every way or place of whatever nature when any part thereof is open to the use of the public, as a matter of right, for purpose of vehicular traffic."

ARTHUR CHRISTOFFERSON,
Deputy Attorney General.

September 26, 1939. 989a-16

HIGHWAYS

128

Bridges—Repair—Duty of town—Liability for not repairing—Authority of town board to dam lagoon—M1927, 2542, 2543, 2552.

County Attorney, Willmar.

You state:

> "A real estate development company platted a tract of land at the edge of one of our lakes. In order to obtain more lots fronting on water and accessible to the lake, lagoons were dredged and canal ways were made connecting the lagoons to the lake. Lots in this particular area were facing on these lagoons and streets in the development were carried over the lagoons by means of wooden bridges.
>
> "Several years have now passed and the property owners are now concerned about the safety of these particular bridges. Some of them have made demands upon the town board of the township in which this

development is located for the repair of these bridges on the theory that the bridges carried streets which were properly dedicated in the plat for public use."

and ask:

"Can you advise me whether or not the township has the obligation to maintain the streets in the plat and to keep in repair the bridges carrying these streets over the particular lagoons in question."

I understand that the roads within the tract are "town roads" within the meaning of the general highway act, Mason's Minnesota Statutes of 1927, Section 2542. A "road" within the meaning of that act includes "all bridges or other structures" located on such road and which form a part thereof. Mason's Minnesota Statutes of 1927, Section 2343. It is made the duty of town boards to repair and maintain all town roads within the town. Mason's Minnesota Statutes of 1927, Section 2552. Your first question is, therefore, answered in the affirmative.

"May the town board put a dirt fill across the lagoon to carry the street across this particular lagoon over the objection of land owners who would thus be cut off from access to the lake?"

I doubt the authority of the town board to do this, especially if the lagoon is a navigable one in the sense that it may be used for boating purposes in going from the lagoon out onto the lake. From your statement of facts, it appears that much of the value of the property bordering upon the lagoon is derived from its ready access to the lake through the canals. Our courts are inclined to view this right of access as a property right. See Northern California Power Company v. Flood, 186 Cal. 301, 199 Pac. 315; Last Chance Water Ditch Company v. Emigrant Ditch Company, 129 Cal. 278, 61 Pac. 960. Also see 152 Cal. 716, 93 Pac. 858; and 60 Cal. 410. We do not answer this question categorically since the correct answer is dependent upon the presence or absence of so many facts.

"What responsibility has the road overseer for accidents which may happen through a failure of the bridge after notice has been given to the town board to repair it?"

A town officer is not personally liable for a negligent failure to repair bridges. See Bolland v. Gihlstorf, 134 Minn. 41. A road overseer is not liable to one injured on a public highway because of his failure to keep it in repair and safe for travel. Stevens v. North States Motor, Inc., (Minn.) 201 N. W. 435. These two cases discuss the liability of town officers under varying circumstances. The general rule is stated on page 436 of the Northwestern report of Stevens v. North States Motor, Inc., supra.

There the court said:

"The liability of a public officer for failing to perform a duty imposed upon him by law is well settled in this state. Such liability attaches when the duty is ministerial, that is, when it is in obedience to the mandate of legal authority and the act is to be performed in

a prescribed manner, without the exercise of the officer's judgment upon the propriety of the act, and the failure to perform is the proximate cause of the injury sustained. It also attaches when the person injured, as distinguished from the public, is the one to whom performance is due. (Citing cases). Where a public officer is charged with duties which call for the exercise of his judgment or discretion, as to its propriety or the manner in which it is to be performed, he is not liable to an individual for damages unless guilty of willful wrong. (Citing case)."

EDWARD J. DEVITT,
Assistant Attorney General.

April 2, 1940. 642a-12

129

Bridges—Type—Judicial Ditches and Roads—M27 § 2605.

Stevens County Attorney.

You state:

"I would like to get an opinion from your office on the question of whether the County or a township in the County would be liable for the rebuilding of a bridge on a township road where said bridge was first constructed for and still used for crossing a judicial ditch.

"When the ditch was first constructed it was necessary to build the bridge over said ditch and no doubt damages were allowed at that time. It has since become necessary to rebuild said bridge and the township contends that the County should pay for said bridge even though it is on a township road. They base their claim on Sec. 2605 of Mason's Minnesota Statutes of 1927 and an opinion rendered from your office dated July 5th, 1933."

This former opinion of July 5, 1933, is clearly erroneous and should be, and hereby is, reversed. Upon reading Section 2605, Mason's Minnesota Statutes of 1927, which originated as Laws 1921, Chapter 323, Section 65, together with the acts therein mentioned, it is evident that this provision applied only to a certain state ditch previously constructed in Traverse County, Minnesota.

When it comes to repairing and rebuilding bridges across judicial ditches, the general rule is that the township must repair or rebuild bridges on township roads, and the county must repair or rebuild bridges on county roads, subject, however, to the limitations and provisions of Section 2606, Mason's Minnesota Statutes of 1927.

J. A. A. BURNQUIST,
Attorney General.

August 9, 1940. 148a-3

130

County Aid Roads—Apportionment and Use of Moneys Accruing to State Road and Bridge Fund From Taxes Imposed on Use of Gasoline—Apportionment to Townships—L29, C283.

Steele County Attorney.

You state that a delegation representing the various town boards in Steele County appeared before the board of county commissioners and requested the county board to pass a resolution giving the townships one-half of the gasoline tax money which will be payable to Steele County during the next two years.

You inquire:

> "Does the Steele County Board of Commissioners have the authority to turn over to the town boards in Steele County fifty per cent of the gasoline tax money which Steele County will receive from the State of Minnesota during the next two years?"

Your inquiry is answered in the affirmative.

Chapter 283, Laws of 1929, the act relating to the apportionment and use of moneys accruing to the State road and bridge fund from taxes imposed on the use of gasoline was enacted by the Legislature following the adoption on November 6, 1928, of the Constitutional amendment which allowed one-third of the gasoline tax money to be placed in the State road and bridge fund. Section 6 of the act required that the money apportioned to the counties should be used solely in the construction, improvement, and maintenance of county aid roads. Section 7 of the act provided that not less than twenty nor more than fifty per cent of this money should be devoted to maintenance, with certain exceptions not here material.

Chapter 366, Laws of 1937, amended the original act—Chapter 283, Laws of 1929, and only required fifty per cent of this money be devoted to construction and maintenance of county aid roads. While under the original act the townships were required to contribute for construction or improvement of county aid roads within their township, the Legislature now changed its policy and permitted a county board to apportion the remainder of the moneys they had received to the townships for construction and maintenance of town roads in the respective towns of said county.

This change in policy by the Legislature was accomplished by the amendment hereinbefore referred to by amending Sections 7 and 8 of the original act, Chapter 283, Laws of 1929, without amending Section 6 which contained the word "solely" with respect to the use of the moneys on county aid roads.

Chapter 325, Laws of 1933, amended Section 6, Chapter 283, Laws of 1929, and permitted fifty per cent of the county road money to be used for the payment of interest or principal on bonds or warrants in said counties where a forty per cent tax delinquency existed. This was the extent

of the amendment and was declared an emergency measure and limited for only two years from the date of said amendment. This amendment was successively continued in effect by Chapter 39, Laws of 1935; Chapter 168, Laws of 1937; and Chapter 366, Laws of 1939.

The enactment of these emergency measures was for the purpose of keeping in effect the privilege of using some of the money to pay interest or principal on road and bridge bonds or warrants, and the last mentioned act, Chapter 366, Laws of 1939, was confined to that purpose and did not operate to prevent the use of the moneys by the townships. The rule is announced in Powell v. King (78 Minn. 83, 80 N. W. 850) to the effect that a latter law which is merely a re-enactment of a former law 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 qualify or modify the new act in the same manner as it did the first. We therefore hold that Section 8, Chapter 283, Laws of 1929, as amended, also known as the 1938 Supplement to Mason's Minnesota Statutes, Section 2720-95, is in full force and effect and grants county boards authority to turn over to the townships fifty per cent of the so-called gasoline tax money.

JOHN A. WEEKS,
Assistant Attorney General.

June 9, 1939. 324d

131

County Road—Maintenance—Cost of right-of-way and construction—Whether county or town liable for—M27, §§ 2551, 2552, 2582, and C41.

Houston County Attorney.

It appears that the Houston county board has granted a petition for the establishment of a county road under Mason's Minnesota Statutes of 1927, Section 2582.

You ask (1) must the county construct this road as well as acquire the right-of-way needed, (2) who is chargeable with maintenance, the county, or the two townships through which the road passes, and (3) may the county acquire the land required by eminent domain, proceeding under Mason's Minnesota Statutes of 1927, Chapter 41.

(1) The burden of constructing such a road falls on the county. See subdivision 7 of the section cited, also opinion 182, Attorney General's Report 1932, and Mason's Minnesota Statutes of 1927, Section 2551. This same conclusion was reached in an opinion to County Attorney Bonniwell, September 28, 1934 (380a-1) appearing as number 215, Attorney General's Report 1934.

(2) The expense of maintaining a county road falls on the townships through which it passes. See opinion 182 Attorney General's Report 1932.

The county, in its discretion, may appropriate money from its road and bridge fund to any town to aid in the maintenance of roads therein. Mason's Minnesota Statutes of 1927, Section 2565, subdivision 2. Opinion 264, Attorney General's Report 1914.

(3) The statute provides that the damages must be assessed and awarded before a county road is opened and worked. Section 2582, supra, subdivision 8. An appeal may be taken by any taxpayer from the award made by the commissioner. See subdivision 11, idem. It would seem that the procedure set forth in said Section 2582 should be followed rather than that provided by Mason's Minnesota Statutes of 1927, Chapter 41. In State ex rel. McFarland vs. Erskine, 165 Minn. 303, 206 N. W. 447, it was held that after a county road is established and damages awarded, if no appeal has been taken, the rights of the landowner and the county are fixed. In other words, proceedings under said Section 2582 are complete and sufficient for all purposes, and need not be followed by proceedings under said Chapter 41. Your third inquiry is answered by the statement that the county should proceed under said Section 2582 and not under said Chapter 41.

ROLLIN L. SMITH,
Special Assistant Attorney General.

November 2, 1940. 377b-3

132

Culverts—Installing by reason of grading—M. M. S. 1927, Sec. 2612—Land dedicated—Conditions or limitations—M27 § 2612.

Olmsted County Attorney.

You state therein that the county board accepted a plat of land located in an outlying township, subject, however, to the condition that all original construction of roads and drainage therein should be done by the owners of the respective lots in the plat and that this was also written into the deed of dedication. You then state that a township road runs by one side of the plat so that the plat now extends to the center of the township road, which road has been in existence for many years; and that the residents along the township road are demanding that culverts be put in their respective driveways at the expense of the township. From the brief facts stated it would appear that in view of the fact that the road has been there for many years, the plat would have nothing to do with the rights of the parties. The matter of culverts would then be governed by Section 2612, Mason's 1927 Statutes, which states as follows:

> "The town boards as to town roads, and the county boards, as to county and state aid roads, are hereby required to install one substantial culvert for an abutting owner in cases where, **by reason of grading a public highway**, the same is rendered necessary for a suitable approach upon said highways over driveways from abutting lands."

This office in construing the above quoted language has heretofore held that a town is required to install one substantial culvert for an abutting owner, where by reason of grading or regrading such culvert is rendered necessary for a suitable approach upon such highway over a driveway from abutting lands. Manifestly, the legislature at the time of the enactment of said statute intended to provide one driveway for each abutting owner, and to impose upon the town the duty of building such driveway where the grading or regrading of a town road makes it necessary. The matter of size or kind of culvert would be discretionary with the town board.

You also inquire as to our opinion as to the entire procedure of the acceptance of this land under these conditions.

The general rule seems to be that the proprietor of land who dedicates streets, alleys and other public places cannot impose any conditions or limitations which are inconsistent with the legal character of the dedication or which take the property dedicated from the control of the public authority or which are against public policy. In such a case the dedication takes effect regardless of the condition, and the condition is construed as void. 18 C. J. 71.

In Jones v. Carter, 45 Tex. Civ. App. 450, it appears that in the dedication deed the owners of the land expressly reserved to themselves the exclusive right for all time to construct, maintain and operate street railways, telegraph, telephone and electric light systems, sewer systems and all other public utilities upon, along and across streets and alleys so dedicated. It was held that the dedication deed, in so far as it attempted to reserve to the dedicator such exclusive rights, free from control of the municipal authorities, was null and void, both because it created a monopoly and because it sought to bind the municipal authorities in their control over the city's most important interests. For other cases see Bradley v. Spokane, etc., R. R. Co., 79 Wash. 455, 140 Pac. 688, L. R. A. 1917C, p. 225; Richards v. City of Cincinnati, 31 Ohio St. 506; City of Des Moines v. Hall, 24 Ia. 234.

4 McQuillin on Municipal Corporations, pp. 494, 495, 496 and 497, states that reservations of lands dedicated for streets which hamper control are void as against public policy. Also that a dedication which will destroy the chief characteristic of the purpose of the dedication or take property from the control of duly authorized public officers is void as against public policy, but if the condition is void the dedication does not fail but takes effect just as if the invalid condition had not been imposed. Citing Riddle v. Charlestown, 43 W. Va. 796, 28 S. E. 831; Noblesville v. Lake Erie, etc., Ry. Co., 130 Ind. 1, 29 N. E. 484; Harlan v. Parsons, 202 Ky. 358, 259 S. W. 717.

Consequently it would seem that the county commissioners have exceeded their authority in accepting this plat subject to such condition. The purpose of having the approval of the county commissioners to a plat of this kind is to insure the accuracy of the plat, i. e., public monuments, distance accurately portrayed, etc. See Rice v. Highland Improvement Co., 56 Minn. 259.

In Nagel v. Dean, 94 Minn. 25, it was further held that legislation prohibiting the recording of a plat in the office of the register of deeds until first approved by the village authorities was of the necessity of public regisration, without which the owner of the property conveyed in a plat might so subdivide and plat the same as to render streets and alleys unfit for public use because of eccentric description of width.

HAYES DANSINGBURG,
Assistant Attorney General.

October 14, 1939. 377a-3

133

Highway Easements—Across tax forfeited lands—L39, C328.

Renville County Attorney.

You advise that the Prudential Insurance Company owns a tract of land that borders upon two sides on the tract of land which has been forfeited to the state by reason of delinquent tax proceedings; and that the manner in which the land owned by the Prudential and that owned by the state lies is such that in order for the Prudential to get on its land from a public highway, it must cross over the land owned by the state. The only way in which it is possible for the state to get to its land from a public highway is to cross over a part of the land owned by the Prudential. You further state that this seems to be an almost impossible condition but that it does actually exist.

We can credit the apparent impossibility. However that may be, we think there is a way out. If you will examine Chapter 328, Laws 1939, Subdivision (c), you will find that the county board has the power to classify land and to subdivide it, and we think this is sufficiently broad to include the setting aside of an easement for highway purposes and making a sale thereon at the appraised value to the Prudential Company.

The granting of a similar easement by deed from the Prudential Company to the state would insure for both parties a proper easement, and the fact that such easement is given by the Prudential Company seems to us would afford a basis for determining a price at which the easement should be sold.

In other words, any amount of money determined to be the value of the easement on the part of the county board in the exercise of their sound discretion, taking into consideration the benefit to be received on the other hand from the Prudential Company, would no doubt stand and under no circumstances would it be likely to be attacked.

ARTHUR CHRISTOFFERSON,
Deputy Attorney General.

July 6, 1939. 229i-3

134

Poles—Cost of removing from during improvement of—Who liable.

Kandiyohi County Attorney.

You state orally that the Kandiyohi Cooperative Electric Power Association, a federal corporation under the R. E. A., heretofore erected poles for a power line along the county highway but outside of its 33 foot right-of-way. This was done only after a permit from the county board reading:

> "Pursuant to application made by your company, permission is hereby granted to place, construct and thereafter maintain a rural distribution line for electricity on or along or across such highways in this County as are under the direct control of this County and this Board.
>
> "We wish to call to your attention that if at any time the County of Kandiyohi shall elect to make and shall make any improvements or changes on all or any part of its right-of-way upon, over, under, or along the highway, then and in every case the Kandiyohi Cooperative Electric Power Association shall after written notice of the Kandiyohi County Highway Engineer or his authorized agents proceed to alter, change, or remove from the highway right of way said power lines so as to conform with said changes without any cost whatsoever to the County of Kandiyohi.
>
> "This permit is granted in accordance with existing laws as to the use of right of way by public utilities, and subject to such rules and regulations as are prescribed or may be prescribed by the State of Minnesota by legislative enactments or by such administrative officers acting for the state of Minnesota from time to time."

Later the county decided to improve the road for winter clearance. Slope easements from abutting owners were then obtained. The poles in question are within the boundaries of these slope easements.

In order to improve the land included in these easements it will be necessary to remove these poles while the land is being leveled off and improved, and then to replace them to their original positions after the improvements have been completed. There are some 600 miles of county highway in this situation. The cost of moving the poles twice in the manner described will approximate $150.00 a mile. Obviously, the total expense involved will aggregate a substantial sum of money. The contractors are prepared to make the proposed improvements at once, but before proceeding we should know who is to meet the expense of removing these poles.

You ask:

1. May the county pay this expense?

2. May it compel the power company to move these poles at its expense?

Quoting from an opinion of January 27, 1939 (982-12):

"* * * it is our opinion that where there is only one removal of telephone poles along a right-of-way, that the Commissioner of Highways has the power to require the removal of the poles from the right-of-way, except in the case where the poles of the telephone company or power company are located off the right-of-way and the telephone company or power company has an easement in the land itself in order to maintain such poles. In the latter case it seems to us that they are in the same position as the owner of any other property desired to be taken for right-of-way purposes, and that a contract would have to be made with reference to the matter of the removal of the poles or condemnation proceedings resorted to."

In other words, the county is under no obligation to remove poles on its right-of-way. Opinion July 26, 1932, opinion No. 238, Report of 1936, opinion No. 461, Report of 1934. However, the rule is otherwise where the poles are not on the right-of-way. The obligation then is on the county, and must proceed just as it would in any other case where it desires an easement on land it does not own.

We have held the expense of moving telephone poles is a necessary incidental expense to road work and may properly be paid out of the road and bridge fund of the county. Opinion November 4, 1939 (98a-12).

The cost of removing the poles in question should, of course, be covered in a contract before the work is undertaken. Categorically, your first inquiry is answered in the affirmative and your second in the negative. The county may pay the expense involved and may not compel the power company to do so.

ROLLIN L. SMITH,
Special Assistant Attorney General.

September 18, 1940. 98a-12

135

Private Road—Use of public funds.

Fillmore County Attorney.

You inquire: May a town board accept a dedication of land from the landowner, his buildings setting back from the outer limits of his land, for the purpose of building a cartway to a public highway over his own land and that of a neighbor?

Whether or not it would be legal for the town board to expend road and bridge funds upon the road which would extend from the outer limits of the owner's land to his dwelling and that the object of securing such a cartway, of course, is that the road entirely upon his own land would be

hard to build and hard to maintain, and he believes that he is entitled to public assistance in building the road directly up to his dwelling instead of merely to the outer limits of his land?

I know of no law which permits the expenditure of public funds for private use.

This answer is given in view of the fact that I understand that this would not be a properly laid out township road and merely would be for the convenience of the owner of the land who wishes to make the dedication.

Of course, where a township road is contemplated, it would be proper for the town board in those circumstances to accept a dedication from the fee owner for such highway purpose.

ARTHUR CHRISTOFFERSON,
Deputy Attorney General.

October 10, 1939. 442a-21

136

Road building materials taken from highway—Gravel and Sand

County Attorney, Winona County.

You request an opinion on the following proposition:

> "A county has taken an easement for the purpose of building a county aid road upon which right-of-way there is considerable stone. May the county use the stone from the right-of-way on any other road in the county, or must it be used for the road upon the right-of-way secured therefor?"

We are of the opinion that the stone taken from the right-of-way must be used as a part of the construction of this particular piece of road and reasonably close to the portion thereof from which it is taken. The county might become liable to the land owner for the value thereof if it is used for any other purpose, or used at some distant place for other road work. See Town of Glencoe v. Reed, 93 Minn. 518, 101 N. W. 956, and attorney general's opinion No. 203, 1926 Report.

M. TEDD EVANS,
Assistant Attorney General.

November 22, 1939. 377a-8a

137

Telephone lines—Trimming trees so as to enable construction of—M27 § 7536.

Freeborn County Attorney.

Referring to Section 7536, Mason's Minnesota Statutes 1927, which authorizes telephone companies and other public service corporations to use the public roads for the purpose of constructing their lines, you ask whether or not this section empowers a rural electrification project presumably engaged in constructing a telephone line along a public highway, to trim and cut trees up to the property line.

In my opinion your inquiry is properly answered in the affirmative, subject to the qualifications hereinafter set forth.

It seems clear that a rural electrification project is within the purview of the law cited.

A company acting under this section must exercise due care not to injure trees growing on the highway or on adjacent property. The rights of the company must be considered in connection with those of the abutting land owner. The rights of neither are superior. Each must exercise his property rights so as not to unnecessarily infringe upon, interfere with, or impede those of the other. St. Paul Realty Co. v. Tri-State Telephone & Telegraph Co., 122 Minn. 424. In that case the court said:

> "This principle has been applied most frequently to the trimming of trees, and the decisions are practically unanimous to the effect that without regard to the question of additional servitude, the trimming must if practically possible be done in such manner as not to injure the trees."

Our court in that case cited with approval Wyant v. Central, 123 Mich. 51. The Michigan court said, among other things:

> "The companies may do it (trim trees and cut branches so as to admit the stringing and operating of wires) being answerable for any unnecessary, improper or excessive cutting."

A land owner's title extends to the center of the street his property abuts and includes all trees standing or growing thereon, and he can be deprived of these trees for a public use only by due process of law. Town of Rost v. O'Connor, 145 Minn. 81.

Section 2609, Mason's Minnesota Supplement 1938, applies only to the removal of trees from the right of way of an existing road, and vests town boards and officers with the necessary authority. You will observe that the removal of trees under this section is unlawful:

> "Unless such trees or hedges or either of them interfere with keeping the surface of the road in good order, or cause the snow to drift onto or accumulate upon said road in quantities that obstruct travel."

This section has nothing whatever to do with the situation you describe. Essentially this situation is one which calls for consideration of the property owners affected and not for action by any governmental officer or agency. This is in accordance with our previous ruling. Opinion July 23, 1928.

ROLLIN L. SMITH,
Special Assistant Attorney General.

April 4, 1939. 98a-28

138

Trunk—Abandoned—Originally established as "Elwell Highway."

Redwood County Attorney.

You state that Highway No. 71 was originally established as an Elwell Highway, under which the abutting owners paid one-eighth of the original cost of construction; the townships through which the same passed, one-eighth; the county one-fourth, and the state one-half. Thereafter this highway as it passed through Redwood County between the termini of Redwood Falls and Sanborn was designated as Trunk Highway No. 71. Of more recent date in the past year or so when this road was regraded preparatory to being surfaced, it was slightly rerouted between the points of Redwood Falls and Sanborn so that a six mile stretch of said road through Redwood Township was abandoned.

You say that the question now arises on the part of Redwood Township as to whether or not the abutting owners on this road and also the township itself may have a vested right in the continued maintenance of this road, either by the state or by Redwood County.

It is the opinion of this office that the abandoned road by the state incident to the permanent relocation of No. 71 between the above designated points, puts the road back exactly where it was before its original determination as a trunk highway. If it was a county road, it then reverts to the county, and the county has the right to treat it as a county road. If the county so desires, it can turn it over to the township and it then becomes a township road.

If neither the county nor the township desires to maintain the highway, it may be abandoned in the manner provided by law. If it is desired by either one of these governmental subdivisions, or both, to keep the road, then they should determine among themselves as to the matter of upkeep.

The road having been abandoned as a trunk highway, it is no longer a trunk highway, and therefore no obligation on the part of the state to keep and maintain the same.

ARTHUR CHRISTOFFERSON,
Deputy Attorney General.

July 18, 1940. 229k-4

INDEBTEDNESS

139

Bonds used for hospital not deductible from gross debt—M27 § 1938-3 (C). M27 § 1938-3 (C).

State Board of Investment.

Relative to application of the Village of Buffalo, Minnesota, for a loan of $33,000 to equip and construct a hospital, which requests an opinion on the question as to whether bonds issued for that purpose are deductible from the gross debt of the municipality, in view of the fact that the village pledges the net revenue of the proposed hospital for the retirement of the bond issue.

Under the definition of "gross debt" in Section 1938-3 (C), Mason's 1927 Minnesota Statutes, the proposed bond issue by the Village of Buffalo would be added to its gross debt. Under the definition of "net debt" in subdivision D of said section, there appears to be no authority for deducting from the gross debt the amount of bonds issued for a hospital.

In paragraph 4 of Section 1935, Mason's 1927 Minnesota Statutes, provision was made for deducting from the sum of all outstanding municipal money obligations bonds issued for the purposes therein stated, of which one was the establishing of a "public convenience from which a revenue is or may be derived." Said Section 1935 containing the definition of municipal "net indebtedness" was enacted in 1905. The later definition of "net debt" to be found in aforesaid Section 1938-3 (D) was adopted in 1927, and is a part of the same act ('27, C 131) that defined the net debt limit. (Section 1938-4).

It is my opinion that for the purpose of establishing said statutory municipal debt limit, it was the intention of the legislature that the 1927 definition of "net debt" should supersede the 1905 definition thereof, and as under the 1927 provision (Section 1938-3 'D') bonds issued for hospital purposes are not included in items that may be deducted from the gross debt, such bonds are not legally deductible in determining the net debt of the Village in question.

J. A. A. BURNQUIST,
Attorney General.

July 18, 1940. 44a-4

140

Bonds ineligible for purchase by state unless (1) will not make entire bonded indebtedness in excess of 15% of assessed valuation of all taxable property; and (2) will not increase municipal net debt beyond limit of assessed value of all taxable property as fixed by M38 § 1938-4.

State Board of Investment.

You request an opinion on the question: "Does the limitation of net indebtedness contained in Section 1938-4, Mason's Statutes, 1938 Supplement, apply where the loan is obtained from the State?"

The section involved reads as follows:

> "No municipality except school districts shall hereafter incur or be subject to a net debt beyond 10 per cent of the last assessed valuation as finally equalized of all taxable property therein including moneys and credits * * *."

Among the exceptions therein made are municipalities receiving state aid, in which case the limit is 20 per cent; school districts, in which case the limit is 20 per cent; and cities of the first class, in which case the limit is 5 per cent unless the charter provides otherwise.

It is my opinion that a muncipality cannot create a net indebtedness beyond that fixed by said section whether the debt is incurred to the State by a vote of the electors or otherwise.

You refer to opinion 16, 1936 report which held that Section 1938-4, Mason's Statutes 1927, was inapplicable where bonds of a village were to be issued to the State with the approval of the voters of the village.

The opinion referred to was based on the assumption that the bonds in question were not to be included in computing the amount of net debt because of the execption in Mason's Statutes 1927, Section 1938-3, of obligations "authorized by the electors of any municipality to be issued and sold to the State of Minnesota." However, this exception pertains to the succeeding provisions as to the issuance of bonds which are covered in detail by Sections 1938-5 to 1938-13, inclusive. It is clear that such obligations cannot be deducted from the gross debt of a municipality so as to effect the 10 per cent limit of net debt provided in Section 1938-4 on the sole basis of being authorized by the electors to be issued and sold to the State.

This is manifest from the fact that under Section 1938-3, the "gross debt" upon which "net debt" is computed is expressly defined in paragraph "C" thereof as including the very obligations which are excepted from the provisions as to the issuance above mentioned.

In defining "net debt" in paragraph "D" of said Section 1938-3, bonds sold the State are not specifically mentioned as an item that may be deducted from the gross debt. If, however, obligations are issued for the purposes designated in said paragraph "D," they may be so deducted as therein provided.

Insofar as the opinion above mentioned is inconsistent with the views herein expressed, it is not adhered to for the reasons above stated.

It is therefore suggested that the State Board of Investment in purchasing muncipal bonds of Minnesota should apply two tests:

(1) Will such bonds make the entire bonded indebtedness in excess of the constitutional limit of 15 per cent of the assessed valuation of the taxable property of the municipality?

(2) Will such bonds increase the municipal net debt as defined in said Section 1938-3 beyond the limit of the assessed value of all taxable property in the municipality as fixed by said Section 1938-4, Mason's Supplement 1938?

If the answer to either question is in the affirmative, the bonds are not eligible for purchase by the state.

J. A. A. BURNQUIST,
Attorney General.

July 28, 1939. 928a-8

141

"Net debt" defined—M27 §§ 1938-3, 1938-4.

Village Attorney, Westbrook.

The Village of Westbrook, incorporated under the 1885 Village Act, has an assessed valuation of all taxable property as follows:

Real Estate	$144,289.00
Personal Property	72,004.00
Moneys and Credits	131,976.00
(1938) Total	$348,269.00

You state that you have outstanding $21,000 in general obligation water bonds; $27,000 in certificates of indebetedness, issued pursuant to Section 1824, Mason's Minnesota Statutes 1927, and $28,200 in bonds issued for a municipal light plant, pursuant to Section 1860-3 of Mason's Statutes 1927.

You ask to be advised as to the total amount of general obligation bonds which the Village of Westbrook may legally issue.

Your Village may issue bonds to the extent of ten per cent of the last assessed valuation as finally equalized (Mason's 1927 Statutes, Section 1938-4) which, in this instance, is ten per cent of your total valuation, or the sum of $34,826.90. From this amount we must deduct all existing obligations which go to make up the "net debt" of the Village. In computing such net debt, the $21,000 in general obligation water bonds is exempt. See Mason's Statutes 1927, Section 1938-3 (D), (2); the $27,000 in certificates of indebtedness, issued pursuant to Section 1824, of Mason's 1927 Statutes, is exempt pursuant to the terms of such act. The statute authorizing the issuance of such certificate of indebtedness provides that, "the amount of

any such certificates at any time outstanding shall not be included in determining any such municipality's net indebtedness under the provisions of any applicable law." The $28,200 in bonds issued for your municipal light plant, pursuant to Mason's Statutes 1927, Section 1860-3, is exempt from the computation of the net debt. See Mason's 1927 Statutes, Section 1938-3 (D), (2).

All of the obligations you have enumerated are exempt from the definition of "net debt." I assume that there are no unpaid judgments rendered against the municipality and that there are no other obligations outstanding. On that assumption your Village may issue general obligation bonds to the extent of ten per cent of its assessed valuation, or in the sum of $34,826.90.

EDWARD J. DEVITT,
Assistant Attorney General.

October 10, 1939. 476a-3

142

Unlawfully incurred—Authority to borrow money—Liability of city to pay—Charter construed.

Alexandria City Attorney.

You state that Alexandria operates under a home rule charter. In 1938, the city purchased part of a block of land in the city of Alexandria to be used as an athletic field. The city park board, created by ordinance, (there is no charter authority for its existence) borrowed $4,000 from a local bank, and executed its note in payment thereof, to pay for indebtedness incurred by the board in developing the athletic field. The council knew that the park board was borrowing the money, but did not affirmatively approve the action. There is no question but that the park board and council acted in good faith. The money was used for legitimate municipal purposes. On the basis of these facts you ask:

> "Is this obligation or contract created by the Park Board, even though unauthorized or ultra vires, a direct obligation of the City, and one upon which the Municipality as such is liable therefor?"

From your city charter, it is apparent that the city is authorized to borrow money only by issuing bonds after a favorable vote of the electors. See Section 80. Section 81 authorizes the council to issue its certificates of indebtedness in anticipation of the collection of taxes already levied. I cannot find any other provision authorizing the council to borrow money. It is evident that neither the park board nor the city council is authorized to borrow money from a bank and execute a promissory note on behalf of the city. It follows, therefore, that the action of the park board in borrowing the money and executing the note was without legal authority and is void.

One who deals with a municipality is bound by the limitations on its powers and is chargeable with knowledge thereof. If money is loaned to a municipality, the lender should see to it that the municipality has power to borrow money and that the borrowing is the act of a body or officer empowered to act for the municipality. See McQuillin Municipal Corporations, Section 2334.

However that may be, the question now presented is whether the city may be held liable for the indebtedness so created. In the case of First National Bank of Goodhue v. Village of Goodhue, 139 N. W. 599, the court held that where the Village of Goodhue had received money from a bank pursuant to a loan obtained for the village by the council president and village clerk, in which transaction the parties acted in good faith and without purpose to violate or evade the law, and where the money so received was retained and subsequently devoted to legitimate municipal purposes, the municipality was liable thereon even though it had failed to submit the question of borrowing the money to a vote of the electors, as was required by statute. The court held the transaction to be illegal and void, but concluded that the municipality should be compelled to do justice and repay the loan; recovery was allowed on the theory of an implied contract to pay for that which had been received. Quoting the decision:

> "* * * In short, the 'doctrines of assumpsit are applicable to municipal corporations as well as to natural persons, and the action may be maintained on the common counts, and not from any contract entered into on the subject, but from the general obligation to do justice, which binds all persons whether natural or artificial.' * * *"

In a later decision, that of Wakely v. County of St. Louis, 240 N. W. 103, the court, in reviewing the decisions pertinent to the point there under discussion, referred to the case of First National Bank v. Village of Goodhue, supra, and said:

> "* * * The rule as laid down in the cases is that where a municipal corporation receives money or property of another under and pursuant to a contract upon a subject within its corporate powers, and the contract was made and carried out in good faith and without purpose or intent to violate or evade the law, but is invalid because not entered into or ratified by the officers of the corporation having power to contract, or for some other failure to comply with statutory requirements, and money or property so received is retained by the corporation and devoted to a legitimate corporate purpose, resulting in benefits to the corporation, the one so furnishing the money or property may recover in quasi contract, to the extent of the benefits received by the corporation. * * *" (citing cases).

It would appear that the facts in your case bring it within the rule expressed in the First National Bank v. Village of Goodhue case. The city of Alexandria has received the money from the bank and used it. The transaction was made and carried out in good faith without purpose or intent to violate or evade the law. The money was devoted to legitimate

corporate purposes and resulted in definite benefits to the city. I am of the opinion that in the event action were to be brought against the city, the court would allow recovery, not on the express contract, but on the theory of an implied contract.

J. A. A. BURNQUIST,
Attorney General.

May 22, 1940. 59a-22

LIBRARIES

143

Appropriations—WPA project to establish—M27 § 673.

Blue Earth County Attorney.

You ask if your county commissioners may lawfully make a donation toward a pending WPA project to establish libraries in two or three different villages.

The county board has no right to appropriate money from general revenue for library purposes. Under section 673, Mason's Minnesota Statutes 1927, they can levy a special tax for that purpose, but the levy will be extended only against property which has not already contributed through taxation for support of a free public library.

M. TEDD EVANS,
Assistant Attorney General.

August 21, 1939. 125b-18

144

Counties—Contract for service through cities situated in another county.

State Director of Libraries.

You ask whether the county commissioners of Waseca County may contract for library service for their county through the cities of Owatonna or Mankato not in their county when there is a small public library located at Janesville, Waseca County, said city of Janesville being situated at the northwest part of the county, and not readily accessible or convenient.

We are forced to the conclusion, after considering all the laws which bear on the subject, that the legislature intended that where there is a public library in the county, the taxpayers' money levied for that purpose should be spent on that public library. The following sections briefly stated may apply:

Mason's Minnesota Statutes of 1927, Section 673, paragraph 3, states that "If there is a free public library in the county, the board of county commissioners **shall** contract with the board of directors of such library * * *."

Mason's Minnesota Statutes of 1927, Section 1591, states that "any public library board * * * **may** enter into arrangements * * * with the authorities of any adjoining county, whereby the inhabitants of any such county or counties may secure the privileges of using the library * * *."

Mason's Minnesota Statutes of 1927, Section 5666, provides that "any board (library) may contract with the board of county commissioners * * * of an adjacent county * * * to loan books of said library to residents of an (adjacent) county."

Considering all of the statutes together, it seems clear that the legislature intended Section 673 should apply in a case like this, also it intended the word "shall" as used therein to be mandatory. Consequently the county commissioners must contract within their own county in this regard and may not do so in a neighboring county.

M. TEDD EVANS,
Assistant Attorney General.

November 10, 1939. 285b

LICENSES

145

Chauffeur—Driver of city fire truck must have—M1940, Sec. 2712-1.

Beltrami County Attorney.

You ask:

"* * * whether city employees engaged as drivers of the city fire trucks must have chauffeur licenses. * * *"

Answer, yes. The chauffeur's license law was amended by Laws 1939, Chapter 426, now contained in Mason's 1940 Supplement, Section 2712-1. The law prohibits any person from driving a motor vehicle as a chauffeur without first being licensed, and the term "chauffeur," as used in the act, is defined as meaning and including every employee who in the course of his employment operates a truck, tractor or truck-tractor belonging to another, upon the public streets or highways. Excepted are drivers of light trucks used only for the purpose of carrying tools, repairs and light materials, and trucks registered in the "T" class when operated by members of the family of the owner.

EDWARD J. DEVITT,
Assistant Attorney General.

November 13, 1940. 635e

146

Chauffeur's—Drive of school bus must have—M40 § 2712.

Anoka County Attorney.

You inquire:

> "Could a pupil, who complies with the regulations of the Department of Education, but is under 18 years of age and hence does not have a chauffeur's license, transport not more than five pupil passengers in a private automobile and take pay for the same from the school district?"

Mason's Minnesota Statutes of 1927, Section 2712 (Laws 1939, Chapter 426) states:

> "No person shall drive a motor vehicle as a chauffeur upon any public highway in this state unless he be licensed by the secretary of state * * *."

The second paragraph of said law states:
"The term chauffeur * * * shall mean and shall include:

1. Every person, including the owner, who operates a motor vehicle while it is in use as a carrier of persons or property for hire.

* * *

4. Every person who drives a school bus transporting school children"

It is the opinion of this office that before any person can operate a school bus, or any motor vehicle, transporting school children for hire, such person must first secure a chauffeur's license.

HAYES DANSINGBURG,
Assistant Attorney General.

August 26, 1940. 635e

147

Detectives—Undercover men employed by county—M27 §§ 5880 to 5887; L39, C305.

Nobles County Attorney.

You ask if a so-called undercover man, employed by the county attorney to obtain evidence of liquor law violations, is required to have a detective license under Sections 5880 to 5887, Mason's Minnesota Statutes of 1927, as amended by Chapter 305, Laws 1939. The 1939 amendment does not change the situation or the law in any way, except it granted full discretion to the governor to grant or deny such application.

Webster's New International Dictionary defines the word "detective" as "one whose occupation is to detect concealed matters, especially crimes and criminals."

An opinion dated April 8, 1926, held that an undercover man, employed by a sheriff to obtain evidence of liquor violations, did not require a detective license. We think the same is true of undercover men employed by county attorneys, out of their contingent fund. The work does not require special training or qualifications as a detective, and could be done by any ordinary citizen.

The foregoing sections of the statute do, however, prohibit any such person from holding himself out to be a private detective or keeping or operating a detective agency. Such undercover men should therefore take due care in holding themselves out or representing the nature of their work; but the mere investigation or obtaining evidence of liquor violations, at your request or at the request of the sheriff, does not make them detectives within the terms of the statute first above referred to.

M. TEDD EVANS,
Assistant Attorney General.

August 17, 1939. 876

151

Marriage—Minors—Under age limit—Clerk should refuse to issue license even though parents give consent—M27 § 8563.

Austin L. Grimes, County Attorney.

You inquire in regard to issuing marriage licenses to minors; in one instance a girl of 14 years of age desires to marry, with the consent of her parents, and in the second a boy 17 years of age has applied for license.

The statute which controls this situation is Section 8563, Mason's Minnesota Statutes 1927, from which we conclude that your clerk of court should refuse to issue marriage licenses to any female under the age of 15 years, even though she has her parents' consent; and that the clerk of court should refuse to issue marriage licenses to any male under the age of 18 years, even though such person has his parents' consent.

It would further appear that any minister or magistrate who performed a marriage ceremony for such persons, knowing that they were under the above age limit, might be found guilty of a gross misdemeanor under Section 8573, Mason's Minnesota Statutes 1927.

Our legislature by Chapter 407, Laws of 1937, further amended our marriage laws by adding a provision to Section 8564, Mason's Minnesota Supplement 1938, which prohibits any marriage where either party is under the age of 15 years. It is the law of this state that a marriage of persons

under age is voidable, but not void (State ex rel. vs. Lowell, 78 Minn. 166, 80 N. W. 877). The provisions of Section 8580, Mason's Minnesota Statutes 1927, do not apply to persons under age.

M. TEDD EVANS,
Assistant Attorney General.

July 10, 1939. 300a

Note: See Lundstrom v. Mample 205 Minn. 91. See also L39, C243, 285 N. W 83.

LIQUOR

152

Cordials—Composition—Legality—Retail sale—M40 § 3200-28.

Liquor Control Commissioner.

You state that a certain manufacturer has put on the market two products, labeled as cordials. You enclose statements of the formulae submitted by the manufacturer, also reports of examination and analysis by the state chemist. From these statements it appears that both of these products are composed of a mixture of alchohol with other ingredients, the alcoholic content being approximately 50% by volume.

You inquire whether the sale of these products is prohibited by the following provisions of Mason's Minnesota Supplement 1938, Section 3200-28, as amended by Laws 1939, Chapter 101:

> "The retail sale for beverage purposes of ethyl alcohol or neutral spirits, or substitutes therefor, possessing the taste, aroma, and characteristics generally attributed to ethyl alcohol or neutral spirits, as such, is hereby prohibited. Nothing in this paragraph shall be construed to prohibit the manufacture or sale of other products obtained by the use of ethyl alcohol or neutral spirits as defined in the Standards of Identity for Distilled Spirits, Article Two (2), Regulations number five (5), Federal Alcohol Administration."

The applicable provision of the federal regulations referred to in this statute is as follows:

> "Class 6. Cordials and Liqueurs. (a) Cordials and Liqueurs are products obtained by mixing or redistilling neutral spirits, brandy, gin, or other distilled spirits with or over fruits, flowers, plants, or pure juices therefrom, or other natural flavoring materials, or with extracts derived from infusions, percolations, or maceration of such materials, and to which sugar or dextrose or both have been added in an amount not less than 2½% by weight of the finished product. Synthetic or imitation flavoring materials shall not be included."

The question is whether these products are a form of ethyl alcohol or neutral spirits, or a substitute therefor, in which case their sale at retail for beverage purposes would be illegal, or whether they are cordials as defined by the federal regulation, in which case their sale would be legal. This involves questions of fact for your determination.

In order to come within the definition of a cordial under the federal regulation, for the purposes of the Minnesota statute, a product must meet three requirements: (1) It must be compounded in the manner prescribed by the regulation; (2) It must be flavored with natural flavoring materials; (3) It must contain at least 2½% of sugar or dextrose by weight.

Upon examining the reports submitted with your letter, it appears that the determination of the character of the products under investigation turns principally upon their flavor. Apparently it is conceded that as to method of compounding and sugar content they comply with the regulation.

However, as to flavor, the state chemist's report states that these products possess a definite alcoholic taste, that their flavor is faint, and that they possess the characteristics of beverage alcohol, not those common to cordials. On the other hand, the manufacturer's formula states that the products contain natural flavoring materials. Nothing is said as to the nature, strength, or amount of such materials. The federal regulation prescribes no standard therefor. However, it must be assumed that in order to be rated as a cordial under the regulation, a product must have sufficient flavor to distinguish it from ethyl alcohol or neutral spirits. This is not to say that the flavor must be so strong as to overcome completely the alcoholic taste or aroma of the basic ingredients. The added flavor must, however, be something more than a faint trace which might be used merely for the purpose of evading the law.

Our advice is that in any such case you make or cause to be made such investigation as you deem necessary in order to satisfy yourself as to the composition and character of the product in question, and thereupon determine whether or not, in your opinion, it complies with the law.

The papers which you submitted are returned herewith.

CHESTER S. WILSON,
Deputy Attorney General.

June 15, 1939. 218

153

Licenses—Cities—Private census and its effect on classification—M. S. 38 §§ 3200-25, M27 1265, 10933.

Liquor Control Commissioner.

You refer to an opinion of this office dated January 30, 1934, asking for a clarification on computing population of cities or villages for the

purpose of determining the number of liquor licenses which may be issued pursuant to Section 3200-25, Mason's 1938 Minnesota Supplement. You specifically inquire as to the effect of a private census taken at Forest Lake, Minnesota, in December, 1938, and its effect on the classification of such village for liquor license purposes.

The law does not, and should not, recognize a private census. In the past, all legislation passed on population referred to the last official state or federal census. This is still the rule in determining the population of all villages for purposes of issuing liquor licenses.

In the case of cities, as classified by Section 1265, Mason's Minnesota Statutes of 1927, they are given the right by Section 1266 to add 5 per cent to their last official census.

In all other cases, the population would be determined as defined by Section 10933, subsection 12:

> "The word 'population,' and the word 'inhabitants,' * * * shall mean that shown by the last preceding census, state or United States, unless otherwise expressly provided."

M. TEDD EVANS,
Assistant Attorney General.

February 6, 1940. 218g-1

154

License—Clubs—May not be licensed outside of corporate limits of any city, village or borough—M40 § 3200-25.

Dakota County Attorney.

You inquire:

> "Can a bonafide club which has been such for at least 20 years and which is located outside of the corporate limits of any city or village in Dakota County obtain a license from the County Board of Commissioners to sell intoxicating liquors either "off-sale" or "on-sale?" Chapter 154, Laws 1939 (Mason's Minnesota Statutes 1927 § 3200-25)

provides in part:

> "All 'On sale' licenses shall be granted and the annual license fee therefor fixed by the respective local governing bodies of the various political subdivisions of the state, and such governing bodies shall have the right to revoke licenses issued by them, for cause."

Following this provision, the statute then imposes the limitations as to the number of licenses that may be issued in cities of the first and second class, then provides as follows:

"Provided, however, that 'On sale' licenses may be issued, except in cities of the first class, in addition to the limitations as herein provided, to bona fide clubs in existence for 20 years which are duly incorporated and which licenses shall be for the sale of intoxicating liquors to members only for a license fee of $100.00."

Then follows provisions regulating the number of "On sale" licenses which may be issued in any third and fourth class cities, boroughs and villages which are followed by certain modification of the above limitations classified on the basis of cities in counties having various populations and congressional townships. The statute then provides:

" 'On sale' licenses may be issued for the sale of intoxicating liquor in hotels, clubs and restaurants in cities of the first, second and third class and villages of over 10,000 inhabitants. Such licenses may be issued in cities of the fourth class, and other villages and boroughs for such sale of intoxicating liquor in hotels, clubs, and/or exclusive liquor stores, which exclusive liquor stores the governing body of such municipalities may establish or permit to be established for dispensation of liquor either 'On sale' or 'Off sale,' or both."

After providing for limitations as to the number of 'Off sale' licenses which may be granted in cities of the first class, the statute continues:

"In all other cities, villages and burroughs, the number of 'Off sale' licenses to be issued therein shall be determined by the local governing body. In all cities, villages and boroughs other than cities of the first class "Off sale" licenses shall be issued only to proprietors of drug stores and exclusive liquor stores."

While it is true that one provision of this chapter as quoted above provides that licenses shall be issued by the local governing bodies of the various political subdivisions of the state, it must be noted that this provision is followed by specific regulations concerning the issuance of licenses, which regulations appear to be limited to the governing bodies of incorporated cities, villages or boroughs. It is, therefore, our opinion that the broad introductory provision is qualified and restricted by the following provisions and that intoxicating liquor licenses may not be issued to any applicant whose place of business is without the corporate limits of any city, village or borough.

KENT C. van den BERG,
Special Assistant Attorney General.

June 15, 1939. 218g-15

155

License—Revocation—Upon conviction—Authority of city council—Revocation mandatory where violation wilful—Effect of conviction of licensee—Liability of licensee for acts of employees—M40 §§ 3200-25, 3200-27, 3200-33.

City Attorney, Mankato.

You ask the opinion of this office as to the powers and duties of the city council with respect to revocation of a liquor license where a licensee has been convicted of a criminal violation of the liquor act.

Section 3200-27, Mason's 1940 Minnesota Supplement, provides that a license may be revoked for violation of any of the provisions of the act, and "an off sale license may be revoked by the governing body of the municipality after hearing, or revoked by the Liquor Control Commissioner after hearing." Section 3200-25, Mason's 1940 Minnesota Supplement, in part reads:

> "All on sale licenses shall be granted and the annual license fee therefor fixed by the respective local governing bodies of the various political subdivisions of the state, and **such governing body shall have the right to revoke licenses issued by them, for cause.**"

Section 3200-33, Mason's 1940 Minnesota Supplement, paragraph (b), provides, "when any licensee shall **wilfully** violate the provisions of this act, his license **shall** be immediately revoked and his bond forfeited * * *."

All these provisions must be read and construed together.

This office has previously ruled that in order to protect the rights of the licensee and to be safe on the question of due process of law, a hearing should be held in every case, and the licensee should be given at least eight days' notice, in writing, of the charges against him, and the time and place of hearing thereon. Eight days is the usual minimum period of notice for court hearings, and the same time is considered sufficient in liquor license cases. More time may be allowed in a particular case, if the circumstances require.

It is clear that the law intended to recognize differences in the conditions under which a license is subject to revocation. If a wilful violation is found, revocation is mandatory, under Section 3200-33; otherwise revocation is discretionary.

It is not essential that there should be a previous criminal conviction in order to warrant revocation. The authorized officer or body, under Section 3200-25 or 3200-27, may revoke a license, upon determining after a hearing, that sufficient grounds exist, even though there has been no criminal conviction. And if in addition it was determined upon a hearing that there had been a wilful violation of the law, it would be the positive duty of the authorized officer or body to revoke the license.

In our opinion the term "wilful" for the purposes of such cases merely implies that the act constituting the violation of law was done by the licensee knowingly or designedly or intentionally, or that it was done by some other person with his knowledge and with his acquiescence or approval.

Dunnell's Digest, Section 2410.

State v. Lehman, 131 Minn. 427, 155 N. W. 399.

State v. Damuth, 135 Minn. 76, 160 N. W. 196.

It is not necessary that the licensee should entertain any specific criminal intent in committing the prohibited act, or even that he should have known that it was unlawful, in order to render the act wilful and subject the license to mandatory revocation. All that is required is that the licensee knew what he was doing, or, if the act was done by some other person, that he knew of it and either consented to or acquiesced in it. All persons are presumed to know the law. As pointed out in the cases above cited, specific criminal intent is not an essential element of violation of the liquor laws.

It has been held that the proprietor of a licensed tavern or saloon is criminally liable for the acts of his employees, even though committed without his knowledge or consent, since he is responsible under the law for the conduct of his place of business.

State v. Lundgren, 124 Minn. 162, 144 N. W. 752.

State v. Sobelman, 199 Minn. 232, 271 N. W. 484.

State v. Holm, 201 Minn. 53, 275 N. W. 401.

Attorney General's Opinion, June 2, 1939.

However, we do not think that the rules laid down in those cases are applicable upon the question whether or not revocation of a license is mandatory. The term "wilful" was not expressly used in defining the offenses involved in the cases cited. In the provision here in question the term "wilful" is used for the express purpose of distinguishing between cases where revocation is discretionary and those where it is mandatory. It clearly imports actual knowledge on the part of the licensee in order to make revocation mandatory. Hence, in our opinion, even though a licensee may be held criminally liable for the act of an employee committed without his knowledge or consent, revocation of his license would not be mandatory in case of a violation by an employee unless the licensee himself had knowledge of the act and consented to or acquiesced in it.

However, the authorized body or officer would have discretionary power to revoke a license in case of a violation by an employee, even though it was committed without the knowledge or consent of the licensee.

The question remains as to the effect of a criminal conviction of the licensee with respect to revocation of his license. This is the particular question with which your city council is now confronted.

In our opinion, if a licensee was convicted of a violation of the law for his own personal act, the violation would be wilful, by legal presumption, and revocation would be mandatory. In such a case, although a hearing should be granted, it should be confined merely to identifying the licensee and ascertaining the fact and nature of his conviction. A certified copy of the conviction, with evidence showing that the licensee personally committed the act, would be all that was required. The council would have no authority to go further and review the merits of the case.

However, if the conviction was for a violation by an employee, the council should proceed to determine whether it was committed with the

knowledge, consent, or acquiescence of the licensee. If so, it must be deemed wilful, and revocation would be mandatory. Otherwise revocation would be discretionary with the council. However, a violation committed by an employee in the presence of his employer would be presumed to have been done with the latter's consent, and hence to have been wilful on the part of the employer, even though not expressly authorized.

In our opinion a conviction under a city ordinance would have the same effect in such a case as a conviction under the statute.

Conviction of a licensee would be stayed by a motion for a new trial or by a timely appeal. In such case the city council would be justified in delaying action or hearing upon the matter of revocation until final disposition of the criminal proceeding.

J. A. A. BURNQUIST,
Attorney General.

April 8, 1940. 218g-14

156

Licenses—Transfer—Intoxicating and non-intoxicating—Refund of fee—M40 §§ 3200-25, 3200-35.

Duluth City Attorney.

You ask:

1. Whether or not a non-intoxicating malt liquor license may be transferred by the city council from one licensee to another. This office has previously held that non-intoxicating malt liquor licenses are not transferable.

2. Whether or not an intoxicating liquor license may be transferred by the city council from one licensee to another. Section 3200-25, Mason's 1940 Minnesota Supplement, provides that all licenses for retail "off sale" liquor shall be granted by the local governing body subject to the control of the Liquor Commissioner and shall not become effective until so approved. Hence, it follows that any "off-sale" liquor license may be transferred by the governing body subject to the approval of the Liquor Control Commissioner and such transfer shall not become effective until so approved by him.

In regard to the transfer of an "on-sale" liquor license, the matter rests within the discretion of the governing body which has authority to make the transfer, excluding, however, the exceptions contained in Section 3200-35, Mason's 1940 Minnesota Supplement, which, we are informed, do not apply to your city, which exceptions increase the number of licenses to be issued in certain counties subject to approval of the Liquor Control Commissioner.

3. Whether or not a refund of non-intoxicating malt liquor or intoxicating liquor license fees may be made to a licensee. This office has previously rendered opinions to the effect that such refunds cannot be made, which opinions you called to our attention. These opinions are in conformity with the laws of this state as set forth in Minneapolis Brewing Company v. Bagley, 142 Minn. 16.

4. Whether or not a municipality may provide by ordinance for the transfer of an intoxicating liquor license. This is answered by paragraph three of this letter.

5. Whether or not a municipality may by ordinance provide for a refund of part of the license fee in the event that a licensee should wish to surrender his license at any time prior to the expiration of said license period. This is answered in the negative.

HAYES DANSINGBURG,
Assistant Attorney General.

July 6, 1940. 217b-6

157

Licenses—Transfer—Liquor store—Refund of unearned portion—M40 § 3200-25.

City Attorney, Owatonna.

You state:

"The owner of an exclusive liquor store here has an opportunity to sell his business. He has a license issued to him which expires June 30th, 1941, both on and off sale. Owatonna has an ordinance which, among other things, provides as follows:

"Section 12. Not Transferable. No license issued under this ordinance shall be transferred by the licensee to any other person.

"The council expects to revoke the license issued to the seller and issue a new license to the buyer for the un-expired term. The question now is as to the license fee. In view of the fact that a license fee has already been paid can the City Council, if they want to, grant a license for the unexpired term, for nothing?"

On November 19, 1938, this office held that a city could not make a refund for the unearned portion of a liquor license. Mason's 1940 Minnesota Supplement, Section 3200-25, permits transfers of intoxicating liquor licenses with the consent of the issuing authority, if the transferee files a new bond. However, since your ordinance prohibits the transfer of a license, your council would hardly be in a position to authorize or consent to such a transfer. In this instance, the ordinance is not so inconsistent with the express terms of the statute that it would be superseded thereby.

We are of the opinion that the city council can hardly issue a free license for the remainder of the year because that would be inconsistent with the state law and with the ordinance. However, the statute does authorize a license on pro rata basis, for a shorter period than one year, when it is done for the purpose of making the expiration date of all liquor licenses uniform. The last sentence of Section 3200-25, Mason's 1940 Minnesota Supplement, reads:

> "Where such license shall be issued for less than one year, a fee may be a pro rata share of the annual license fee."

M. TEDD EVANS,
Assistant Attorney General.

September 13, 1940. 218g-10

158

LIQUOR

Liquor stores—Establishment—Result of election—L39, C395—M40 § 3200-30.

Henning Village Attorney.

You state that the village of Henning, pursuant to Chapter 395, Laws of 1939, voted on the question of establishing a municipal liquor store; that separate ballots were used with the following result: for municipal liquor store 189, against municipal liquor store 187, blank ballots 5.

You ask us if the village may establish a municipal liquor store within the terms of said chapter.

The material portion of said chapter relating to the result of the election reads as follows:

> "* * * If a majority of all the ballots cast at such election upon the question of establishing a municipally-owned exclusive liquor store shall be 'for municipal liquor store', the council may * * * establish such a store and sell intoxicating liquor therein in the same manner as in other counties of the state; * * *."

There is a conflict among the cases as to whether blank ballots should be counted in determining the total vote cast. By the greater weight of American authority, blank and illegal votes must be rejected in determining the total vote cast on any question. Am. Jur., page 342, note in 45 L. R. A. (N. S.) page 714, note in L. R. A. 1915 C, page 714 at 718.

Minnesota for many years followed the minority: Taylor v. Taylor, 10 M 81 (107); Dayton v. St. Paul, 22 M. 400; Smith v. Renville County, 64 M. 16; State v. Hugo, 84 Minn. 81; Hopkins v. Duluth, 81 M. 189 (contra and distinction noted); State v. Osakis, 112 M. 365; McLaughlin v. Rush

City, 122 M. 428; Lodben v. Warren, 118 M. 371; Anderson v. LeSeuer, 127 M. 318; and Eikmeir v. Steffen, 131 Minn. 287.

While some of the Minnesota cases are hard to reconcile, there is a strong tendency to get away from the rule announced in the case in 131 Minnesota. "Spoiled ballots must be included in determining the total vote cast at the election" and the last sentence of the majority opinion reads: "Whether the rule stated in the Rush City case should be limited so as to exclude ballots wholly blank is left for consideration when that question shall be directly involved."

In Doepke v. King, 132 M. 291, the court said, "the contestee must have a majority of all votes cast, blank and unintelligible votes included, and the court properly excluded from the total, votes cast in violation of law, etc."

Then in later Minnesota cases the court has been inclined to lean toward the two dissenting opinions in Eikmeir v. Steffen, and in a Minneapolis charter election held that blank ballots did not count in determining the total votes cast. Godward v. City of Minneapolis, 190 Minn. 54, 250 N. W. 719. The older Minnesota cases can only be distinguished on the theory stated in some of the opinions, that extraordinarily strict rules apply in county seat removal and in county option cases.

We are therefore inclined to the opinion that blank ballots cannot be counted as votes cast on such question. Therefore, it would appear that a majority of the votes cast were "for municipal liquor store." Therefore, the village council may establish a municipal liquor store with any funds on hand in their general revenue fund, and should for that purpose adopt an ordinance to establish and regulate the same.

M. TEDD EVANS,
Assistant Attorney General.

December 16, 1939. 218g-13

159

Liquor Stores—Evidence of population for purpose of number controlled by Section 9892, Mason's Minnesota Statutes—M27 § 9892, L39, C154.

Keewatin Village Attorney.

You inquire:

"The Village of Keewatin, Minnesota, according to the last Federal census had a population of 2,134 and pursuant to Section 3200-25, 1938 Supplement of Mason's Minnesota Statutes for 1927 as amended by Chapter 154 of the Laws of 1939, has three (3) exclusive liquor stores operating within its corporate limits. At the present time, it is the general consensus of opinion that the Village has a population in excess

of 2500 and, therefore, the Council desires your opinion on whether or not there is any possibility for the licensing of one or more additional liquor stores."

There appears to be no provision in the liquor control act or in Chapter 154 of the 1939 Session Laws which provides for proof of population for the purposes of the limitations contained within the act.

I refer you to Section 9892, Mason's Minnesota 1927 Statutes, which provides:

> "That the governor of the state of Minnesota shall obtain from the director of the federal census, such certified copies thereof as will show the population of the several political divisions of this state, which said certified copies shall be filed in the office of the secretary of state, and thereafter the several political divisions of the state for all purposes, unless otherwise provided, shall be deemed to have the population thereby disclosed. Copies thereof, duly certified to by the secretary of state, shall be prima facie evidence of the facts therein disclosed in all the courts of this state.

It is my opinion that the population as shown by the certified copies filed with the secretary of state under Section 9892 will control in determining the number of liquor stores that may be permitted in the village of Keewatin.

KENT C. van den BERG,
Special Assistant Attorney General.

May 17, 1939. 218g-13

160

Liquor Stores—Funds—Right to contribute to public activities.

City Attorney, Luverne.

I have to say the funds of a municipal liquor store belong to the city. A city has no authority to make contributions out of its funds to local civic bodies.

We have held that contributions may not be made to the Red Cross or to any private charity. In this connection see 44 C. J., Section 4030. Also Hitchcock v. St. Louis, 49 Mo. 484, holding that a city cannot give its funds to charity or educational institutions within the city but not under its control.

It follows that your questions 1 and 2 are answered in the negative. The liquor store may not become a member in the local civic and commerce association. Neither may it contribute to a fund to be used in attracting

conventions to the city. Advertising is merely an incidental feature to such contribution.

However, the store may expend money for advertising in local papers, including directories and other advertising media.

ROLLIN L. SMITH,
Special Assistant Attorney General.

April 20, 1940. 218e

161

Liquor Stores—Ordinances—Opaque windows—M38 § 3200-28.

City Attorney, International Falls.

You ask if your city may pass an ordinance requiring windows of liquor stores to be opaque to a height of four feet from the sidewalk so that children cannot look into the place of business.

The motives for such an ordinance are commendable, but because of the provision in Section 3200-28, Mason's 1938 Minnesota Supplement, prohibiting opaque windows on on-sale stores, such an ordinance would not be valid. Cities and villages may make ordinances and regulations as long as they are not inconsistent with the state law.

Possibly your ordinance would avoid the inconsistency with what would be a technical violation of this statute by requiring a curtain or screen to the height of four feet from the sidewalk. This office has heretofore ruled that the provision of the act above referred to that sale shall be within full view of the public, refers only to the public inside of the premises so there will be no conflict with this provision.

M. TEDD EVANS,
Assistant Attorney General.

June 22, 1939. 218e

162

Non-intoxicating malt—Hours—Off-sale—L39, C402.

Hubbard County Attorney.

You ask as to the effect of Chapter 402, Laws of 1939, regulating closing hours for sale of non-intoxicating malt liquors.

The scope of the act is limited by its title to **on-sale** of non-intoxicating malt liquors. We therefore are of the opinion that this chapter does not affect the closing hours as to off-sale non-intoxicating malt liquors.

M. TEDD EVANS,
Assistant Attorney General.

May 8, 1939. 218j-a

163

Non-intoxicating Malt—"On Sale"—Hours—Regulation of—L39, C402.

Ramsey County Attorney.

You inquire:

> "The Sheriff of Ramsey County desires your opinion concerning the effect of Chapter 402 of the Laws of 1939 and desires to know: First, whether the effect of this Act is to establish **closing hours**, that is, the hours for the closing of establishments which sell non-intoxicating liquors. Second, whether off-sale establishments are effected by this law, and third, if this law does effect on-sale and off-sale licensees, does it prevent them from transacting in the same establishments other lawful business during the prohibited hours."

It is my opinion that the prohibition pertains to the sale of non-intoxicating malt liquors within the specified hours and does not prohibit the licensee from conducting other lawful business in his establishment during the hours specified. Though the title is possibly broad enough to sustain a regulation requiring the closing of an establishment, the body of the act contains no such restriction. The title may be broader than the body of the act without ipso facto invalidating the act. State v. Droppo, 126 Minn. 68.

It is my opinion that the law pertains to the "on sale" distribution of non-intoxicating malt liquors only. The words of limitation in the body of the act are broad enough to include both "on sale" and "off sale." However, this is broader than the scope of the act as defined in its title and consequently the body of the act will be restricted in scope by the definition contained within the title, which pertains to "on sale" only. Consequently, it is my opinion that this act does not pertain to "off sale" distribution.

KENT C. van den BERG,
Special Assistant Attorney General.

May 8, 1939. 218g-6

164

Sale—Minors—Students—M27 § 3238-4, M38 §§ 3200-7, 3200-9.

Nicollet County Attorney.

You ask whether the crime of selling intoxicating liquor to a minor is a misdemeanor by reason of Chapter 248, Laws of 1939, or a gross misdemeanor.

This offense is covered by an old statute which has been on our books since 1911, and which is Section 3238-4, Mason's Minnesota Statutes of 1927,

making such offense a gross misdemeanor, and which section has not been amended or changed by any of the 1939 acts.

The sale of non-intoxicating malt liquor to a minor is a misdemeanor under Section 3200-7 and 3200-9, 1938 Supplement to Mason's Minnesota Statutes of 1927.

M. TEDD EVANS,
Assistant Attorney General.

July 10, 1939. 218j-12

165

Sale—Sunday—Whether a holder of an "on sale" license may sell 3.2 by the bottle on Sunday morning—M38 § 3200-6, L39, C402.

Monticello Village Attorney.

You inquire:

> "Does this law (Chapter 402, Laws 1939) permit the sale of malt liquors between the hours of 2 A. M. and 12 M. on Sunday, if so, by the bottle in an on sale non-intoxicating liquor store?"

In my opinion, a person having an "on sale" non-intoxicating malt liquor license may not sell beer by the bottle between the hours of 2 A. M. and noon on Sunday under Chapter 402, Laws 1939. Section 3200-6, Mason's 1938 Supplement to Minnesota 1927 statutes in my opinion provides in legal effect that an "on sale" license does not permit "off sale" transactions of non-intoxicating malt liquor.

KENT C. van den BERG,
Special Assistant Attorney General.

May 20, 1939. 218j-8

166

Sales—Violations—Penalties—Ordinances—Conflicting Statutes—L39, CC 101, 248, 429.

City Attorney, St. Paul.

In construing conflicting portions of these statutes we try to carry out the intent of the legislature, and the rule laid down in State v. Schimelpfenig, 192 Minn. 55:

> "Where two inconsistent statutes are enacted at the same session of the legislature, the first must give way to the last as the latest expression of the lawmaking power."

This rule applies, however, only to the inconsistent portions of the acts and not to entire chapters or portions omitted in the later enactments. This rule is followed in Gerdts v. Gerdts, 196 Minn. 599.

As to your first inquiry in regard to Chapter 101, Laws of 1939, which goes into effect June 1, 1939, we are of the opinion that this chapter will be in full effect after June 1, 1939, except as to portions which are inconsistent with later enactments of this same session as found in Chapters 248 and 429. The effective date of the statute is not controlling or material in determining the effect of later legislation. The time of enactment is the controlling fact in determining which statutes are superseded.

You next ask what the penalty is at present for the sale of intoxicating liquor without a license. It is a gross misdemeanor under Chapter 248, and there will be no change in penalty on June 1 because Chapter 248 supersedes Chapter 101 as to inconsistent parts.

You next ask if the holder of a liquor license, who sells at a prohibited time is to be treated as selling without a license and punished under Chapter 248, Section 1, paragraph (f); or to be charged with a gross misdemeanor under paragraph (e) of the same. We think a statutory prosecution for selling after hours should be under Section (f) and that this section of Chapter 248 fixes the penalty for violations of Chapter 429 relating to closing hours.

You next ask if this same offense, selling after hours, will be a gross misdemeanor if committed after June 1, 1939. We think we have already answered this that there will be no change made by the effective date, June 1, 1939.

You next ask what proper penalty there is at the present time for the sale of liquor without a proper stamp thereon. It is a misdemeanor under Section 3200-70; but will become a gross misdemeanor on June 1, 1939, the effective date of Chapter 101.

You next ask if there is any penalty at present for the sale of ethyl alcohol as a beverage. There is none at present but it will be a gross misdemeanor on and after June 2, 1939, under Chapter 101.

You next inquire as to the city ordinances relating to closing hours. Chapter 429 does not alter or change any city ordinances, and municipalities now as heretofore have the right to regulate by ordinance shorter hours; that is this statute is permissive and affords authority to the city council to extend their hours to the ones mentioned in the statute, if they want to, by amendment of their respective ordinances. This will not be changed any on June 1.

The council has authority to pass regulatory ordinances not inconsistent with the statute and make the violations of the same misdemeanors.

M. TEDD EVANS,
Attorney Attorney General.

May 12, 1939. 218e

167

Sale—Without license in dry territory—Criminal Matters: Cases Misdemeanors—M38 § 3200-51.

Lac Qui Parle County Attorney.

You enclose copy of a complaint, which charges the offense of selling liquor without a license in dry territory under Section 3200-51, Mason's 1938 Supplement, which remains unamended as to penalty, and the penalty for which is therefore that of a misdemeanor, but requires punishment of both fine and jail sentence.

Former opinions of this office dated November 22, 1935, and opinion No. 300, 1936 report, dated April 27, 1936, are overruled and reversed as far as they imply that this section is exclusive; and we now hold that a party can be prosecuted in dry counties for selling without a license under Section 3200-25, Mason's 1938 Supplement, which by amendments in Chapters 101 and 248, Laws of 1939, is a gross misdemeanor.

Defendant by the same act may be guilty of violating several different statutes, and the prosecutor may choose the statute under which he intends to prosecute, even though in most instances a conviction under one would bar the further prosecution under a different statute for the same act.

The opinion of April 16, 1937, you refer to, is correct in its holding that since Section 3200-51 provides a punishment of both fine and jail sentence, the penalty exceeds the jurisdiction of the justice court, and that the defendant should therefore be bound over to district court. Therefore, as your municipal court before which this case is pending has only jurisdiction in criminal cases limited to the jurisdiction of a justice court, you are in the same position; and the defendant on the proposed complaint could be bound over to district court.

M. TEDD EVANS,
Assistant Attorney General.

August 7, 1939. 218f

LOCAL IMPROVEMENTS

168

Sewers—Lift station—Lateral sewers—Cost of construction—Method of payment—By village or by special assessment—M27 §§ 1918-15, et seq., 1880, et seq.

President, Village Council, Winnebago.

You state that there are about twenty houses on the edge of Winnebago which have no access to the main sanitary sewer. You state in order to

give these houses such access it will be necessary to construct a new sanitary sewer and a lift station. You ask whether, under Mason's Minnesota Statutes of 1927, Section 1819-23, the village could pay for the entire sewer and lift station; whether it is possible to continue pursuant to Sections 1880, et seq., Mason's Minnesota Statutes of 1927; and whether it is necessary to designate an official newspaper for published notices.

This office, in an opinion dated August 27, 1937, has ruled that under Sections 1880, et seq., above referred to, a village council would not be authorized to pay part of the expenses of laying or constructing a lateral sewer.

It is our opinion, therefore, that it is not possible to continue your proceedings under Sections 1880, et seq., and at the same time have a village pay part of the cost of the sewer and the cost of the lift station.

We are enclosing a copy of the opinion of August 27, 1937. In this connection we would like to call your attention to Section 1918-71, Mason's 1938 Minnesota Supplement, which might have some bearing on your problem.

With respect to proceedings under Sections 1918-15, et seq., it is our opinion that the village may pay for the entire cost of the sewer, together with the lift station. Section 1918-15 indicates that the act should receive a broad construction. Section 1918-23 provides that:

> "The municipality also may * * * pay the cost of any such improvement applicable to intersecting streets and * * * may also pay such portion of the cost of such improvements between street intersections * * * as the council may determine."

It further provides that:

> "The cost of outlets and disposal plants for a sewer * * * may be paid by the municipality or may be assessed against other property found benefited thereby."

This language taken in conjunction with the definitions set forth in Section 1918-15, in our opinion is broad enough to include a lift station.

Under Section 1918-18, Mason's Minnesota Statutes of 1927, it will not be necessary for you to designate an official newspaper. That Section provides in part, "The notice shall be published in a newspaper published in the municipality once in each week for at least two successive weeks, and the last publication shall be at least seven days prior to the date set for the hearing." The only limitation, you will observe, is that the newspaper be published in the municipality once in each week.

You ask whether the present condition of the sewer system with respect to the twenty houses at the edge of Winnebago will create any liability on the part of the village on the grounds that a nuisance is being created. In Hughes v. Village of Nashwauk (1929) 177 Minn. 547, 225 N. W. 898, the court held a municipal corporation liable for the casting of sewage upon the property of the plaintiff. It appears in that case that the village owned

and controlled the sewage system in question. We gather from your letter that this is not the situation with respect to the sewer for the twenty houses. Consequently, it is our opinion that on the facts stated in your letter there is no liability on the part of the village.

This conclusion, that the village is free from liability, is not entirely free from doubt. Cases supporting our opinion may be found in the notes to Section 1910 of the title Municipal Corporations in 43 Corpus Juris at page 1152, which reads in part as follows:

> "Creation of nuisance. A nuisance, such as the pollution of a stream, created by third persons without the authority or permission of the municipality will not render the municipality liable, in the absence of notice and failure to abate. So a municpality is not liable for damages caused by sewage discharged from one of its street culverts into a ditch on plaintiff's premises, where it does not appear that the village ever gave permission or knew that the sewage flowed in the culvert, which was constructed merely for surface water, and such flowage was wrongfully caused by a third person. But the municipality is liable where sewage is turned into a sewer or culvert with its authority and permission. Likewise, where a sewer constructed by the municipality and under its control becomes a nuisance because landowners abuse the privilege given them of connecting their premises with the sewer, the municipality is liable."

On the other hand, the principles stated in Section 1908 and in Section 1734 of the same authority, indicate that the question is a close one.

W. W. WATSON,
Special Assistant Attorney General.

January 20, 1940. 387g-5

169

Sidewalks—Curb—Assessment—Against Court House property—Minn. Cons. Art. IX § 1—M27 §§ 1975, 1205, 1815.

Pine County Attorney.

You enclose a copy of a bill which was filed with your county auditor for work done under a WPA project of the Village of Pine City. The work consisted in the rebuilding of a sidewalk and building a curb on property owned by the county, upon which the Court House is located. You inquire whether or not your county is liable for the payment of these improvements as stated. Your letter does not state under what authority the village council acted in doing this work.

Article IX, Section 1 of the Constitution of Minnesota provides:

> "Taxes shall be uniform upon the same class of subjects, and shall be levied and collected for public purposes, but public burying grounds,

public school houses, * * * and public property used exclusively for any public purpose, shall be exempt from taxation * * *."

Section 1975, Mason's Minnesota Statutes for 1927, as amended, provides as follows:

"All property described in this section to the extent herein limited shall be exempt from taxation, to wit: (7) All public property exclusively used for any public purpose."

As a general rule assessment laws apply to private and not to public property, and though such laws are general in terms they do not apply to public property unless the intent to so apply them affirmatively appears.

Washburn M. O. Asylum v. State 73 Minn. 343.
State v. Macalester College 87 Minn. 165.
State v. Board of Education 133 Minn. 386.

The case last cited seems to be the authority in this state today. The question then is did the law under which the council had this work done by its terms apply to county property such as a court house block.

Section 1205, Mason's 1927 Statutes, provides as follows:

"The council of any village may cause any street * * *; and, without any petition, it may order any sidewalk curb, sewer or gutter previously built to be put in repair, or rebuilt when necessary, * * *. 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, part of the street or side thereof, so improved or sprinkled, and most benefited thereby."

If the village council acted under this section of the law it is our opinion that the county is not liable for the improvements so made. There is nothing in this section or the following section indicating an intention to subject this property to the payment of assessments for local improvements.

Further, we are unable to see how collection of any assessment for this work could be made. See Mason's 1927 Statutes, 1207.

If the council acted under the authority of Section 1815, Mason's 1927 Statutes as amended, it would follow that the county would be liable for the expense of the curb, as Section 1822 of Mason's 1927 Statutes as amended, provides for payment of such work by county boards and proper school district officials. However, Section 1815 makes no reference to sidewalks, and the original title of this law makes no reference to anything but streets. A good general discussion of special assessments with reference to public property may be found in 90 A. L. R. 1137.

HAYES DANSINGBURG,
Assistant Attorney General.

March 31, 1939. 480a

170

Streets—Assessments—Against school property—M27 § 1822.

City Attorney, Owatonna.

You inquire as to the right of Owatonna, a city of the 4th class, governed by home rule charter, to make assessments against school property for curbs and gutters, pavements, etc. You state that your home rule charter makes no specific reference to holding school property liable for such assessments.

We believe the answer to your question is found in Section 1822, Mason's Minnesota Statutes 1927, which provides the method of collecting such assessments although it would not be a lien on the property. This Section was adopted as a part of Chapter 65, Laws of 1919, which act is applicable to cities of the 4th class, without regard to the law under which they are organized, and hence is applicable to the City of Owatonna.

Upon the question of the validity of this chapter, we call attention to the cases of Washburn Orphan Asylum v. State, 73 Minn. 343, State v. Macalester College, 87 Minn. 165, and State v. Board of Education of Duluth, 133 Minn. 386.

M. TEDD EVANS,
Assistant Attorney General.

April 28, 1939. 396e

171

Streets—Oiling—Assessment of benefits—Issuance of warrants—L03, C382.
Village Attorney, Lindstrom.

You state that the Village of Lindstrom is contemplating an oiling project on its streets, costing approximately $4,000.00, and the village council of said village is desirous of undertaking the project on its own motion and not by petition of the owners of the property abutting the proposed improvement. You suggest that the village may undertake the project pursuant to the authority provided in Chapter 382, Laws of 1903. You make the following inquiries with reference to said act:

"1. May the procedure and mode of financing as provided in Chapter 382, Laws of 1903 be used where the council orders the improvement without petition and without determining the question of an assessment?

"2. In the event of a negative answer to the above may the council proceed with the hearing on the question of the benefits and assessments to be levied therefor and then determine that there is no special benefit and that no special assessment should be levied against benefited

property? Assuming an affirmative answer to this query may the procedure as to improvement warrants as provided in the law be followed?

"3. Assuming a negative answer to questions 1 and 2 may the council after the hearing on the resolution to determine benefits and assessing the cost thereof provide nominal assessments and finance the balance through general revenue taking advantage of a provision for the issuance of improvement warrants."

Your inquiries may be considered together.

Although you do not state, we assume that the Village of Lindstrom has a population of less than 10,000. Therefore, the village council may order the improvement without petition of the majority of the owners of the property abutting the proposed improvement and on its own motion, pursuant to Section 1 of Chapter 382, Laws of 1903. In acting pursuant to said 1903 act, it is our opinion that the entire procedure provided therein must be followed by the village council. The council is required to make a determination of the amount of special benefits received by any property within the village by reason of the improvement, and to assess such benefits to each piece of property benefited in the manner specified in the act. In the event such assessments are not fully paid to the village within the time specified in Section 6 thereof, or if there is insufficient money in the treasury of the village at the end of said period of time to pay the portion of the cost of the improvement which may be in excess of the aggregate amount of the assessments levied on account thereof, regardless of whether the same have or have not been collected in full, the village council pursuant to the provisions of the act shall issue the orders of said village upon the treasurer thereof for the payment of which the full faith and credit of said village is pledged, for the aggregate amount of the unpaid balance of the cost of such improvement, payable in three annual installments, each of which shall be represented by a separate order, and bearing interest at a rate to be determined by the village council but not exceeding 6%, and to be payable in the manner specified in Section 7 of the act.

Your inquiries infer that the village council is desirous of proceeding pursuant to said Chapter 382 by initiating improvement on its own motion, and is desirous of paying for the improvement by issuing the improvement orders as specified in the act, but without determining the matter of special benefits to property benefited by the improvement and making assessments therefor. It is our opinion, however, that if the improvement is carried out pursuant to the procedure established in the 1903 act, the village council must comply with all the provisions thereof, including the determination of special benefits and the making of assessments therefor, in addition to the issuance of the village orders to pay the portion of the cost of the improvement which may be in excess of the aggregate amount of the assessments levied on account thereof.

ARTHUR CHRISTOFFERSON,
Deputy Attorney General.

June 22, 1940. 396g-7

172

Streets—Plats—Vacation—Title to land occupied by highway or street. Railroads—Right-of-way—Immunity from adverse possession.

Village Attorney, Moose Lake.

You state that the Northern Pacific Railway Company, as successor to the Lake Superior and Mississippi Railway Company, owns a right-of-way 150 feet in width running through the village of Moose Lake. The village plat, however, shows this right-of-way to be only 100 feet wide. Along and adjacent to the right of way as shown on the plat runs a 60 foot street on either side. Thus the plat shows two parallel streets, each 60 feet wide, with the right-of-way 100 feet wide between them. A 25 foot strip of each street adjacent to the right-of-way would be within the boundaries of the original 150 foot right-of-way. The railroad company has at times asserted its rights to these 25 foot strips, but has never ejected the public from the same.

It is contemplated that portions of the streets in question may be vacated. You ask who will then get title to that part of the vacated streets lying outside of the original railroad right-of-way.

Apparently it is conceded that in case of vacation the 25 foot strip of street within the original 150 foot right-of-way would revert to the railroad company. We think that this is correct. You say it is your understanding that adverse possession would not run against the railroad company anyway. Presumably this idea is based on the decision of the United States Supreme Court in Northern Pacific Railway Company vs. Townsend, 190 U. S. 267, holding that private individuals may not get title by adverse possession to land expressly granted by congress to a railroad company for right-of-way purposes, since the result would be to impair the efficacy of the federal grant for railroad purposes. Neither could the railroad company itself alienate any part of the right-of-way so granted. The decision recognizes that to some extent the right-of-way may be subjected to limitations in favor of the general public.

However, if the streets were vacated, the rights of the public, however acquired, would be extinguished. Hence no controversy as between the public and the railroad company is involved in the present inquiry. The only question is who would be entitled to the ground now occupied by the street in case of vacation. This depends, as indicated in your letter, on who owned that ground before the street was platted, subject, of course, to any subsequent transfers of such ownership that may have occurred.

Assuming that the railroad company owned the 150 foot right-of-way when the street was platted, and has never since made any valid conveyance thereof, the 25 foot strip of right-of-way which was included in the street would revert to the railroad company upon vacation. We think you are correct in your conclusion that the company would not acquire any interest in the remaining portion of the street. Its rights extend only to the boundary of the original right-of-way.

The remaining portion of the street, being a 35 foot strip outside of the original right-of-way, would belong, in case of vacation, to the fee owner of the ground at the time the street was platted or to his successors in interest.

We assume that at the time the plat was dedicated the abutting lots and the ground under the streets between such lots and the original railroad right-of-way were owned by the same person. If such was the case, and if such a lot has since been conveyed without expressly including the ground under the street, but without anything to indicate an intention of excluding such ground, the fee title to all that part of the street lying between the lot conveyed and the original railroad right-of-way would pass to the grantee in the conveyance as an appurtenance to the lot, subject to the public highway easement.

Of course it is possible that the fee title to land under a street may be conveyed separately from the abutting lots, either by express language in a deed or through attendant circumstances evidencing such intent. However, that would be an unusual case.

For cases illustrating the principles above stated, see:

In Re: Robbins, 34 Minn. 99; 24 N. W. 356.
Owsley v. Johnson, 95 Minn. 168; 103 N. W. 903.
White v. Jefferson, 110 Minn. 276; 124 N. W. 373; 125 N. W. 262.
Dunnell's Digest, Section 1065 and cases under note 75.

Of course it is beyond the province of the village council in a vacation proceeding to determine the ownership of the ground under the vacated street, although the council may properly take into consideration the prospective rights of the property owners, so far as they can be ascertained, for whatever bearing they may have on the advisability of the vacation from the standpoint of the public. The Attorney General could not assume to advise as to the rights of any individual private property owner. Any dispute as to such rights, if not settled amicably, would have to be determined by the courts. All we can do is to point out the general rules, so far as material, for the guidance of the public authorities.

CHESTER S. WILSON,
Deputy Attorney General.

November 4, 1939. 396g-16

173

Water Levels—Appropriation—Proceedings—M27 § 6588, M40 § 6602-13.

Kandiyohi Attorney.

You submit the following questions:

"An application has been made informally to the County Board of Kandiyohi County for funds to be appropriated by the county for the

purpose of digging a deep well and for maintaining a pumping station to pump large quantities of water into Diamond Lake lying wholly in Kandiyohi County.

"Will you kindly advise me as follows:

"1. Is it necessary as a prerequisite for the county to appropriate such money that proceedings be initiated under Section 6602, Subsection 13.

"2. May the County Board make such appropriation directly without the consent of the Commissioner of Conservation and without any other proceeding."

"3. If this project is a community project, may the county receive donations from interested persons in order to help defray the expense of this digging and the maintaining of the pumps."

Answering your first question, the county commissioners should not appropriate money until they have at least adopted a resolution for maintenance of the lake level, pursuant to Section 6588, Mason's Minnesota Statutes of 1927. If this were done, it would not be necessary to adopt the more complicated proceedings of Section 6602-13, Mason's 1940 Minnesota Supplement.

Your second question is answered in the affirmative. The statutes giving powers to the county board, Section 6588 et seq., Mason's Minnesota Statutes of 1927, as amended, are independent of the sections giving powers to the commissioner of conservation in connection therewith, which are Section 6602-51 to 69, Mason's 1940 Minnesota Supplement. A former opinion, dated April 2, 1929, points out that the county commissioners have independent and greater powers than the conservation commissioner. The conservation commissioner may maintain higher lake levels where game and fish, or conservation, would be affected. In either event, the interests of property owners are not affected if your only purpose is to maintain the usual high water mark, without raising the level of the lake. The latest case in connection with the powers of the conservation commissioner is in Re Lake Elysian High Water Level, 293 N. W. 140.

Proceedings for maintaining the water level may be instituted either upon the petition of landowners abutting the lake or upon motion of the board without any petition. If they adopt a resolution to take steps either by building a pump, or erecting a well and pump, to maintain the lake level, they may then appropriate money for such purpose.

Answering your third question, we are of the opinion that the county may receive donations or gifts, to be used toward the expense of this work.

M. TEDD EVANS,
Assistant Attorney General.

August 8, 1940. 273a-23

174

Watermains—Installation—Procedure—Applicable statutes—M27 § 1918-1, 1880, 1205.

Clifford E. Olson, Village Attorney.

You inquire whether an individual property owner can compel the village of Cokato to install sewer and water mains on his street when all other property owners in the block oppose such action. The council does not wish to undertake the improvement and assess the unwilling owners, but prefers to have the individual owner install his own sewer and water pipes to connect with mains at a nearby corner.

Sewers and water mains may be constructed by a village pursuant to several different acts. These are briefly reviewed below.

1. Mason's Minnesota Statutes of 1927, Section 1880, et seq., empowers the council to construct sewers and requires that an ordinance directing the improvement must first be enacted by majority vote of the council.

2. Sections 1918-1, et seq., thereof permits the council to lay water mains when authorized by resolution adopted by majority vote of the council.

If proceedings be proposed under either of the foregoing sections, the construction of the improvement is discretionary with the council. It cannot be compelled to undertake the project.

3. Section 1205 idem provides as to sewers:

> "The council of any village may cause any * * * sewer * * * to be built * * * or in part built * * * upon a petition therefor signed by a majority of all owners of real estate bounding both sides, and by the owners of at least one-half of the frontage of the street or part of street to be improved. * * *"

4. Sections 1918-15, et seq., thereof empowers the council to construct sewers or lay water mains when so petitioned by "owners of at least fifty-one per cent in frontage of the real property abutting on the parts of the street or streets named in the petition."

If the interested owner proceeds under either Sections 1205, et seq., thereof or Sections 1918-15, et seq., thereof he must furnish the petitions required by those statutes. Until he has done so, the council is not obliged to give consideration to his proposed improvement.

M. TEDD EVANS,
Assistant Attorney General.

September 11, 1940. 624d-9

MILITARY AFFAIRS

175

Soldiers and Sailors Civil Relief Act—Application of—Public 861—76th Congress—3rd Session.

Ramsey County Attorney.

You inquire whether Section 13A of the Selective Training and Service Act of 1940 (Public 783, 76th Congress, 3rd Session) requires filing of certain affidavits before obtaining a default judgment in this state. Section 13A, idem, provides:

> "The benefits of the Soldiers and Sailors Civil Relief Act, approved March 8, 1918, are hereby extended to all persons inducted into the land or naval forces under this act, and to all members of any reserve component of such forces now or hereafter on active duty for a period of more than one month; and, except as hereinafter provided, the provisions of such act of March 8, 1918, shall be effective for such purposes."

Section 13B, idem, specifies certain sections of the act of 1918 which are to be inoperative.

It should be noted that by virtue of the Soldiers and Sailors Civil Relief Act of 1940 (Public 861, 76th Congress, 3rd Session, approved October 17, 1940) the entire Section 13 of the Selective Training and Service Act is declared to be inapplicable to any military service performed after the date of the enactment of the Soldiers and Sailors Civil Relief Act of 1940 (Public 861, 76th Congress, 3rd Session, Section 605). Some of the provisions of the Soldiers and Sailors Civil Relief Act of 1940 pertinent to your inquiry are:

> "Sec. 101 (1) The term 'persons in military service' and the term 'persons in the military service of the United States,' as used in this Act, shall include the following persons and no others: All members of the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy. The term 'military service', as used in this Act, shall signify Federal service on active duty with any branch of service heretofore referred to or mentioned as well as training or education under the supervision of the United States preliminary to induction into the military service. The terms 'active service' or 'active duty' shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause.
>
> "(2) The term 'period of military service', as used in this Act, shall include the time between the following dates: For persons in active service at the date of the approval of this Act it shall begin with the date of approval of this Act; for persons entering active service after the date of this Act, with the date of entering active

service. It shall terminate with the date of discharge from active service or death while in active service, but in no case later than the date when this Act ceases to be in force.

* * * * *

"(4) The term 'court', as used in this Act, shall include any court of competent jurisdiction of the United States or of any State, whether or not a court of record."

"Sec. 200. (1) In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment. Unless it appears that the defendant is not in such service the court may require, as a condition before judgment is entered, that the plaintiff file a bond approved by the court conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgment as in its opinion may be necessary to protect the rights of the defendant under this Act.

"(2) Any person who shall make or use an affidavit required under this section, knowing it to be false, shall be guilty of a misdemeanor and shall be punishable by imprisonment not to exceed one year or by fine not to exceed $1,000, or both."

It is my opinion that the Soldiers and Sailors Civil Relief Act of 1940 will apply to actions in our state courts which come within its terms.

Though the language of the 1940 act is somewhat different from that of the 1918 act (40 U. S. Statutes at Large 440), the two acts seem to be substantially the same except in a few particulars. Consequently, it may be helpful to review some of the decisions under the 1918 act. However, this may not be considered as an opinion of the Attorney General. It is merely a catalogue of some of the decisions under the 1918 act without any attempt to determine their soundness or applicability to the 1940 act.

It seems well settled that the 1918 act is within the power of Congress to maintain armies and is constitutional. Hoffman v. Charlestown Five Cent Saving Bank, 231 Mass. 324, 121 N. E. 15. Pierrard v. Hoch, 79

Ore. 71, 191 Pac. 328. Kuehn v. Neugebauer (Tex. Civ. A 1919), 216 S. W. 259. Errickson v. Macy, 231 N. Y. 86, 131 N. E. 744.

The act was held to apply in state courts. Clark v. Mechanics National Bank (C.C.A., Ark. 1922), 282 Fed. 589. A judgment obtained without having filed the required affidavit will not be set aside unless the defendant was in military service at the time the judgment was entered. Wells v. McArthur, 77 Okla. 279, 188 Pac. 322. Howie Mining Company v. McArthur (C.D.N.W., W. Va. 1919), 256 Fed. 38. Alzugaray v. Onsurs, 25 N. M. 662, 187 Pac. 549.

Where the defendant appears either by way of answer or personally in court, and no showing is made that he is in military service, there may be some question as to the necessity of the affidavit. People v. Byrne, 189 N. Y. S. 916. Bulgin v. American Law Book Company, 77 Okla. 112, 186 Pac. 941.

In Mader v. Christie, 52 Cal. Ap. 138, 198 Pac. 45, the court held that the filing of the required affidavit subsequent to the entry of default but prior to the entry of judgment satisfied the statute.

In Schroeder v. Levy, 222 Ill. Ap. 252, the court held that the requirement of the affidavit was not jurisdictional and that a judgment entered without the required affidavit being filed is not void. It should be noted that both the 1918 and the 1940 acts at Section 200 (4) provide that if a judgment is rendered against a person in military service during the period of service or within thirty days thereafter, and if such person was prejudiced by reason of his military service in making his defense thereto, such judgment may be opened. Application for opening the judgment must be made within ninety days after the termination of the military service.

KENT C. van den BERG,
Special Assistant Attorney General.

November 6, 1940. 310

176

War Orphans—Aid to—Division of Social Welfare—L. 1935, C. 350.

The Adjutant General.

You state:

> "Chapter 350, Session Laws 1935, in providing educational opportunities for children of soldiers, sailors and marines who died in service or from disabilities which were the result of service in the World War, under Section 1 thereof states:
>
> " 'That the moneys appropriated shall be used for the benefit of children not under sixteen *nor* over twenty-two years of age.' "

You ask:

"Whether or not the educational aid as authorized by the foregoing provision of law terminates on the twenty-second birthday or is it authorized until the individual has reached the age of twenty-two years, three hundred sixty-four days."

The authorities are not in agreement as to the interpretation which should be placed on the words "over twenty-two years of age" or similar language. The preponderance of authority and, in our opinion, the best considered decisions concur in the conclusion reached in the case of Wilson v. Mid-Continental Life Insurance Co. (Okla.) 14 P2 946. The language under consideration there was used in an insurance policy. The court said in part:

"We are of the opinion that in construing the ordinary and generally accepted meaning of the language used in the policy, fractions of a year should not be considered, and that the insured having not reached his sixty-sixth birthday at the time of the accident and death, that he was therefore not 'over the age of sixty-five years', and that the policy was in force at the time of his death * * *."

It is our opinion that a person otherwise qualified to receive the aid authorized by said Chapter 350 is entitled to receive it until he reaches his twenty-third birthday.

You also state that the last sentence of said Section 1 states:

"Said children shall be admitted to State Institutions of secondary or college grade free of tuition."

You ask:

"Whether this money should be paid to those colleges or should 'War Orphans' be provided the full $200.00 for board, room rent, books and supplies in such sums as they are needed for such purposes."

The language of the statute is clear and unambiguous. It specifically provides that the children referred to shall not be required to pay tuition in order to be admitted to "State Institutions of secondary or college grade." If such person attends a state institution of secondary or college grade he is entitled to receive the full amount of $200.00 for board, room rent, and supplies, in addition to free tuition, if the Adjutant General makes an administrative determination that such amount is reasonably necessary for the use of such person in attending such school provided that not more than $200.00 shall be so paid for any one year.

You also state that Section 3 of said act provides:

"That not more than $200.00 shall be paid under such provisions for any one child for any one year."

You ask:

"Whether the Section refers to the school year, the fiscal year, or the calendar year."

In our opinion the phrase "for any one year" refers to the school year which may of course be less than or equal to but not more than a twelve months period.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

September 23, 1939. 310r

MOTOR VEHICLES

177

Plates—"IN TRANSIT"—MINNESOTA highways—Use by duly licensed dealer in Minnesota or other states or provinces to transport new motor vehicles by complying with law which permits driving of vehicle by dealer, his employes, or one authorized by dealer—M40 § 2686 (f).

Opinion October 9, 1935, and memo of March 5, 1936, superseded.
Chief Highway Patrol Officer.

Relative to "in transit" plates you ask to be advised if it is permissible by the use of such plates for a transport company that contracts with the dealer for the delivery of trucks to various branches of the dealer within and without the state to drive said vehicles upon the highways of Minnesota without being subject to the regular motor vehicle license tax.

Your request involves a construction of paragraph (f) of Section 2686, Mason's 1940 Minnesota Supplement.

There is nothing in said paragraph that requires that a new motor vehicle which is being transported by the dealer as therein provided shall be driven by the dealer himself or an employe of the dealer, or that prevents such vehicle from being driven for purpose therein stated by an independent contractor authorized by the dealer to transport such vehicle.

The "in transit" plates, however, can be used only

> "* * * upon all new motor vehicles being transported from the dealer's source of supply or other place of storage to his place of business or to another place of storage or from one dealer to another."

It is therefore my opinion that under said Section 2686 (f) the highways of the state may be used by a dealer duly licensed in Minnesota or in other states or provinces, and to whom "in transit" plates have been issued by the registrar of this state to transport by the use of such plates new motor vehicles on Minnesota highways from and to the places and for the purposes as in said Section 2686 (f) defined, whether the places so designated are within or outside of the state, or whether the vehicles so transported are driven by the dealer personally, his employe, or anyone authorized by the dealer.

My opinion of May 29, 1940, is therefore adhered to, but insofar as the opinion of October 9, 1935, and the memo of March 5, 1936, to which you refer, are inconsistent herewith, they are hereby superseded.

J. A. A. BURNQUIST,
Attorney General.

August 1, 1940. 632a-8

Note: See L. 1941, C. 213.

OFFICES

178

Incompatible—City Attorney and County Attorney.

County Attorney, Dakota County.

You ask for an opinion as to the county attorney's right to act as attorney for the village within his county, when not on a retainer or stated salary.

Former opinions of this office No. 391 of the 1910 Reports and No. 209 of the 1926 Reports have properly held the offices of the county attorney and city attorney incompatible offices. The question you present, must be determined by the nature of each individual act which the village might call on you to perform, as to whether or not the duties connected therewith are repugnant or inconsistent with your duties as county attorney.

We can say that in some rare instances, such as actual trial work, court litigation or collecting on defaulted bonds of village officers, the county attorney could act without any interference with his duties as county attorney, if not barred by Sec. 929, Mason's Minn. Statutes 1927.

However, in most instances his work in an advisory capacity to the village, would be incompatible with his duties as county attorney. He cannot serve two masters. There is often a conflict of interest between village and county, particularly on matters of taxation, relief, and division of liability for other governmental expenses. Clearly the county attorney should not be retained or should not advise the village on such matters.

M. TEDD EVANS,
Assistant Attorney General.

July 27, 1939. 358a-1

179

Incompatible—Justice of the peace and state deputy oil inspector are not.

City Attorney, Windom.

You ask whether or not the offices of justice of the peace and deputy state oil inspector are incompatible.

In my opinion your inquiry is properly answered in the negative.

A justice of the peace is a judicial officer of limited jurisdiction in criminal and civil cases. The duties of a deputy state oil inspector are administrative. He inspects petroleum and its products, storage tanks, receptacles where petroleum is kept and checks shipments, and generally does whatever his superior, who is the chief oil inspector, directs him to do. He reports to that officer. I fail to see wherein the administration of these two offices by one person results in any antagonism.

The test of incompatibility is the character and relation of the offices; whether the two are inherently repugnant and inconsistent. If one is not subordinate to the other, and no necessary antagonism results from the attempt of one person to discharge the duties of both, then there is no incompatibility. Section 7995, Dunnell's Digest, Vol. 5; State v. Sword, 157 Minn. 263; note in 1917 A, L.R.A. page 216.

Some of the old English pages held a judicial office and a ministerial office were incompatible. However, in this country it has frequently been held that a justice of the peace may simultaneously hold another office, to-wit: City Clerk (Mohan v. Jackson, 52 Ind. 599), Register of Deeds (Answer of Justices, 68 Maine 594), but may not hold certain other offices, to-wit: Constable (Pooler v. Reed, 73 Maine 129), Sheriff (Stubbs v. Lee, 64 Maine 195).

Among previous rulings of this office I find we have held that a justice of the peace may also hold office of town treasurer (Opinion 385, Reports 1912), but not that of constable (Opinion 181, Reports 1924), or mayor (Opinion 182, Reports 1924), or notary public (Opinion 422, Reports 1922), or town supervisor (Opinion 653, Reports 1920), or city recorder (Opinion 365, Report 1916), or village treasurer in a village not separated from town (Opinion 369, Report 1916), or deputy clerk of court (Opinion 366, Report 1916), or member of council (Opinion 415, Report 1910), or county commissioner (Opinion 390, Report 1910), or village recorder (Opinion 393, Report 1910), or village president (Opinion 400, Report 1910), or court commissioner (Opinion 404, Report 1910).

I fail to see wherein the faithful performance of duties as deputy state oil inspector would in any way interfere with the faithful performance of duties as justice of the peace.

ROLLIN L. SMITH,
Special Assistant Attorney General.

April 6, 1939. 358d-3

180

Incompatible—School Board Member and County Attorney are not—M27 §§ 926, 2826.

Commissioner of Education.

It is the view of this office that the positions of County Attorney and Member of the School Board in a district located in such county are not incompatible, but may be held by one person at the same time.

A county attorney appears for the county in court, is legal advisor of the county officers, draws indictments and presentments found by the grand jury and prosecutes the same. Section 926, M. M. S. '27.

A school director sits on a board which hires teachers, levies taxes necessary for the conduct of the district schools, spends the district money and generally has charge of the affairs of the district. Section 2826, M. M. S. '27. Neither of the two offices in question sit in review on or have any revisory power over the other, nor is one subordinate to the other. Counties and school districts are different types of political subdivisions organized for different purposes. The possibility of a serious conflict of interest where one person attempts to exercise the duties of both offices strikes us as remote. This ruling follows opinion 229, Report 1928, and reverses opinion 260, 1936 report.

ROLLIN L. SMITH,
Special Assistant Attorney General.

June 13, 1939. 358a-1

181

Incompatible—School Board member of district embracing city and Mayor are.

City Attorney, Fergus Falls.

You inquire "whether or not the offices of mayor of the City of Fergus Falls, Minnesota, and member of the school board of a school district embracing the city are incompatible."

The copy of the charter of the City of Fergus Falls, adopted in March, 1903, to which you refer as being in our office, contains the provision that the mayor may vote at the meetings of your city council in the case of a tie but not otherwise. The charter also provides that the mayor may veto any ordinance or resolution of the council. A two-thirds vote is necessary to pass an ordinance or resolution over the mayor's veto. The mayor is also designated as one of the three commissioners "to assess and levy expense" in connection with construction of sidewalks and the sprinkling of the streets.

Unless there have been amendments to the aforesaid provisions of the city charter, it would appear that the mayor shares in the legislative power of the city council and in assessing costs in certain cases. As such city official, he can vote in the event of a tie upon all resolutions involving, among other matters, public improvements and can veto the same if passed by the council.

The school district may become liable for the cost of public improvements voted by the city council affecting school property, as provided in Sections 1822 and 1828, Mason's Minnesota Statutes 1927. Regardless of charter provisions, under such sections the school district may be assessed for such improvements. Litigation arising therefrom between the city and the school district might result. In voting upon public improvements and in proceedings resulting therefrom, the incumbent of the two offices herein considered would be in an inconsistent position.

Thus, whether an actual case arises or not, there is a possibility of conflict between the inherent official duties of the two offices as defined by law or by the city charter. This is sufficient to render the positions incompatible.

Membership or official sharing in the proceedings of two such legislative bodies may under other conditions place the common officer in a situation where he would represent two constituencies with conflicting interests. In your letter you refer to the fact that the city leases an athletic field to the school district. In this and similar transactions the interests of the city and the school district are necessarily in opposition.

The possibility of such occasional transactions not inherent in the duties of the respective offices in question might not of itself be sufficient to render the positions incompatible. However, it adds weight to the conclusion already reached upon other grounds above mentioned.

By reason, therefore, of the fact that the statutory duties of a member of your school board and the charter powers of your mayor are inherently such that the functions of the offices in question and the interests of the constituencies represented by the mayor who is also a member of the school board may at times be inconsistent and conflicting, the two offices, in my opinion, are incompatible.

J. A. A. BURNQUIST,
Attorney General.

December 13, 1939. 358f

182

Incompatible—School Board member and Town Supervisor are.

Otter Tail County Attorney.

Opinion number 519, Attorney General's Reports 1934, rendered August 16, 1934, was reversed by opinions dated March 17, 1937 and April 6, 1937. This department has adhered to the last two opinions referred to.

In other words, we hold that the offices of a member of the school board and town supervisor, in a township whose area includes all or a part of the school board, are incompatible and may not be held by one person at one and the same time.

We can conceive of many situations where antagonism might result from an attempt on the part of one person to discharge the duties of these two offices. For example to name two of them, in the laying out and improving of town roads, and in the letting of contracts for snow removal.

You are also advised that the acts of a member of the school board who vacates his office by qualifying for the office of township supervisor, are, even after he has forfeited his office of school board member, the acts of a **de facto** officer, and as such they are valid for all practical purposes.

ROLLIN L. SMITH,
Special Assistant Attorney General.

September 16, 1940. 358f

OFFICERS

183

Assessors—Election—Situation in Edina.

Edina Village Attorney.

You state that "C" was elected assessor at the last (1938?) village election and now holds office; also that the recorder, in his posted notice of election, has listed the office of village assessor as among those to be filled at the approaching December election, and that "C" and another candidate have filed for this office.

Village assessors are elected in even numbered years for a two year term. There is a confusing statutory situation due to the fact that this department held, as far back as 1931, that village assessors should be elected in even numbered years, nothwithstanding an express provision in the law that they should be elected in odd numbered years (opinions November 13, 1931, November 30, 1931, January 12, 1932, January 21, 1932 and March 28, 1932).

Laws 1939, Chapter 345, is a codification, that is a rearrangement and reenactment in slightly amended form, of previously existing law. This codification carried forward the existing law as to the election of assessors. This department carried forward the construction placed by it upon that law. In other words, it is now our position that assessors should be elected in even numbered years for a two year term.

That being so, no assessor should be elected in Edina village this year, which is an odd numbered year. The present assessor should hold office until the first secular day in January, 1941, at which time the candidate chosen at the December, 1940 general election should assume office for a two year term.

Under the facts stated by you, the attempted filings for the office of assessor this year are a nullity. Assuming there is time, a new notice of election should be posted omitting the reference to village assessor.

ROLLIN L. SMITH,
Special Assistant Attorney General.

November 21, 1939. 12b-2

184

Board of Estimate and Taxation—Compensation of alderman member—M40 §§ 2058-1, 1417-1, and 1417-2.

City Attorney, Minneapolis.

You call attention to the pertinent provisions of Chapter XV, Section 1, of the Minneapolis city charter, also to Laws 1931, Chapter 162 (Mason's 1940 Minnesota Supplement, Section 2058-1) and Laws 1937, Chapter 294 (Mason's 1940 Minnesota Supplement, Sections 1417-1 and 1417-2), prescribing the composition of the Board of Estimate and Taxation, the compensation of the members of the board, and the compensation of the aldermen of the City of Minneapolis.

The question is whether, since the regular salaries of the aldermen were raised from $1800 to $2400 per year by the 1937 act, the alderman member of the Board of Estimate and Taxation above mentioned is still entitled to compensation for services on the board at the rate prescribed by the 1931 act, up to the stated maximum of $500 per year.

It appears that since the 1937 act was passed the alderman member of the board has received the prescribed compensation of $500 per year for his services on the board, in addition to his regular salary of $2400, the same as before the salary was increased. Only recently has the question been raised whether this is permissible in view of the aggregate salary limitation of $2500 contained in the 1931 act. If that limitation were applied to the alderman who serves on the board, he would receive only $100 per

year for services for which other members of the board received $500 per year. Moreover, bearing in mind that the regular aldermen are only part time officials, the alderman serving on the board, in comparison with the other aldermen, would have to do increased work, at the expense of his own private business or employment, all out of proportion to the extra compensation of $100 which he would receive.

You express the opinion that no such unreasonable result was intended by the legislature. In view of the fact that the 1937 act was an entirely separate statute, dealing only with the regular salaries of the aldermen and making no mention of the Board of Estimate and Taxation, I am inclined to agree with you. The situation would be otherwise if the salary increase had been made first. However, the manifest purpose of the 1931 act was to rectify an obvious disparity which existed under prior provisions with respect to the compensation of the alderman member of the Board of Estimate and Taxation. This purpose would be largely defeated if it should be held by implication that the $2500 limitation in the 1931 act must be applied against the increased salary under the 1937 act.

Repeals or changes in the law by implication are not favored, especially where they would lead to unreasonable or unjust results or would conflict with the principal intent of the legislature. Dunnell's Digest, Sections 8927, 8947, 8957. As you point out, citing Levant v. Burns, 200 Minn. 191, a statute is to be given a reasonable and practical construction, with the fundamental aim of giving effect to the intent of the legislature. Dunnell's Digest, Sections 8939, 8940.

My conclusion is that your interpretation is correct, and that the alderman member of the Board of Estimate and Taxation is entitled to compensation for his services on the board at the full rate prescribed by the 1931 act up to the maximum of $500 per year.

It is not the province of this office to make recommendations for substantive legislation affecting matters of this kind. However, in view of the fact that the question here considered arose because of disconnected statutes which were thought to be in conflict, I venture to suggest that it would be advisable to seek an amendatory act framed so as to clarify the provisions in question and avoid possible misunderstanding in the future.

CHESTER S. WILSON,
Deputy Attorney General.

November 6, 1940. 63a-2

185

City Clerk—Duties of—Compensation—Additional for preparing data under —L39, C431.

Hastings City Attorney.

It appears that your present city clerk took office May 1, 1938, under appointment by the city council for a two-year term. The council by

resolution fixed his salary as $90.00 per month. The resolution of appointment did not prescribe any duties except those defined by the city charter. In the fall of 1939, the clerk was requested by the state public examiner to make a report submitting data with reference to municipal affairs pursuant to Laws 1939, Chapter 431, Article IV, Section 5. The clerk advised the council of the request and "it was apparently understood that he should make it though there was no motion or action of the Council to that effect. The question of additional compensation was not raised or discussed at that time. The clerk proceeded to make the report requested by the Public Examiner. He now seeks additional compensation for his work in making this report."

You ask:

1. "Is the City obliged to pay the City Clerk additional compensation for his work in making out the report above mentioned?"

and

2. "May the City Council pay the City Clerk additional compensation for his work in making out the report above mentioned if they wish to do so?"

Laws 1939, Chapter 431, Article IV, Section 5, places the duty upon the public examiner to collect certain data from local units of government with reference to the assessment of property, the collection of taxes, receipts from licenses and other sources, the expenditure of public funds for all purposes, debts, principal and interest payments on debts, borrowing, and such other needful information. The data is to be supplied upon such blanks as the public examiner shall prescribe and it is specifically made

"* * * the duty of all local public officials so called upon to fill out properly and return promptly all blanks so transmitted. * * *"

The powers and duties of your city clerk are set out in Chapter III, Section 5, of your charter, and among other things provide that:

"he (the city clerk) shall examine the report books, papers, vouchers and accounts of the city treasurer, **and shall perform such other duties as may be required of him by the city council.**"

It is to be noted that it is the duty of local public officials to furnish the required data. It is also the duty of the city clerk to perform such duties as are required of him by the city council. Your letter states that "it was apparently understood that he (the city clerk) should make" the necessary report as requested by the public examiner. If by this you mean the council requested the city clerk to prepare the data, then I am led to the conclusion that the clerk was performing duties which he was required to perform under the charter and resolution and would not be entitled to

receive extra compensation. Both of your questions, therefore, are answered in the negative.

In fixing his salary for the next term, the council may consider the fact that the city clerk may be required to perform such additional out-of-the-ordinary duties in the future.

EDWARD J. DEVITT,
Assistant Attorney General.

March 1, 1940. 60

186

Coroners—Death Certificates—Inquest—Accidental Drowning—M27 §§ 947 to 957, 5357.

Benton County Attorney.

The coroner's duties are covered by Sections 947 to 957, Mason's Minnesota Statutes 1927. We note that in your particular transaction, the coroner being absent, the sheriff called the doctor who came to the scene of the tragedy and filed his report of death. You say that the sheriff was acting for the coroner, but there is no statutory provision for him to act as such. Apparently none of the parties present were deputy-coroners. Apparently the parties were dead before the doctor arrived.

You then ask if the county is liable to this doctor, who has now presented his bill to the county for coroner's fee and mileage. Clearly he is not entitled to compensation on this basis, because he had no authority to perform the duties of the coroner. However, in these emergency cases, from a humanitarian viewpoint, everything should be done that can be done, and in some cases a doctor's presence results in saving a life thought to be already gone. Morally at least, the county should pay the reasonable value of the services of the doctor in making this call at the request of the sheriff.

You then question that the death certificates signed by this doctor are in proper form, and state that the clerk of court is holding up the filing of the certificates of death. We agree with you on this because the doctor was not in fact the deputy-coroner, nor was he the physician in attendance at the time of death as provided by Section 5357, Mason's Minnesota Statutes 1927. Said section further provides,

> "Provided, that the medical certificate shall be made and subscribed by the coroner whenever the cause of death is investigated by him. Provided, further, * * * the local registrar, or a sub-registrar, shall make and subscribe the medical certificate for any death occurring therein without medical attendance or investigation by the coroner. If the local registrar or sub-registrar, is unable to determine the cause

of death he shall refer the case to a physician, or to the coroner, for certification."

Apparently the coroner could still make an investigation of these deaths and properly sign the death certificates.

M. TEDD EVANS,
Assistant Attorney General.

July 11, 1939. 103f

187

Coroner—Fees—Reporting testimony—M27 § 6995 sub. 2.

Rice County Attorney.

You inquire as to proper method for paying court reporter who takes testimony at coroner's inquest.

The general provision is found in Section 6995, Subdivision 2, Mason's Minnesota Statutes of 1927, which provides:

> "Fees of coroners—For holding an inquest, five dollars for each day's necessary attendance after the day on which the body was viewed, and mileage as above, and 15 cents per folio for writing the record, including testimony of witnesses."

This statute places the duty on the coroner to have the testimony taken and written up and specifically fixes the fees, so that in most cases the coroner should make this arrangement and pay the reporter out of the 15c per folio.

However, we believe that there are emergency cases where the County Attorney's interest in getting a prompt and accurate transcript might justify him in hiring a court reporter and this could be done out of the County Attorney's contingent fund, with the approval of your District Judge. If this is done the coroner cannot charge the 15c per folio, because it would be for services which he did not render.

This office has previously ruled that there was no provision by which a coroner could pay a reporter on a per diem basis.

M. TEDD EVANS,
Assistant Attorney General.

February 17, 1939. 103a

188

Coroner—Office Equipment—M27 § 664.

Clearwater County Attorney.

You request our opinion as to whether forms and supplies for the coroner's office can be allowed as legal claims against the county.

We answer this in the affirmative. Mason's Minnesota Statutes of 1927, Section 664, provides that the county board shall furnish all county officers with books, stationery, office equipment, supplies, etc., necessary to the discharge of their respective duties. This portion was added by Chapter 346, Laws 1927, and prior to that time the county could not furnish such supplies for the coroner's office.

Said amendment to the statute therefore necessarily supersedes opinions of this office dated October 8, 1915, and August 8, 1912.

M. TEDD EVANS,
Assistant Attorney General

March 20, 1940. 103k

189

County Attorney—Compensation—Actions to quiet title—M40 §§ 2190-5 to 2190-22.

Lac Qui Parle County Attorney.

You ask our opinion as to compensation for the county attorney for actions to quiet title, pursuant to Sections 2190-5 to 2190-22, inclusive, (same as Chapter 341, Laws of 1939), we are of the opinion that this act gives no authority for paying additional compensation to the county attorney unless you can convince your county board that they should increase your salary because of such additional work.

This seems to be just another instance in which the legislature created additional work and duties for the county attorney without providing for additional compensation therefor.

We realize that actions under these sections involve a great deal of time and work, and that the time and work involved will vary in different counties. The county board should take this into consideration in fixing the salary of the county attorney, and it would be proper for each county attorney to give the board an estimate of the work involved and the value of the additional services rendered herein.

M. TEDD EVANS,
Assistant Attorney General

June 10, 1940. 121b-21

190

County Attorney—Contingent Fund—Clerk hire in absence of statute—Certain expenses—M27 §§ 934, 664.

Hubbard County Attorney.

You submit several questions about clerk hire for county attorneys and reimbursements from contingent fund.

Many county attorneys by special act, are furnished with clerk hire on a monthly basis. Your questions apply particularly to counties in which no provision is made for clerk hire on a monthly basis. You ask if Chapter 319, Laws of 1939, authorizes clerk hire to be allowed in your county. This chapter throughout refers to additional clerk hire, and apparently applies only to those county attorneys, who are now provided with clerk hire on a monthly basis by general or special act. Unfortunately some county attorneys do not even have a contingent fund. Section 934, Mason's Minnesota Statutes 1927, says the county commissioners may set aside a contingent fund up to $2,000.00 per year, except one class of counties limited to $1,000.00 per year. We urge the county commissioners of every county to set aside a county attorney's contingent fund in a reasonable amount, because no county attorney can efficiently carry on the duties of his office without the assistance of such a fund. In the last twenty years, the duties of your office have been steadily increased and the work has been more than doubled. Nearly every new law that is passed places some additional duty on the county attorney's office.

Section 664, Mason's Minnesota Statutes 1927, directs the board to provide certain supplies for all county officers, but sometimes the county attorney, to avoid delay, purchases these supplies himself and pays for them. A great number of emergencies arise where a county attorney incurs other expenses out of his own pocket in connection with his official duties.

The opinions of this office cited in Mason's Minnesota Statutes 1938 Supplement, under Section 934, are somewhat in conflict and hard to distinguish or reconcile. We think that in the interests of efficiency for your office, certain general rules can and should be laid down:

All necessary expenses provided for by law including all the items provided for in section 664 should be either purchased in the first instance in the name of the county as authorized by the county auditor or board and paid for directly by them; or if the county attorney has paid for any such items, he should file an itemized claim with the county board for reimbursement to him.

Next, any expenses not especially provided for by law including itemized work for extra clerk hire, mileage and expenses in connection with criminal investigations or other county business, such as taking confessions, statements of defendants or witnesses, etc. may be filed as a claim against the county attorney's contingent fund and paid, if approved by the district court.

M. TEDD EVANS,
Assistant Attorney General.

July 28, 1939. 121a-4

191

County Attorney—Legal work for County Welfare in connection with O.A.A. —L39CC, 242 and 315.

O. A. Lewis, County Attorney.

You ask if a County Attorney has a right to charge the County Welfare Board for legal work in connection with reimbursement for old age assistance payments.

Chapter 95, Special Session Laws 1935-36 make it the duty of the County Attorney to attend to these matters for the County Welfare Board. Chapters 242 and 315, Laws of 1939 contain similar provisions, making it the duty of County Attorneys to bring actions for reimbursement of old age payments.

The County Attorney cannot charge for this extra work, other than actual mileage and expenses; but it does seem that, especially in counties where this work is heavy, the County Commissioner should consider an increase in the salary of the County Attorney, to take care of these many and various added duties which have been placed upon the County Attorney.

M. TEDD EVANS,
Assistant Attorney General.

August 31, 1939. 121a

192

County Superintendent of Schools—Record books—Claim against County—M27 § 959.

Department of Education.

You request our opinion on claims made against Mower county by their county superintendent for certain booklets and asking whether these are proper claims against the county.

As to class record books, we think these are a proper claim against the county under Section 959, Mason's Minnesota Statutes 1927, as a necessary expense incurred by the county superintendent.

As to School Officers' and Teachers' Manuals, Clerk's Order Books, and Receipts for Retirement Fund, the superintendent had no right to furnish these at county expense; they are not a necessary expense under Section 959 and are therefore not a valid claim against the county. The last three mentioned items are sometimes furnished by the state department, or can be purchased by each school district at its own expense, but are not proper claims against the county.

M. TEDD EVANS,
Assistant Attorney General.

August 10, 1939. 125b-27

193

County Treasurer—Bond—Power of Commissioners to reduce penalty of during term—M27 § 864.

Mille Lacs County Attorney.

Please be advised that I have considered the decision and briefs hereinafter referred to on the question of the right of the board of county commissioners to reduce the penalty of the official bond of the county treasurer during the term for which it was given, and have to say as follows:

It has been the uniform holding of this department over a period of years that a board of county commissioners possesses such power, and while the practice of giving a new bond in a lesser amount has been followed in many instances, the district court of Lac qui Parle county in the case of Fidelity and Deposit Company of Maryland against County of Lac qui Parle on September 25, 1937 held otherwise.

The court, as its tenth finding of fact in that case, said:

> "The sole and exclusive issue presented by this action and by the pleadings is the legal force and effect of the resolution adopted by said board of county commissioners on December 7, 1935, and the right, power and authority of the board of county commissioners to reduce said bond from one in the sum of $100,000 to one in the sum of $50,000 and the resulting question as to the amount of the premium to be paid by the defendant for such bond."

Judgment was awarded for the balance of the premium due on a bond for the full amount of $100,000.

We do not have the memorandum by the judge before us. Possibly one was not written. However, the reasoning in the briefs for the plaintiff, which the court apparently adopted, is as follows:

A board of county commissioners is purely a creature of statute and is vested only with such powers, rights and privileges as the statute has conferred upon it, and such as are clearly and necessarily implied from the granted powers to enable it to carry out and accomplish the objects of its creation.

The statutes (Sections 840, 864, 865 and 984 of Mason's Minnesota Statutes of 1927) give power to the board to require a new bond only in two instances, viz., (1) where the sureties are insufficient, and (2) where the penalty of the original bond is deemed insufficient.

The controlling statute is Section 864, Mason's Minnesota Statutes of 1927, which empowers the board to require a new bond of the treasurer when, in its opinion, "the sureties, or any of them, on the original bond are insufficient," and also, whenever, "the penalty of such original bond is deemed insufficient."

The power to reduce a bond is the same as the power to release a bond because the effect of the reduction is to release the surety as to part of its liability.

The statutes do not expressly confer power on the board to release a surety on a bond. In the absence of such power it does not exist. It cannot be implied.

Fidelity and Deposit Company v. Fleming, 43 S. E. 899, is cited (N. C.), in which the court said:

> "The power, therefore, to release, does not exist, unless it can be implied from those powers which are conferred by law. The commissioners are authorized and required to qualify and induct into office the several officers of the county, and to take and approve their official bonds . . . . The sole power given by statute is to take and approve official bonds, and any renewals thereof, and when this is done the commissioners have fully performed their duty and completely exhausted the power conferred."

Also cited is Brunswick County v. Inman, 166 S. E. 519, to the same effect.

Applying the reasoning of the cases cited, which appears sound, to Section 864, supra, it is my opinion that it empowers a county board to require an additional bond in certain specified instances, but does not authorize the reduction of the amount of a county treasurer's bond during the term for which it is given.

You are, therefore, advised that the board of county commissioners is without authority to reduce the penalty of the official bond of the county treasurer during his term of office. To the extent that previous opinions hereinabove referred to are in conflict herewith they are superseded.

J. A. A. BURNQUIST,
Attorney General.

March 1, 1940. 450b-2

194

Probate Judge—Annual Fee Statement—M27 § 976, L39, C296.

Winona County Attorney.

As to the necessity of your judge of probate filing an annual statement of fees collected, pursuant to Section 976, Mason's Minnesota Statutes of 1927, we are of the opinion that he is required to file such a statement, the same as all other county officers.

He is an elective county officer, under Article 6, Section 7, of the constitution of this state. Your judge's salary was recently fixed by Chapter

296, Laws 1939, but there is nothing in said chapter, which supersedes or tends to change the provisions of Section 976 supra, as it applies to him.

M. TEDD EVANS,
Assistant Attorney General.

January 9, 1940. 347e

195

Register of Deeds—Chattel mortgages—Fees for furnishing certified copies—M27 § 7002-sub C, M38 § 8365.

Everett L. Young, Sibley County Attorney.

You ask the proper fee for your register of deeds for furnishing certified copies of a chattel mortgage.

You point out that there appears to be some conflict between Section 7002, subsection C, Mason's Minnesota Statutes of 1927, and Chapter 168, Laws 1935, same as Section 8365, Mason's 1938 Minnesota Supplement.

We are of the opinion that Chapter 168, Laws 1935, being the latest legislative enactment on the subject, supersedes the provision in the other section, and that the legislature intended thereby that the register of deeds should receive 25c and no more, for furnishing a certified copy of any chattel mortgage filed with him.

M. TEDD EVANS,
Assistant Attorney General.

October 18, 1939. 373b-10(e)

196

Register of Deeds—Chattel Mortgages—Filing duplicate original—what constitutes.

Marshall County Attorney.

You refer to opinion 147, Report 1938, holding a register of deeds should accept for filing only an original or a duplicate original of a conditional sales contract or chattel mortgage, and ask whether or not a carbon copy of such an instrument containing a carbon copy of the signature of the maker constitutes a duplicate original, so as to be entitled to record.

Where different impressions of a writing are produced by placing carbon paper between sheets of paper and writing upon the exposed surface, the different sheets are "duplicate originals." Ordinarily, each duplicate is

signed separately by the maker in long hand, and unquestionably that is the better practice. However, our court has held such a carbon copy as of equivalent value with the original. International Harvester v. Elfstrom, 101 Minn. 263. After all, if the signer affixes his signature to the original and an exact reproduction of it simultaneously appears on the copy, both signatures appearing as a result of the same stroke of the pen, it is difficult to see wherein the copy is not an exact reproduction of the original. Duplicate means to double, repeat, make, or add a thing exactly like a preceding one. Reproduce exactly is a synonym. State v. Ogden, 151 Pac. 758 (N. M.); Maston v. Glen Lumber Co., 163 Pac. 128 (Okla.).

We have held that a typed signature on a carbon copy is not sufficient. Opinion August 9, 1939. We believe a carbon impression of the original signature on an exact copy of the original instrument constitutes the document a duplicate original so as to be entitled to record, and so advise you.

ROLLIN L. SMITH,
Special Assistant Attorney General.

September 18, 1939. 373b-6

197

Register of Deeds—Conditional Sale Contracts—Filing—Necessity of acknowledgment—Combination of assignment and sale contract—Effect of leaving unfilled blanks—M27 § 7002 sub 6.

Kanabee County Attorney.

I have to say the case of Good v. Brown, 175 Minn. 354; 221 N. W. 239, held squarely that witnessing and acknowledging are unnecessary prerequisites to the filing of conditional sales contracts, and the rulings of this office over a period of years have necessarily followed that opinion.

We have held that the filing fee for an assignment of a conditional sales contract is fixed by subdivision 6, §7002, M. M. S. '27, which provides:

> "For filing every other paper and entering the same when necessary, 10 cents."

Also, that when two documents such as a conditional sales contract and an assignment are combined in one, a fee for each must be paid. Opinion May 9, 1939.

The absence of any name in the blank provided in the assignment form for the name of the assignee results in an incomplete instrument which strictly speaking is no assignment at all. If the assignee has been authorized to insert his name in the blank, he should do so before offering the document for filing. Otherwise, the filing officer may decline to receive it.

ROLLIN L. SMITH,
Special Assistant Attorney General.

June 19, 1939. 373b-6

198

Register of Deeds—Liens—Fees for releasing—M27 § 6840-51.

Norman County Attorney.

You ask our opinion on the proper fee to be charged by your register of deeds for releasing two separate ditch liens, where the two releases are incorporated in one instrument.

The fees of the register of deeds for releasing ditch liens are fixed in paragraph 8 of Section 6840-51, Mason's Minnesota Statutes of 1927, at 25c for each description not exceeding 160 acres. This means that he may charge 25c for every tract of 160 acres or less. Small acre tracts owned by different owners would each be considered as a separate tract. A section of land in the name of one owner would be considered as four different tracts.

M. TEDD EVANS,
Assistant Attorney General.

May 13, 1940. 373b-10(g)

199

Register of Deeds—Recordable instruments—conveyance of easement to county—Lease of gravel pit—Necessity of tax certificate before record.

Clearwater County Attorney.

I have to say that the reasoning of the opinion reported as No. 68 in Attorney General's Report 1924 is applicable to the situation you describe. (See Foster v. Duluth, 120 Minn. 484, and in re Delinquent Real Estate Taxes, 182 Minn. 437).

Where the fee is conveyed the property is exempt from future taxation, and the payment of taxes which are a lien at the time of the conveyance cannot be enforced. Where an easement only is conveyed, the fee remaining in the grantor, the payment of taxes which are remaining at the time of the conveyance may be enforced as against the interest remaining in the grantor, and the interest of the state or county, consisting of the easement, is exempt from future taxation so long as it remains in the state or county.

Categorically answering your question, conveyances of highway easements and leases of gravel pits to a county need not bear the auditor's certificate as to payment of taxes as a prerequisite to their record in the office of the register of deeds.

ROLLIN L. SMITH,
Special Assistant Attorney General.

October 6, 1939. 373b-17e

200

Register of Deeds—Mineral rights—Recording conveyances—M27 § 1978.

Crow Wing County Attorney.

You ask if your register of deeds can properly refuse to record a conveyance of mineral rights, which has not heretofore been separated from the fee title, without a certificate from the county auditor and treasurer that all taxes have been paid.

We are of the opinion that he should refuse to record such a deed. Pursuant to Section 1978, Mason's Minnesota Statutes of 1927, and the cases of Fletcher v. Lorain Iron Mining Co., 172 Minn. 271, and Marble v. Oliver Iron Mining Co., 172 Minn. 263, mineral rights may be separated, and assessed and proceeded against separately from the fee title. However, in your case the state has a lien for delinquent taxes on the entire property, including mineral rights.

On the other hand, if the mineral rights have heretofore been assessed separately from the fee title, the conveyance would require only a certificate that the taxes on the mineral rights had been paid.

M. TEDD EVANS,
Assistant Attorney General.

May 18, 1940. 373b-9b

201

Register of Deeds—Recording instruments—Fees for filing satisfactions—M27 § 884.

Grant County Attorney.

You state:

> "A mortgagee has five or six montgages against one mortgagor. The last mortgage is paid, and on the satisfaction he sets up the mortgage paid and also all other prior mortgages from that same mortgagee, and gives the number and date of filing of each instrument."

You ask whether the register of deeds is entitled to 25c for the filing of the five or six satisfactions, or whether he is entitled to 25c for each one of the satisfactions, notwithstanding the fact that they are satisfactions between the same mortgagor and mortgagee.

If the register of deeds of Grant County operates on a fee basis his compensation in fees should be commensurate with the services rendered. Under Section 884 of Mason's 1927 Statutes, the method of discharging mortgages by an entry on the margin of the record is provided for. If the regis-

ter of deeds of Grant County follows this procedure in discharging mortgages, it would seem that he would have approximately six times as much work to do with respect to the six mortgages mentioned as he would have with only one.

On these assumed facts and under the circumstances stated in your letter, it is our opinion that the register of deeds would be entitled to charge a separate fee for each satisfaction recorded.

WILLIAM W. WATSON,
Special Assistant Attorney General.

March 19, 1940. 373b-16

202

Register of deeds—Records—Transcribing—M27 §§ 666, 833.

Renville County Attorney.

You state that the register of deeds of your county has brought to your attention about a half a dozen scattered pages in your deed records where such records are practically impossible to read due to the fact that the ink has faded. You inquire as to whether or not the county commissioners can have such work transcribed under Section 833 of Mason's Minnesota Statutes of 1927.

Section 833, Mason's Minnesota Statutes of 1927, refers solely to the books and records in the office of the county auditor, or county abstract clerk, and has no application to the office of the register of deeds. The provision referring to the county abstract clerk pertains principally to the three larger counties of this state where a separate and distinct office of abstract clerk is maintained.

However, it is our opinion that under Section 666, Mason's Minnesota Statutes of 1927, such work could be done. This section provides:

> "In case the records of any such offices shall be damaged so as to render any portion of them liable to become illegible, destroyed, or lost, such board shall provide suitable books, and cause such records to be transcribed, so that the new volumes will correspond, in designation, letter or number, and page, to the original records. The fees for such work shall be fixed by such board, and shall not exceed seven cents per folio for the whole work done. Printed record books shall be used whenever practicable for both original and transcribed records."

HAYES DANSINGBURG,
Assistant Attorney General.

June 24, 1940. 851p

203

Sheriffs—Aides—Payment—Power of county to pay reasonable value—Offer of reward after arrest and conviction—M27 § 669-15, M40 § 7005.

Mower County Attorney.

You state that a telephone call came to the sheriff's office, advising him that there was a bank robbery in a neighboring town in your county; that the deputy sheriff immediately started for this town and on his way picked up three police officers of the city of Austin, together with the equipment of the police department; that they arrived at the scene of the robbery and engaged in a gun fight with the robbers; three of them were wounded, with a total result of the capture and conviction of said bank robbers. You state that the police officers now filed bills with the county for $50 each for their assistance and inquire:

> "1. May the Board of County Commissioners pay the three police officers a reward under Section 669-15 * * *, or is that section inapplicable?"
>
> "2. Is the County Board in payment of the three police officers, limited to $3.00 per day and mileage as provided by Section 7005?"
>
> "3. May the Board of County Commissioners pay the three police officers what they believe to be reasonable compensation for their services the night in question?"

Your questions are answered as follows:

1. It is our opinion that this is answered in the negative. The only authority I am aware of that provides for payment of rewards by the county is Section 669-15, Mason's Minnesota Statutes of 1927; and unless the facts give the board power to pay such reward under this section, there is no existing authority therefor.

A reward is a contract with a valid offer on the one side and an acceptance of such offer on the other. It is for services to be performed. Hence it must follow that the county board is without authority to pay a reward or enter into a contract for services already performed.

2. It is our opinion that the county board is limited in payment of these officers to $3 per day and mileage, as provided in Section 7005, Mason's 1938 Minnesota Supplement referring to sheriff's aides.

3. This inquiry is answered in the negative. The county board is without power to make payments in a situation of this kind without legal authority so to do. We are not aware of any authority granting such power to them.

HAYES DANSINGBURG,
Assistant Attorney General.

December 11, 1939. 390a-1

204

Sheriff—Fees—Chattel Mortgage—Foreclosure sales—M27 § 6993.

Wabasha County Attorney.

You request an opinion on the fees that a sheriff may collect on a chattel mortgage foreclosure sale by advertisement.

This question has been subject to a great deal of argument ever since the Supreme Court decision, Thompson v. First Division, 26 Minn. 353, and has not been before the Supreme Court since. Former opinions of this office on the question can be found in 1930 Reports, No. 148, and 1920 Reports, No. 280.

The Thompson case definitely decides that the foreclosure of personal property under decree of court entitles the sheriff to a fee of $3.00. The general basis for fees in these cases in section 6993, subsection 24, Mason's Minnesota Statutes 1927, which reads:

> "For services not herein enumerated, the sheriff shall be entitled to the same fees as for similar duties."

It seems quite clear that a chattel foreclosure sale of an elevator building or of any property that can be sold in one piece at auction sale, would be similar to foreclosure sale of real estate under decree.

However, where the sheriff has, at chattel foreclosure sale, auctioned off a number of head of livestock or any amount of property piece by piece, after taking and holding such property in his actual possession, he has a good argument for claiming that his services are similar to sale under execution, and that he is therefore entitled to fees provided for sale under execution. The dividing line is somewhere in between these two illustrations. This matter is apparently more or less settled by local custom in different counties; but it is unfortunate that the legislature does not pass an amendment to clarify the situation and make the fee fixed and uniform in all cases.

M. TEDD EVANS,
Assistant Attorney General.

July 31, 1939. 390c-11

205

Travel Expense—Commissioners Investigating Application for tax reductions—M27 § 657.

Clay County Attorney.

You ask if your county commissioners may properly charge $3.00 per day and mileage for investigating applications for tax reductions or abatements.

We assume that there are no special laws applying to your county and that the general provisions for payment of your county commissioners are covered by Section 657, Mason's Minnesota Statutes of 1927. Therefore, such a claim by a county commissioner is not a valid claim against the county unless he had been previously appointed on a committee for such investigation, so as to bring him under the provisions for additional payment, while acting on any committee under the direction of the board.

M. TEDD EVANS,
Assistant Attorney General.

December 28, 1939. 124j

206

Travel Expense—Coroner—Mileage—When two officers ride together—only one of them can collect.

T. O. Streissguth, County Attorney.

In regard to mileage charged by the coroner for reviewing a dead body. You state that it has long been the practice of the coroner to travel in the company of the sheriff. That on certain occasions the coroner made the trip in the sheriff's automobile and that both the sheriff and coroner are charging mileage therefor.

We advise that no officer can charge mileage unless it is an expense incurred by him, and that in your instance if the coroner bills the county for mileage he should pay the sheriff out of that mileage.

It is very proper for the sheriff to go along on these trips, as there may often arise a question of criminal acts and the sheriff has the right to investigate these matters and bill the county for necessary expenses in connection therewith, but when the two officers ride together only one of them can collect mileage therefor.

M. TEDD EVANS,
Assistant Attorney General.

March 17, 1939. 104a-6

207

Town Clerks—Compensation—Not subject to same limitation as supervisors —M27 § 1089.

Chippewa County Attorney.

You refer to an opinion dated April 11, 1933, holding a town clerk, under Section 1089, Mason's Minnesota Statutes of 1927, is entitled to a

per diem of $3.00, not exceeding $90.00 in any one year, unless increased by the voters. You state it seems that the limitation of $90.00 applies only to supervisors and has no application to the clerk. You ask our opinion on this.

The statute, so far as pertinent, reads:

> "The following town officers shall be entitled to compensation for each day's service as follows, viz.: * * * supervisors and clerks three dollars when the service is rendered within the town, and three dollars when rendered without the town, and mileage at the rate of five cents per mile for each mile necessarily travelled by them on official business out of town but not exceeding the sum of thirty dollars for such mileage for any one town officer in any year **but no supervisor shall receive more than ninety dollars as compensation in any one year * * *.**"

We agree that the $90.00 limitation applies only to supervisors. It does not apply to town clerks. To the extent that the opinion of April 11, 1933, is inconsistent herewith it is superseded.

You are advised that in townships to which Section 1089, Mason's 1940 Minnesota Supplement, applies, the compensation of the town clerk is $3.00 for each day's services rendered within or without the town, and mileage as specified, and that the clerk's compensation is not subject to the $90.00 limitation.

The legislature in the quoted part of the statute refers in one place to "supervisors and clerks" and in another to "supervisors." It is difficult to see what basis exists for construing the expression, "no supervisor shall receive more than ninety dollars," as though it read, "no supervisor **or clerk** shall receive more than ninety dollars." The legislature is presumed to know what it is doing. Phelps v. Minneapolis, 174 Minn. 309 at 513. It has said "supervisors" and not "supervisors and clerks" shall be subject to this limitation. If it wishes clerks to be under the same limitation it may easily amend the law and say so.

ROLLIN L. SMITH,
Special Assistant Attorney General.

March 15, 1940. 436c

208

Town Clerk—Removal—Conviction of infamous crime—What constitutes— M1927, 6953.

Scott County Attorney.

You ask whether or not a town clerk who has pled guilty to compounding a crime is disqualified from holding office during the remainder of his term. Section 6953, Mason's Minnesota Statutes of 1927, provides every office shall become vacant on the happening of certain enumerated

events, among them the incumbent's "conviction of any infamous crime, or of any offense involving a violation of his official oath."

We have no definition from our supreme court as to what constitutes an infamous crime. The supreme court of another state has said whether or not a crime is infamous within the statute making an office vacant on the incumbent's conviction thereof is not determined by the nature of the offense but by the consequences to the individual by the punishment prescribed. Attorney General ex rel. O'Hara v. Montgomery, 267 N. W. 550, 275 Mich. 504. That case specifically held that any crime punishable by imprisonment in the state prison was an infamous crime. For other definitions, see 3 Words and Phrases (5th series) page 482.

Gross misdemeanors are defined by Mason's Minnesota Statutes of 1927, section 9906, and the punishment, where no other is prescribed, is fixed by section 9923, id., at imprisonment in the county jail for not more than one year or by a fine of not more than $1,000.00.

Compounding a crime where the corrupt agreement relates to a misdemeanor or gross misdemeanor is a gross misdemeanor, and as such is punishable by imprisonment in the county jail for not more than one year or by a fine or by both. See 10034, id. Inasmuch as the gross misdemeanor of which this town officer has been convicted is not punishable by imprisonment in the state prison, it would not seem to be an infamous crime within our statute. You are so advised.

The only remaining question is: is the offense one involving a violation of incumbent's official oath?

Insufficient facts are stated to answer this definitely. It would first be necessary to know what crime was compounded. For example, compounding the crime of shooting game out of season would not involve a violation of a town clerk's official oath. On the other hand, compounding a violation of the statute forbidding public officers from being interested in contracts with the municipality they represent would amount to a violation of the official oath.

If the crime compounded did in fact involve a violation of the town clerk's official oath, then the conviction itself operates as a removal. State ex rel. Martin v. Burnquist, 141 Minn. 308, at 322. In such a case no removal proceedings are necessary. However, it would probably be appropriate and desirable in such a case for the town board to adopt a resolution reciting the fact of the conviction and declaring that as a result thereof the incumbent had vacated his office and directing him to turn over his official books and records to the person appointed to succeed him.

The law makes no provision for the removal of a town officer because of his misconduct. In the case under consideration, either the town clerk is automatically removed from his office by virtue of his conviction or he continues to hold it. Neither the town board nor any other authority has the power to remove him from the office because of his conduct.

ROLLIN L. SMITH,
Special Assistant Attorney General.

December 2, 1940. 475g

209

Vacancies—Officer who was also officer elect, died between election and end of term. Vacancy in office existed at once, to be filled by Commissioners. On first Monday in succeeding January, a vacancy again existed to be filled by Commissioners—M27, §§ 659, 6953, 821.

Honorable Harold Harrison.

You inquire as to "the right of a county board to fill a vacancy in the office of register of deeds for a full term of four years beginning the first Monday in January, 1939, or whether such appointment should be only until the next county election, or until a special election."

Section 659, Mason's Minnesota Statutes of 1927 provides:

> "When a vacancy occurs in the office of * * * register of deeds * * * the county board shall fill the same by appointment. * * * The person so appointed * * * shall hold for the remainder of the unexpired term and until his successor qualifies."

Section 822 of said statutes also contains the provision that such appointment "shall be for the balance of such entire term."

Subdivision 8 of Section 6953, Mason's Minnesota Statutes of 1927, provides that in the case of the death of the person elected before he qualifies,

> "the vacancy shall be deemed to take place at the time when his term of office would have begun had he lived."

Section 821 of Mason's Minnesota Statutes of 1927 provides that:

> "The term of office of a register of deeds shall be four years and until a successor is elected and qualified and shall begin on the first Monday of January next succeeding an election."

As the register of deeds of Hennepin county, who was also register of deeds elect, died before the beginning of a new term, the office became vacant on his death, and by reason of the aforesaid subdivision 8, Section 6953, a second vacancy took place on the first day of the new term.

The County Commissioners therefore had the power to appoint a register of deeds who should hold office for the balance of the term from and after the death of the incumbent up to the first Monday of the following January and also to appoint a register of deeds to fill the vacancy which occurred on the first Monday of January, 1939, for the entire balance of the term ending in 1943. If the board has not filled the vacancy existing on the first Monday of January, 1939, it has the right to do so at any time.

The conclusion herein reached is in conformity with the decision of our Supreme Court in State v. Borgen, 248 N. W. 744, which holds,

> "that no provision of the constitution is violated by the acts which provide that an appointee to a vacancy in the office of sheriff holds for the remainder of the unexpired term."

As the law pertaining to a vacancy in the office of register of deeds is the same as that applicable to a vacancy in the office of sheriff, it is clear that unless the law is changed there can be no election of a register of deeds in Hennepin County until 1942.

J. A. A. BURNQUIST,
Attorney General.

April 11th, 1939. 373a-4

ORDINANCES

210

Aircraft—Authority to regulate operation of over city.

City Attorney, Albert Lea.

It appears that a certain local enterprise has resorted to advertising from an airplane equipped with a loud speaking device. As the plane is flown over the city music is reproduced and advertising announcements are made. Quoting from your letter:

> "I have personally observed pedestrians on the streets, on a busy Saturday afternoon, attempt to cross at intersections with their eyes fastened upon the airplane flying overhead, in total disregard of traffic movements upon the streets and trunk highways."

In connection with these facts you ask whether or not the city may prohibit the playing of music and the making of advertising announcements over the corporate limits of the city or audible therein.

Your question brings us into a new field. There are no state laws or supreme court decisions shedding any light on the subject. A question of charter interpretation is involved. We assume your charter contains the usual provisions authorizing the council to regulate the use of public grounds, and streets, and to abate nuisances. The manner in which these advertising planes are operated might constitute a public nuisance. Possibly their operation over the city might be forbidden on the grounds that, as operated, they constitute a public nuisance.

The few cases we have on this subject are not determinative of your question.

In Smith v. New England Aircraft Co., 270 Mass. 511, 170 N. E. 300, 69 A. L. R. 300, it was held that the fixing by state law and federal regulation of 500 feet as the minimum altitude of flight by aircraft, except in taking off and landing, was not in excess of the permissible interference under the police power, and the power to regulate commerce. In that case, certain landowners sought to enjoin the operation of airplanes over their property on the ground it constituted a nuisance by reason of noises ema-

nating therefrom. Relief was denied them on the ground that the noise and proximity of aircraft had not been such as to be harmful to the health and comfort of ordinary people, and fright or apprehension of personal danger, or of injury to livestock or property were not present. In other words, an airport is not a nuisance **per se.**

However, an airport may become a nuisance from the manner of its construction or operation. Thrasher v. Atlanta, 178 Ga. 514, 178 S. E. 817. Especially where there is an interference with property rights. Swetland v. Curtis, etc., 55 F. (2d) 201. In an article in 48 Am. Law Rev. 919, this rule is announced:

> "Where enjoyment of property is interfered with by, for instance, the frightening of horses, or even of persons of ordinary courage by the close proximity of the aircraft it cannot be doubted the court's interference could be obtained to restrain annoyance by such causes."

If a property owner has such a right it is difficult to see why a city—granted requisite charter authority—does not possess similar rights, including the right of the council to regulate the manner of flying over the city.

In Silverman v. Chattanooga, 165 Tenn. 642, 57 S. W. (2d) 552, it was held that charter authorization to regulate public grounds included power to enforce violation of an ordinance regulating the operation of aircraft over the municipal airport.

Assuming charter authorization, express or implied, it is our opinion that the council may adopt an ordinance prohibiting the playing of music or the making of advertising announcements from aircraft flying over the city at a low altitude.

It may be that such an ordinance would be held inapplicable to aircraft engaged in interstate commerce—that being a field for the federal authorities. However, in such a case it is possible the federal authorities might adopt a regulation similar to the city ordinance.

ROLLIN L. SMITH,
Special Assistant Attorney General.

November 8, 1940. 62c

211

General Welfare—Clean-up-day—Based purely on aesthetic grounds—Police powers.

Charles A. Fortier, City Attorney, Little Falls.

You state and ask:

> "The City Health Officer is desirous of having an ordinance passed providing for definite clean up days within the city. He desires this

ordinance to be so inclusive that he or the city will have power to force people to clean up their yards and premises when the same are unsightly.

"Can such an ordinance legally be enforced if such clean up is based purely on aesthetic reasons and not on any idea that the premises constitute a menace to health or a fire hazard?"

Generally speaking, a municipality is vested with authority to enact ordinances protecting the public health. The extent to which such police power may be exercised has never been defined with precision. The Supreme Court of the United States once said that:

"* * * It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate. * * *" Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079.

The nature of ordinances and regulations which may be adopted and enforced for the purpose of conserving the public health is largely discretionary with municipal authorities. Such regulations have uniformly received a liberal construction by the courts and unless clearly unreasonable and arbitrary or demonstrably violative of some constitutional provision intended to protect the liberty of the individual or property rights, such regulations will be sustained.

I therefore have no hesitation in saying that your city is authorized to enact an ordinance requiring the cleaning of private yards and premises in order to satisfy the requirements of public health.

In the second part of your inquiry you ask if such an ordinance could legally be enforced if it were "based purely on aesthetic reasons and not on any idea that the premises constitute a menace to health or a fire hazard?" This part of your question is answered in the negative.

Our courts have looked with disfavor upon ordinances and regulations enacted under the police power based on artistic or aesthetic purposes and have viewed such ordinances as invasions of private property rights. Welch v. Swasey, 214 U. S. 91, 53 L. Ed. 923. The prevailing legal view has been expressed in the case of Passaic v. Paterson Bill Posting, etc., Co., 72 N. J. L. 285, 62 Atl. 267. There the court said:

"Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation."

However, there is a marked tendency in the decisions of our courts to place a greater emphasis upon beauty and cultural values in connection with the exercise of the police power. It is apparent that our courts will consider aesthetic values in connection with some other basis for the exercise of the police power. Thus, in Opinion of the Justices, 234 Mass. 597, the court said:

"The inhabitants of a city or town cannot be compelled to give up rights in property, or to pay taxes, for purely aesthetic objects; but if the primary and substantive purpose of the legislation is such as justifies the act, considerations of taste and beauty may enter in, as auxiliary."

As early as 1908, the Court of Appeals of Maryland said:

"* * * it may be that in the development of a higher civilization, the culture and refinement of the people has reached the point where the education value of the Fine Arts, as expressed and embodied in architectural symmetry and harmony, is so well recognized as to give sanction, under some circumstances, to the exercise of this power even for such purposes." Cochran v. Preston, 108 Md. 220, 70 Atl. 113.

The Kansas court in Ware v. Wichita, 113 Kan. 153, 214 Pac. 99, states:

"* * * There is an aesthetic and cultural side of municipal development which may be fostered within reasonable limitations. * * * Such legislation is merely a liberalized application of the general welfare purposes of state and federal constitutions."

See also "The Attitude of the Law Toward Beauty," vol. VIII, American Bar Association Journal, August, 1922, page 470, et seq.; State v. New Orleans, 154 La. 271, 97 So. 440.

In summary, therefore, as the law now stands, ordinances and regulations based purely on aesthetic grounds will not be sustained, but if such aesthetic grounds are auxiliary to or in addition to some other grounds then the ordinance will be sustained as a legitimate exercise of the police power. It is difficult to draw a line of demarcation between regulations based purely on aesthetic grounds and ordinances based on some other grounds within the proper exercise of the police power. There must be an examination of the ordinance or regulation in each case in order to determine whether or not such ordinance would be a reasonable exercise of the police power.

Generally speaking, therefore, I am of the opinion that your city council may pass and enforce an ordinance requiring the cleaning of yards in the interest of the public health, as asked in your first paragraph, and that the city council is without authority to pass and enforce an ordinance "based purely on aesthetic reasons," as asked in your second paragraph.

Section 32 of your city charter vests authority in the city council to enact all ordinances "necessary for the government and good order, and for the health, safety and welfare of the city, * * *"; and Section 14 of your charter vests in the board of health the authority to enforce all such ordinances.

EDWARD J. DEVITT,
Assistant Attorney General.

September 13, 1939. 62c

212

Licenses—Authority to require payment of delinquent taxes as condition precedent to granting of.

White Bear Lake City Attorney.

You state:

> "We have a situation existing in White Bear Lake where a number of applicants for licenses are owing personal property taxes and real estate taxes in past years. In some instances the personal property taxes were incurred by the applicant during the term of previous licenses granted to him. One specific case is the movie theatre licensee. She is owing personal property taxes levied against the movie equipment during several years last past and she has now an application for a further license. While I have found no precedent, I am of the view that the City may as a prerequisite to the granting of a license require payment of all taxes that are delinquent against the business licensed in previous years, including real estate taxes."

You ask our opinion. Your inquiry presents a question as to the authority of your city council to enact an ordinance requiring the payment of delinquent personal property and real estate taxes as a condition precedent to the granting of a license by the city council.

The question, so far as I have been able to discover, has not been passed upon by the Supreme Court of this state. However, in the case of State of Minnesota ex rel. Ashton v. Register of Deeds of Ramsey County, 26 Minn. 521, the court held that it was unlawful for the register of deeds of Ramsey County to receive for record or to record deeds of real estate situate in the City of St. Paul which did not have upon them the county auditor's certificate that all taxes had been paid and the city treasurer's certificate that all special assessments had been paid. The decision, therefore, upheld the constitutionality of Laws 1878, Chapter 1, requiring that all delinquent taxes be paid before a deed could be filed for record, and Special Laws of 1874, Chapter 1, Section 73, which required that all taxes for local improvements be paid before a deed be recorded with the register of deeds. In so holding, the court, inter alia, said:

> "* * * because the constitution imposes no restriction upon the authority of the legislature in the matter, we can see no reason why it is not competent for the legislature to prescribe any other rule, regulation or condition with reference to the registration of conveyances of real estate, which, in its wisdom, it may see fit to enact, provided only that such its action is legislative.
>
> "It is therefore competent for the legislature to enact, as it has done in the statutes before quoted, that no register of deeds shall record any deed not having thereon the county auditor's statement and the city treasurer's certificate, as therein prescribed. * * *"

In passing, I may call your attention to the provisions of Laws 1927, Chapter 381, now found in Mason's Minnesota Statutes of 1927, Section 1973-6 and 1973-7, which provides that no public moneys are to be deposited in any bank in Minnesota while any taxes assessed against any of the shares of stock of such bank are delinquent. So far as I know, the constitutionality of the law has never been tested.

Looking elsewhere for authority on the question submitted, we find a rule stated in 37 C. J., Licenses, Section 92, to the effect that:

> "* * * an applicant (for a license) may be required, inter alia, to disclose the extent and value of his business, and **pay, or show that he has paid, all his taxes.** * * *"

In the case of Flanagan v. Town of Petersburg (W. Va.), 150 S. E. 382, the court stated that the governing body of the municipality was authorized to refuse a pool room license to an applicant who was delinquent in the payment of his town taxes and who by his own admission had been convicted of assault and battery. The court discussed at great length the authority of a municipality to prohibit entirely the maintenance of pool rooms and the playing of pool, and then came to the conclusion that regardless of whether or not the municipality had authority under the statutes to absolutely refuse pool room licenses, the evidence submitted in the case showing that applicant had not paid his taxes and that he had been convicted of assault and battery was sufficient evidence to support the municipality's action in refusing the pool room license. The court stated that the municipality had not abused its exercise of reasonable discretion. This case is not authority for the proposition that a municipality may refuse a license solely on the grounds that taxes have not been paid but it holds that the fact the taxes have not been paid may be considered in examining the character and fitness of the applicant.

The case of Sights v. Yarnalls was decided by the Court of Appeals of Virginia in 1855 and is found in 12 Grat. (53 Va.) 292. There the court expressed the opinion that the city council of Wheeling, Virginia, having been so authorized by its charter, could impose a tax upon ordinaries (taverns or lunch rooms) in addition to the regular state tax and that such council was fully authorized to make the payment of such tax a condition precedent to the right to demand the emanation of the license. It is to be noted that in this case the tax required to be paid as a condition precedent to the granting of the license was a local tax.

A very enlightening case is that of In re Kalana, 22 Hawaii 96, 1916 D Annotated Cases 1094, decided by the Hawaiian Supreme Court in 1914. There the court stated that the statute making the payment of taxes to the state as a condition precedent to obtaining an occupation license (hack driver's license) was valid even though it required the payment of taxes that became due before the enactment of the statute. There, in answer to the argument that the statute in effect combined the taxing and police powers of the government in a manner contrary to the constitution of the United States, the court said:

"* * * There is no good reason why a single statute should not include the exercise of both the power of taxation and the police power."

An interesting note is attached to the case on page 1099 of the Annotated Cases, 1916 D, wherein it is stated that as a general rule,

"* * * a statute denying to delinquent taxpayers civil rights not specifically secured by the Constitution is valid. * * *"

Under this general rule, the Minnesota case of State v. Register of Deeds of Ramsey County, supra, is cited. The note also points out that statutes making the payment of taxes a qualification for voting has been upheld as a valid exercise of the taxing powers. Citing cases.

A recent case more in point is that of Somerset v. Newton, 82 S. W. (2d) 306, decided by the Kentucky Supreme Court in 1935. There, as a condition precedent to the granting of a liquor license, the city council of Somerset required by ordinance that all taxes, assessments and other financial claims of the city must be paid as a condition precedent to the license. The enactment of additional requirements had been authorized by the Alcoholic Liquor Control Act enacted by the state legislature. The court upheld the validity of the ordinance, saying:

"* * * Governments cannot be maintained without revenue, and good citizenship includes the duty of meeting one's just obligations to his government. Of course, we would not be understood to say that good citizenship is measured by ability to meet one's obligations, but inability is one thing and unwillingness quite another. One who is financially able to pay $300 for a license is certainly able to pay to his city an annual poll and property tax of approximately $2. * * *"

None of the above cases are exactly in point. Most of them construe the constitutionality of a statute imposing the condition that taxes be paid before a license be issued. None of them construe the constitutionality of an ordinance. The decided cases, however, do indicate the tendency of the courts to uphold legislation of this kind.

The objectives of such legislation are undoubtedly commendable and conducive to the aims of good government. The practice is now quite widespread in this state and is working especially satisfactorily in the cities of St. Paul and Minneapolis. Its operation inures to the benefit of the state and the municipalities alike. In view of the holdings above reviewed, I am of the opinion that it would be upheld as against constitutional objections. I believe it would be best, however, to initiate the practice by means of an ordinance authorizing the issuance of licenses only to persons of good character and to provide therein that the failure to pay taxes would constitute evidence of a lack of good character for the purposes of the ordinance.

EDWARD J. DEVITT.
Assistant Attorney General.

May 17, 1940. 62c

213

Peddlers—Hawkers and transient merchants—Whether farmers selling animals, turkeys and chickens within terms of ordinance—Minn. Cons., Art. 1, § 18.

Thomas J. Carey, Ely City Attorney.

You state that the city of Ely has an ordinance requiring that peddlers, hawkers and transient merchants procure licenses before selling their wares in Ely. You ask if farmers selling meat from animals raised by them on their own farms including turkeys and chickens, must procure a license under the ordinance.

The Minnesota Constitution, Article 1, Section 18, provides that:

> "Any person may sell or peddle the products of the farm or garden occupied and cultivated by him without obtaining a license therefor."

Our Supreme Court has never passed upon the question, but if it were to do so I am inclined to the view that it would hold that meat from animals and turkeys and chickens raised on land occupied by a farmer would be interpreted as "products of the farm or garden" within the meaning of Article 1, Section 18, above quoted.

Under a statutory limitation that no city shall levy or collect any tax or license fee from any farmer for the sale of any "produce" raised by him and sold from his wagon in such city, it has been held that a license cannot be imposed on a farmer for selling from his wagon on the streets spareribs and sausages made from hogs raised and butchered by him on his farm. Higbee v. Burgin, 197 Mo. App. 682, 201 S. W. 558. In that case the court quoted the court of appeals of the District of Columbia which said with reference to the definition of the word "produce":

> " 'But the common parlance of the county, and the common practice of the country, has been to consider all those things as farming products or agricultural products which had the situs of their production upon the farm, and which were brought into condition for the uses of society by the labor of those engaged in agricultural pursuits, as contra-distinguished from manufacturing or other industrial pursuits.' "

The cases seem to revolve around the definition of a peddler and the courts have even gone so far as to hold that a butcher killing beeves on his own premises and selling meat from a wagon was not a peddler within the meaning of the ordinance. State v. Kumpel (Del.), 43 Atl. 173.

For a discussion of the proposition see McQuillin's on Municipal Corporations, Sections 1065 and 1120, and cases therein cited.

Our Supreme Court recently held (July 9, 1939) that an ordinance requiring transient merchants selling "natural products" of the farm to secure a license, and exempting therefrom persons selling products raised on farms occupied and cultivated by them, was violative of the state and federal con-

stitutional prohibitions against class legislation. State of Minnesota v. Pehrson, 287 N. W. 313. The case followed two earlier decisions decided prior to the effective date of Article 1, Section 18, of the constitution. State ex rel. Wagener, 62 Minn. 206, 72 N. W. 67; State v. Jensen, 93 Minn. 88, 100 N. W. 644. I do not know the provisions of your ordinance, but it should perhaps be examined in the light of State v. Pehrson, supra.

As to the authority of a municipality to charge an inspection fee for products as a condition precedent to authorizing the sale of products of the farm or garden see Mason's 1938 Minnesota Supplement, Section 3813, and Mason's Minnesota Statutes of 1927, Section 3820, as construed by Opinion No. 20 of the 1936 Report of the Attorney General. See also the discussion in 18 Minn. Law Rev. 841.

For Minnesota cases on the history of the constitutional provision see especially State ex rel. Mudeking v. Parr, 109 Minn. 147, 123 N. W. 408, and other cases cited in Mason's 1927 Statutes under Article 1, Section 18, of the constitution. See also the following: 85 Minn. 290, 93 Minn. 88, 109 Minn. 302, 69 Minn. 209.

EDWARD J. DEVITT,
Assistant Attorney General.

December 7, 1939. 477b-21

214

Peddlers—Solicitors—"Green River Ordinance."

City Attorney, Anoka.

I have examined the ordinance you submit and it is substantially the same as the type of ordinance known as the "Green River Ordinance," which has been the subject of much judicial expression in recent years.

In November of 1931, the town of Green River, Wyoming, enacted an ordinance substantially the same as yours declaring the practice of going in and upon private residences by solicitors, peddlers and others named as a nuisance and providing punishment therefor. The pertinent part of such ordinance reads as follows:

> "The practice of going in and upon private residences in the Town of Green River, Wyoming, by solicitors, peddlers, hawkers, itinerant merchants and transient vendors of merchandise, not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences, for the purpose of soliciting orders for the sale of goods, wares and merchandise, and/or for the purpose of disposing of and/or peddling or hawking the same, is hereby declared to be a nuisance, and punishable as such nuisance as a misdemeanor."

The Fuller Brush Company caused an injunction to issue prohibiting the enforcement of the ordinance. The granting of the injunction was sustained in the United States Federal District Court, 60 Fed. (2d) 613. The case was appealed to the Circuit Court of Appeals, which court reversed the order granting the writ and dismissed the bill. Town of Green River v. Fuller Brush Co., 65 Fed. (2d) 112. In that decision the court pointed out that the classes named in the ordinance had long been recognized as subject to police power regulation. Since the ordinance did not attempt to prohibit sales but only denounced a particular practice, it was held not an unreasonable burden upon interstate commerce. The court took judicial notice of the fact that the frequent ringing of doorbells can become a nuisance. Since by its terms it was universal in its application, the ordinance was held not discriminatory. The decision of the Circuit Court of Appeals was not appealed to the United States Supreme Court.

The same ordinance was sustained by the State Supreme Court of Wyoming. Town of Green River v. Bunger, 58 Pac. (2d) 456. Here the court emphasized that the town had power to pass the ordinance under its police powers. The court stated that although the defendant in the case operated through what the court called a "license by consent implied from custom," the practice might nevertheless be regulated and restricted.

On June 27, 1938, the Supreme Court of Louisiana upheld the validity of a similar ordinance. Shreveport v. Cunningham, 182 So. 649.

There have been several decisions holding the so-called Green River ordinances to be invalid. In the case of City of Orangeburg v. Farmer, 186 S. E. 783, decided in July, 1936, by the Supreme Court of South Carolina, a similar ordinance was held invalid as an unreasonable exercise of the police power.

Later, in June, 1937, the Maryland Supreme Court held a similar ordinance (but with some distinguishing features from the original Green River ordinance) to be invalid. Jewel Tea Company v. Town of Bel Air, 192 Atl. 417. In the case of Prior v. White, 180 So. 347, decided April 6, 1938, the Supreme Court of Florida held a Green River ordinance invalid because of the existence of an implied custom or usage permitting calls on householders. "Such calls are therefore not nuisances and cannot be made punishable as such. Even at most, the acts constituted private nuisances," the court said. The ordinance in that case was also held to be unreasonable.

The Virginia Supreme Court on February 20, 1939, held a Green River ordinance invalid mainly on the ground that the prohibited act at most constituted only a private nuisance and was therefore not an object of police power regulation. White v. Town of Culpeper, 1 S. E. (2d) 269.

It will thus be seen that there is a distinct lack of uniformity in the decisions of the courts of the various states. Our Supreme Court has never passed upon the question.

I am informed that two of our district courts have held the Green River ordinances of the cities of Pipestone and Waseca to be valid exercises of

the police power. The Pipestone case was decided in 1936, the Waseca case in 1938.

The lack of uniformity in the decisions is also present within the State of Minnesota, for on July 20, 1938, the Polk County District Court held a Green River ordinance of the village of Fertile to be invalid on the ground that it was unreasonable and beyond the statutory power granted to the village. I am also informed that the Green River ordinance of the city of Rochester was construed by the Olmsted County District Court in August, 1938. The decision did not hold the ordinance invalid on the customary constitutional grounds, but did hold that it was inapplicable to farmers peddling their own products.

Our Supreme Court recently construed a licensing ordinance of the city of Minneapolis which exempted persons selling produce raised on farms occupied and cultivated by them from the operation of the ordinance, and held it to be invalid because of such exemption. State of Minnesota v. Pehrson (July 9, 1939), 287 N. W. 313. I call your attention to the decision, not because it has a direct bearing on the validity of your Green River ordinance, but because it should be considered as within the general subject matter.

In view of the absence of uniformity in the decisions of the various state and federal courts, and the diversity of opinion amongst the district courts of the state, we are reticent (and unable) to express a definite opinion as to the validity of your ordinance. Its legality can be finally determined only by a judicial determination by our highest court, a decision very much to be desired.

EDWARD J. DEVITT,
Assistant Attorney General.

December 22, 1939. 477b-1

215

Service Trades—Dry cleaners—Council—Powers of.

City Attorney, Mankato.

You ask whether or not the city of Mankato has the authority to enact an ordinance regulating service trades such as the dry cleaning business, by fixing prices which may be charged for services. You state:

> "We would like to set up an ordinance in the City of Mankato allowing the dry cleaners or any other service trade to petition the City Council, and after a hearing allow the City Council to set a price as a fair trade price for this industry in this area, and after such determination of price the amount set is to be considered the fixed price for such operations in this area until a change is made by a new peti-

tion being presented and a new hearing to determine such change." You also ask several other subsidiary questions.

You do not point to any statute or section of your city charter under which it is claimed that the city would have authority to fix prices in the service trades. An examination of the statutes and your charter does not disclose that there is any such authority. As you know, it is a well established general rule of law that a municipality has only such authority and power as is expressly granted to it by the legislature. A city council is a body of special and limited jurisdiction and its powers cannot be extended by intendment or implication, but must be confined within the express grant of the legislature. Our Supreme Court has so held in several instances. See especially St. Paul v. Laidler, 2 Minn. 190 (159); St. Paul v. Traeger, 25 Minn. 248; St. Paul v. Robinson, 129 Minn. 383, 152 N. W. 777. See Dunnell's Digest, Sections 6684, 6763, and cases cited.

As you point out, the barber trade is regulated and prices are fixed in certain areas of the state. However, this is by authority of a special act of the legislature, Laws 1937, Chapter 235. The act has been held constitutional. State v. McMasters, 204 Minn. 438, 283 N. W. 767. The legality of laws fixing prices in various fields has been the subject of much judicial expression in recent years, but I have been unable to find any cases which dwell upon the authority of a municipal body to fix prices in service trades where there is no express statute or charter provision as the basis for the exercise of such authority.

EDWARD J. DEVITT,
Assistant Attorney General.

August 27, 1940. 62c

216

Special assessments—Authority of city council of Fergus Falls to impose "tapping fee" as condition precedent to water main and sewer connections to property purchased at tax sale—L39, C386, L39, C328.

City Attorney, Fergus Falls.

You state:

"This City has heretofore levied special assessments for the construction of water main extensions and sanitary sewers. Subsequent to the making of the assessment some of the premises were forfeited to the State of Minnesota for nonpayment of taxes. Some of this property has now been repurchased in proceedings held pursuant to recent legislation upon this subject and we anticipate that other premises will

be similarly purchased. If the purchasers of these premises are going to receive the benefits of sewers and water mains the property will be receiving the same without having paid any assessment."

and ask:

"whether or not the City of Fergus Falls, operating under a municipal charter, has authority by ordinance or resolution to compel the owners of such property to pay a so-called 'tapping fee' commensurate to or equal to the amount of the original assessment made against the property, which assessment had been cancelled when the property was forfeited to the State for nonpayment of taxes, which 'tapping fee' must be paid before a service connection is made either with the water main or sanitary sewer so as to serve the premises in question."

I doubt the authority of the city to enact and enforce an ordinance or resolution of the kind proposed.

Generally speaking, the power to impose a "tapping fee" as a condition precedent to making a connection with a city water main or sewer is an exercise of the police power of the municipality, as distinguished from the taxing power. 3 McQuillin Municipal Corporations, Section 1092. Such a fee is not a tax upon the property but is a burden imposed for the right to exercise a franchise or privilege and the amount to be charged is used as a mode of computing the amount to be paid for the exercise of such a privilege. Pullman Southern Car Company v. Nolan, 22 Fed. 276. Since such a license fee is imposed as a condition precedent to the exercise of a privilege or franchise and not for the purpose of obtaining revenue, the fee must be a reasonable one based on the cost of exercising the police functions. The fee here attempted to be imposed is to be "commensurate to or equal to the amount of the original assessment made against the property" and is in the nature of a revenue measure meant to compensate the city for amounts previously paid by it or still owing by it for the cost of the water mains and sewers abutting the property in question.

It would thus appear that the city is attempting to do indirectly what it cannot do directly.

Viewing the problem in a different light, it is stated as a general rule that:

"* * * a municipality cannot make the payment of a void assessment a condition of making the connection."

4 McQuillin's Municipal Corporations, Section 1567. In the case of Meyler v. Meadville, 23 Pac. Co. Ct. Reports 119, the city of Meadville attempted to demand payment of $43.58, the amount due for certain special assessments for the construction of sewers abutting the property in question, as a condition precedent to allowing the property owner to connect his sewer with the main sewer. The assessment made was without authority of law and null and void and of no effect. In construing the authority of the city to make the payment of such void assessment a condition precedent to the connection, the court said:

"It cannot be denied that municipal corporations may by general rules regulate the use of public sewers, and determine the price at which a private person may connect therewith * * * and we have no doubt but that they may compel the payment of any properly and regularly assessed amount upon a given property before the same may be permitted to connect with the sewer, but we are of opinion that **they may not compel the payment of a void assessment as a condition precedent to making the connection.**"

An analogous situation exists here. The assessment heretofore levied, so far as the purchasers of the tax-forfeited property from the state are concerned, is void and of no effect since, if the property was owned by a private individual at the time of forfeiture and such assessment had been levied prior thereto, it was the duty of the county auditor to cancel such assessment. Mason's 1938 Minnesota Supplement, Section 2139-21. If the assessment was attempted to be levied while the title to the property was vested in the state, no valid lien attached as a result thereof since state-owned property is not subject to a lien for special improvements. Foster v. Duluth, 120 Minn. 484, In re Delinquent Taxes, Polk County, 182 Minn. 437. An analogous conclusion may, therefore, be drawn.

For cases dwelling on discrimination see: Dulaski v. Longburough (Ark.), 129 S. W. 536; Baneser v. Philadelphia, 41 Pa. Sup. Ct. 515; Springmyer v. State, 1 Ohio Cir. Ct. 501; Mobile v. Bienville Water Supply Company (Ala.), 30 So. 445.

It also appears that the "tapping fee" proposed is sought to be charged only against property which had previously forfeited to the state. The same fee is not to be charged against property which has been privately owned. Such an imposition would run contrary to the general rule that license fees imposed must be uniform and apply equally to all persons of the same class. It is not apparent that there is any reasonable basis for placing purchasers of tax-forfeited property in a class separate from that of persons who have purchased property from private individuals or who have owned it since the time of the imposition of the special assessment.

I am informed that the city of Minneapolis has enacted ordinances requiring the payment of a tapping fee commensurate with the cost of the special assessment previously paid by the city as a condition precedent to making sewer and water connections to property purchased at tax-forfeiture sale. See official publication of Ordinances and Resolutions passed by the city council of the city of Minneapolis, Minnesota, at a regular meeting thereof held August 25, 1939, and published August 30, 1939, in the Minneapolis Star Journal. The city attorney has based the authority of the city council to enact such ordinances and resolutions on certain provisions of the city charter and on the authority of Herrmann v. State (Ohio), 43 N. E. 990, and upon two cases which arose in the city of Fergus Falls, City of Fergus Falls v. Boen, 78 Minn. 186; City of Fergus Falls v. Edison, 94 Minn. 121. Both cases are cited and followed in Lee v. Scriver, 143 Minn. 17. The two Fergus Falls cases deal with the authority of the council to impose a connection charge of $33.00 applicable alike to all abutting prop-

erty owners where the council failed to levy special assessments against the abutting property owners, to defray the cost of constructing the sewers in question. We do not feel that those cases are controlling of your inquiry.

It must be admitted that the law, as it now stands, works an injustice on municipalities making special improvements on tax-forfeited land since there is no statutory provision for proportionate reimbursement to municipalities after such property has been purchased. However, this is a matter which can easily be remedied by legislative act, and the subject may well have the attention of the next legislature. We suggest that you call it to the attention of the members from your district at the next session.

For the reasons above stated, we are inclined to doubt the authority of your council to enact the ordinance or resolution proposed, and to doubt the validity of such an ordinance or resolution if enacted.

EDWARD J. DEVITT,
Assistant Attorney General.

March 11, 1940. 62c

PUBLIC HEALTH

217

Communicable Diseases—Control—Liability for cost of.

Itasca County Attorney.

As to what constitutes control of a communicable disease, this office has held over a period of years that:

(1) Establishing, enforcing and releasing quarantine constitutes such control and is a purely public charge payable in the first instance by the town or village which may in turn recover one-half from the county.

(2) Disease control measures necessary for the public's protection but which also benefit the patient, e. g., vaccination, antitoxin, hospitalization in certain cases, are primarily the liability of the patient or person liable for his care but may be allowed as a public charge when all possible efforts to secure payment by the responsible individual have failed; and

(3) Measures intended for the care, comfort and relief of a patient but not necessary for the protection of the public are private liabilities and cannot be assumed as a public charge except by way of poor relief.

You will find many of these opinions digested briefly at the end of the State Health Laws and Regulations issued in printed form by the State Board of Health.

ROLLIN L. SMITH,
Special Assistant Attorney General.

June 16, 1939. 611a-1

218

Health Officer—Liability for services in certain instances—M27, §§ 5348, 5351.

Director Department of Health.

You inquire:

1. "Is a county liable to a town for any part of the money expended by such town in payment for the services of a medical health officer appointed by the town board?"

This inquiry is answered in the negative. It is my opinion that Mason's Minnesota Statutes of 1927, Sections 5348 and 5351, do not contemplate the county paying any part of the money expended by the town on payment for the services of the regular medical health officer, whether he be the physician member of the town board or the one appointed by the chairman to fulfill the duties of the former.

2. "If a town board has not appointed a medical health officer for the town and the town board or its chairman employs a physician to make an investigation of suspected communicable disease, take cultures and do those other things of a medical nature which are necessary for the control of disease, and the town having paid such physician a sum of money for such services; is the county liable for the reimbursement of any part of the money so paid to such physician by the town?"

Mason's Minnesota Statutes of 1927, Section 5351, only contemplates that the county shall pay one-half of the expenses for establishing, enforcing, and releasing quarantine for the purpose of combatting an epidemic of a communicable disease in a particular locality when such additional medical help is necessary. This is applicable whether or not the town has appointed a regular medical officer under either of the methods provided in Section 5348. A regular town medical officer in the course of his duties is expected to take care of communicable diseases. However, when they reach the extent of an epidemic and it is necessary that he have additional help, then the cost of such additional help should be borne equally by the county.

I do not feel that this provision of the statute should be utilized for the purpose of foisting a portion of a town's regular medical expense upon the county. If there is sufficient reason why this should be done, the statute should be amended; and the legislature is the place to have it done.

JOHN A. WEEKS,
Assistant Attorney General.

December 22, 1939. 225i-2

219

Health Officer—Not liable for one-half of services even though services rendered in combating communicable diseases—M27, §§ 5348, 5351, 10305.

Director, Department of Health.

You inquire relative to the question of the responsibility of counties to reimburse towns one-half of the amount expended for medical services performed for the town board of health by physicians who have been appointed by towns as medical health officers; or in case the town has not regularly appointed a medical health officer, by physicians employed by the town chairman to perform medical services in a given case for the control of communicable disease.

Mason's Minnesota Statutes of 1927, Sections 5348 and 5351, provide for the matters about which you inquire. The former authorizes local boards of health for towns, their membership, the appointment of their health officer, and requires the compensation of the health officer to be fixed by the board appointing him or to which he belongs; and the same, together with his necessary expenses, shall be paid by the local body which he serves. The latter section of the statute deals with the handling of communicable disease and authorizes the local health officer in handling such matters to employ at the cost of the health district of which his local board has jurisdiction, all medical and other help necessary in the controlling of such communicable disease, but provides that the local district may recover one-half of all expense incurred in establishing, enforcing, and releasing quarantine.

It is the duty of the health officer to see that the health laws are enforced. There is no express direction in the law requiring the health officer to do this work. His authority is to employ all medical or other help necessary in the control of such communicable disease or for carrying out within the jurisdiction of the local board all lawful regulations and directions of the state board of health.

The question is whether a local board may charge the county for one-half of the services and expenses of the local health officer when he is engaged in establishing, enforcing, and releasing quarantine with respect to communicable disease. The case of Bjelland v. City of Mankato, 112 Minn. 24, 127 N. W. 397, held void a contract between a board of health and its health officer whereby he rendered services "as a physician" and "performed professional services in controlling and eradicating an epidemic of typhoid fever." In this case the services rendered were performed in controlling and eradicating an epidemic of typhoid fever and an epidemic of smallpox. The purpose of Section 5351 is to make the county bear one-half of the expense of such special measures as may be necessary to suppress epidemics of communicable diseases. However, Section 5348 provides that the compensation of a health officer shall be paid by the municipality in which he serves. Prior to 1917 Section 4646 of the General Statutes of 1913, now Section 5351, read as follows:

"But all persons whose duty it is to care for another infected with a communicable disease, to isolate such persons, 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."

This was amended by Laws 1917, Chapter 427, to read as follows:

"Any person whose duty it is to care for himself or another afflicted with a communicable disease shall be liable for the reasonable cost thereof to the municipality or town paying such, excepting that the municipality or town constituting such health district shall be liable for all expenses incurred in establishing, enforcing and releasing quarantine, one-half of which may be recovered from the county as provided under Sections 4647 and 4648, General Statutes of 1913."

The purpose of this amendment was to shift to the county and the city or town as the case might be, in equal shares, certain expenses which heretofore had been charged against individuals. The individual had never been liable for any part of the compensation of the health officer, and there is nothing in the act to suggest that there was any intention to shift the liability of such compensation as was earned in establishing, enforcing, or releasing quarantine from a local town or municipality to the county. There was never any intention that counties were to be liable for half of the salary of health officers, when they are engaged in establishing, enforcing, or releasing quarantine. If the legislature had intended to change the liability of the municipality for any part of the health officer's compensation, it doubtless would have expressly provided for it, instead of leaving it to doubtful implication. The logical conclusion is that this amendment was never intended to make the county liable for any part of the health officer's salary, even though a part of it might be earned while he was establishing, enforcing, or releasing quarantine. It therefore follows that any extra services the health officer may perform, beyond those contemplated when he is hired and his salary fixed by the local board, are contractual in their nature, either express or implied. In this event they would be subject to Mason's 1938 Minnesota Supplement, Section 10305, which prohibits any public officer who is authorized to make any contract in his official capacity or take part in making any contract from becoming interested in such contract directly or indirectly.

The case of Chairman, etc., v. Board, 89 Minn. 402, 95 N. W. 221, would appear to indicate that this rule should not apply to boards of health, but Bjelland v. City of Mankato, supra, forecloses any such contention, and follows Stone v. Bevans, 88 Minn. 127, and distinguishes Chairman, etc., v. Board. In City of Mankato v. Blue Earth, 87 Minn. 425, the court expressly holds that the county is liable for necessary additional salary paid to a local health inspector for extra services in locating and combating contagious disease. However, there the health inspector was not a member of the board of health, but merely an employee, and as such his employment would doubtless be authorized as medical and other help necessary to the control of such diseases.

To summarize, the distinctions are as follows:

1. Under Section 5348 the regular salaried health officer of the local subdivision performs the functions of his office at stipulated compensation granted him when he was appointed. The remuneration of the regular salaried health officer is paid entirely by the town, village or city by which he is appointed, and the county is not liable for any portion of his services, even though a part of his work may have been performed during an epidemic or in combating communicable diseases.

2. Under Section 5351 only temporary medical help is contemplated for the purpose of combating an epidemic of communicable disease in the particular locality. When such additional medical help is necessary, the expense incurred for such additional medical aid in establishing, enforcing and releasing quarantine, one-half thereof may be recovered from the county. The regular town, village or city health officer should not appoint himself for the purpose of receiving additional compensation to his salary as a health officer or for the purpose of having the county pay one-half of his salary or fees. In so doing, he may violate the provisions of Section 10305.

JOHN A. WEEKS,
Assistant Attorney General.

December 6, 1939. 225i-2

220

Hospitals—Osteopaths and chiropractors may be excluded by regulation of the governing board—M27, § 5731.

City Attorney, Stillwater.

You state that Lakeview Memorial Hospital located in your city is operated as a city and county hospital, three members of the governing board being appointed by the city council and four by the county board; that the hospital is open to the public at regular rates and maintains a section for poor patients who are admitted without charge or at a reduced rate, if unable to pay all or part of the cost of treatment; that there is usually a deficit at the end of the year, which is paid by the county.

You further state that the governing board of the hospital has adopted a rule that no osteopath may bring patients into the hospital or treat them there; that it is claimed that this exclusion is necessary in order that the hospital enjoy a "Class A" rating given by a national hospital association. You also state that one of the duly licensed local osteopaths desires to bring his patients into the hospital and that the board will not permit him to do so.

You inquire:

"1. May the hospital board deny him the use of the hospital under any circumstances?

"2. May it deny him the use of the hospital for treatment of his patients within the scope of his authority to practice osteopathy?

"3. If it may legally deny him the use of the hospital, may such denial in any way be based upon a loss of the Class A rating above mentioned?"

It is my opinion that the hospital board may deny the use of its hospital to an osteopath under any circumstances or for the use of his patients within the scope of his authority to practice osteopathy, and this may be done for the reason given in the exercise of the board's judgment.

The opinion of the attorney general given under date of May 25, 1939, must be limited in its application to public hospitals which have not adopted a regulation excluding treatment of patients by certain licensees of particular schools of healing.

In the case of Hayman v. Galveston, 273 U. S. 414, the right of a public hospital to enjoin and enforce any rule or regulation excluding certain physicians from practicing their profession in the hospital and denying admission to patients who wish to be treated by such physicians was upheld. There the court said with reference to the Fourteenth Amendment:

"However extensive that protection may be in other situations, it can not, we think, be said that all licensed physicians have a constitutional right to practice their profession in a hospital maintained by a state or a political subdivision, the use of which is reserved for the purposes of medical instruction. It is not incumbent on the state to maintain a hospital for the private practice of medicine. Compare Heim v. McCall, 239 U. S. 175."

Nor is there a denial of equal protection of the laws:

"Even assuming that the arbitrary exclusion of some physicians would have that legal consequence in the circumstances of this case, the selection complained of was based upon a classification not arbitrary or unreasonable on its face. * * * We cannot say that a regulation excluding from the conduct of a hospital the devotees of some of the numerous systems on methods of treating diseases authorized to practice in Texas, is unreasonable or arbitrary. In the management of a hospital, quite apart from its use for educational purposes, some choice of methods of treatment would seem inevitable, and a selection based upon a classification having some basis in the exercise of the judgment of the state board whose action is challenged is not a denial of the equal protection of the laws. Compare Collins v. Texas, 223 U. S. 288; Watson v. Maryland, 218 U. S. 173; Crane v. Johnson, 242 U. S. 339; Jacobson v. Massachusetts, 197 U. S. 11."

I am not unmindful of Mason's Minnesota Statutes of 1927, Section 5731, which entitles a chiropractor to all rights and privileges of other doctors and physicians in all matters pertaining to the public health. The rights under this statute do not extend to an institution, even though pub-

lic, which by regulation of its board chooses to deny the use of the hospital to certain schools or systems of medicine.

In the case of Nebbia v. New York, 291 U. S. 502, the court said:

> "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. The right * * * to pursue a calling may be conditioned."

JOHN A. WEEKS,
Assistant Attorney General.

January 30, 1940. 1001a

221

Vital statistics—Record books loose leaf—Purchase by state—M27, § 5363.

State Printer.

You inquire if loose leaf post binders may be used by local registrars of births and deaths in the state for keeping statistical data required under the law.

Mason's Minnesota Statutes of 1927, Section 5363, provides as follows:

> "The state board of health shall prepare, provide and furnish to the local registrars, and other persons requiring them, all blanks, forms and books of record necessary for carrying out the purposes of this act.
>
> "Such blanks, forms and books shall be furnished at the expense of the state and printed by the state printing commission. Provided, that the books of record for the local registrar shall be paid for by the city, village or town comprising the registration district and furnished by the state at actual cost. These books shall be substantially made and shall contain space for recording all of the facts shown on the original returns of births and deaths."

The portion of the statute pertinent to your inquiry requires that the books shall be "substantially made." In a ruling upon a similar question regarding the record books for registers of deeds under Mason's Minnesota Statutes of 1927, Section 884, which required that they shall keep a "suitable book" for recording instruments, this office has held that a loose leaf book complied with the statute.

No Minnesota cases on this question have come to our attention, but the propriety of keeping records and recording instruments in loose leaf books has been discussed in other jurisdictions. In the case of Richardson v. Woolard, 123 Miss. 417, 97 So. 808, the question before the court was whether a loose leaf book was within the meaning of a statute which provided that the clerk of court should record written instruments in a "well

bound book." There the court held that a loose leaf book conformed with the statute and went into the type and style of book in considerable detail.

The Illinois statute also uses the language "well bound book," which was interpreted in the case of People ex rel. Arnknecht v. Haas, 311 Ill. 164, 142 N. E. 549. There the court held that there was nothing in the statute which forbade copying of the instrument in separate sheets and then binding these sheets into book form.

In the case of Town of Bennington v. Booth (Vt.), 140 At. 157, the court held that photostatic records of instruments recorded with a town clerk, and which are bound when enough have accumulated, comply with statutory requirements. There the court stated:

> "Any method, not otherwise unlawful, whereby a record is produced which has all the characteristics required by law, may be used. New times have brought new methods."

It is my opinion that loose leaf binders of a substantial character with a locking device may be used by local registrars of births and deaths in which to keep their records.

You also inquire whether these registrars may purchase loose leaf post binders and the birth and death certificates from private concerns who manufacture them or whether it is necessary under the law for the state department of health to make the first purchase and then resell them to the registrars.

The statute provides that the books of record for the local registrars shall be paid for by the city, village or town but shall be furnished by the state at actual cost. In this instance the use of the word "shall" indicates a mandatory requirement, both with respect to payment and the furnishing by the state at actual cost. It is likely that the purpose of the statute in requiring that they be furnished by the state was to obtain uniformity and also for reasons of economy, as no doubt a better price could be obtained if a quantity of such books were purchased, rather than small lots for each individual county.

It is my opinion that the books and forms should be purchased by the state and furnished to the governing body of the local registration district at actual cost.

JOHN A. WEEKS,
Assistant Attorney General.

May 15, 1940. 2251

PUBLIC UTILITIES

222

Charter provisions—Sewage disposal plants—Swimming pools—What are within the meaning.

City Attorney, New Ulm.

You point out that Section 222 of the proposed city charter of the city of New Ulm provides as follows:

> "Except as otherwise provided in this Charter, the Commission shall have full and exclusive control of and power over The Water Works System, the Electric Light Plant, and the Steam Heating System, now owned and operated by the City, and of all other utilities at any time hereafter owned or operated by the City, including all buildings, structures, machinery, apparatus, equipment, materials, supplies and all other property belonging to or appurtenant to the same; and shall also have full and exclusive control and power over all moneys, bonds, certificates of indebtedness, warrants, and other securities in the current or any other fund of the Commission."

and ask our opinion as to whether or not the language of this section should be interpreted so that your swimming pool and bathhouse and the sewage disposal plant may be classed as "utilities" within the meaning of the charter provision.

1. I am of the opinion that a municipal sewage disposal plant is a public utility within the meaning of the provision. See opinion October 27, 1939. Our Supreme Court in the case of County of Anoka v. City of St. Paul, 194 Minn. 554, held that the City of St. Paul is:

> "* * * engaged in its governmental capacity when it manages or operates **any public utility** such as a waterworks, an electric power plant, **a sewage disposal plant**, etc., where the entire citizenry benefits thereby and the health and welfare of the community make such action expedient or necessary. * * *"

The Oklahoma Supreme Court, in the case of State v. Millar, 96 Pac. 747, in holding that the sewage disposal system was a public utility within the purview of the Oklahoma constitution which authorized the issuance of bonds for the construction of public utilities, said:

> "There is probably nothing more conducive to the health, comfort, and convenience of the inhabitants of a city or town than a good system of sewerage. Sewers are always incident to a well-ordered city or town, and certainly must be included within the term 'public utilities' as used in section 27, supra. * * *"

In the case of Schurtz v. City of Grand Rapids, 175 N. W. 421, the court, in defining the term "public utility," said:

> "We think that the term 'public utility' means every corporation, company, individual, association of persons, their trustees, lessees, or

receivers, that may own, control, or manage, except for private use any equipment, plant, or generating machinery in the operation of a public business or utility. **Utility means the state or quality of being useful. Was this plant (sewage disposal plant) one useful to the public? If so, it was a public utility. We think it was such."**

The term "public utility" has been defined as being synonymous with the term "public use." Valley City Salt Co. v. Brown, 7 W. Va. 191.

The Alabama court, in Aldridge v. Tuscumbia, etc., 23 Am. Dec. 307, said:

"Whatever is beneficially employed for the community is of public use."

There is no doubt but that a sewage disposal system is constructed for public use to benefit the public at large and may logically, therefore, be classed as a "public utility," or "utility" within the meaning of the charter provision.

2. It is doubtful if a municipal swimming pool and bathhouse can be classed as a utility within the meaning of the charter provision quoted. As to definitions of the term "public utilities" within constitutional and statutory provisions authorizing the purchase, construction or repair of public utilities by municipal corporations, see the annotations in 9 A. L. R. 1033 and 35 A. L. R. 592. In the first annotation it will be noted that the term has been held to include sewers, a convention hall, a public park, an electric light plant and public fire stations.

In the case of Belton v. Ellis (1923), 254 S. W. 1023, it was held that a bathing pool and slide owned and operated by the city which charged fees for the use thereof was a "public utility" within the meaning of a legislative act authorizing the city to operate the same. On such a holding the city was held liable for injuries suffered by a patron of the pool. The court did not discuss the reasons for arriving at the conclusion. The only statement of the court is that:

"We hold that the facts in this case show that the bathing pool is a public utility, and that the city was charged under its charter to operate the same. * * *"

The case of Capen v. City of Portland, 228 Pac. 105, 35 A. L. R. 589, held that a golf course was a public utility within the meaning of a charter provision authorizing a municipal corporation to acquire public utilities.

In Denton v. City of Sapulpa, 189 Pac. 532, 9 A. L. R. 1031, the Oklahoma Supreme Court held that a burial ground or cemetery, purchased, owned and controlled by a city, was a public utility within the meaning of the constitutional provision.

I have been unable to find any all-inclusive definition of either the term "public utility" or "utility." One thinks of a swimming pool and bathhouse as a recreational facility rather than as a utility. I am inclined to the view that your charter commission, when it used the term "utilities" in Section

222 of your proposed charter, contemplated the more restricted definition of the term, such as a waterworks system, electric light plant, sewage disposal plant or the like.

I have been unable to find any case exactly in point. The case of Belton v. Ellis, supra, was decided on the fundamental issue of whether or not the city had any authority to construct and operate a bathing pool, and not whether a bathing pool was a utility so as to be operated by the utility commission. In your case there is no question but what the city has authority to construct and operate such a pool, but the issue is whether or not it will be controlled and managed by the commission or by some other arm of the local government.

The reasoning of the case of Capen v. City of Portland, supra, in which the court held a golf links to be a public utility would indicate that it arrived at its conclusion partially because it felt that the playing of golf, as a comparatively new form of recreation, should be recognized as a form of sport which could properly be sponsored by a municipality. While I am not convinced of my own view, I do not believe that the charter commission, when using the word "utilities," contemplated including a swimming pool and bathhouse within the meaning of such word, and advise you accordingly.

EDWARD J. DEVITT,
Assistant Attorney General.

August 14, 1940. 59b-11

223

Ordinance and charter—Construed—Water—Right of city council to shut off water for non-payment of bills—Cases of resident dwellings, business buildings, hospitals.

E. F. Malluege, City Attorney.

You state that the city of Faribault owns and operates its own water works system and that Section 261 of the city charter provides as follows, to-wit:

> "Section 261. The Council may by ordinance, establish such rules and regulations as it may deem necessary for the management of the water works of the city and the supplying of water for the use of the inhabitants thereof. And may make such rules and regulations concerning the tapping of any mains or branches or making connections therewith by private parties, or licensed plumbers and make and provide penalties for any violation thereof. And may impose a charge for the shutting off of water for failure to pay the water rent due thereon, and for the turning on of such water after being shut off if the same is requested after payment of such water rate, and may also provide for the shutting off of water from any premises where rates are payable and

remain unpaid, until such rates shall be paid, together with such charges."

And that Section 23 of Ordinance No. A-20 provides as follows, to-wit:

"Section 23. It shall be the duty of the water commissioner upon receiving the list of such persons who shall have failed to pay water rent on the 16th day of the month aforesaid, to forthwith make diligent effort to enforce payment by proper representation and failure by the consumer to pay said account within a reasonable time thereafter shall be deemed sufficient cause for turning off the water from such premises."

And that Section 25 of Ordinance A-20 provides as follows, to-wit:

"Section 25. When the water shall have been turned off for the reason of non-payment of rent, it shall not be turned on again until the full amount has been paid; and the person who shall request the turning on of water to the premises from which the same has been turned off shall be entitled thereto only on the exhibition to the water commissioner of the treasurer's receipt showing such payment."

You then submit the following questions:

1. "Would the city be liable in any way if the city water were turned off by the water commissioner from the premises of (a) an ordinary residence; (b) a business building; (c) a hospital who has failed to pay the water rent duly charged?"

2. "If the water were turned off by the water commissioner from the premises of (a) an ordinary residence; (b) a business building; (c) a hospital who has failed to pay the water rent duly charged and therefore is without water and sanitary sewer, could the State Board of Health compel the city to turn on the water?"

Both of your questions, in all of their subdivisions, are answered in the negative. Sufficient authority therefor is found in the above cited charter and statutory provisions. It is well settled that a council has authority to make reasonable regulations for the collection of water rents. Regulations providing for the shutting off of water upon non-payment of bills have been held to be reasonable. See 27 R. C. L., p. 1453. Our Supreme Court has upheld the authority of city councils to make similar regulations. Powell v. City of Duluth, 91 Minn. 53; City of East Grand Forks v. Luck, 97 Minn. 373.

Although there is no question in my mind but what the city council has authority to make reasonable regulations and to enforce such regulations by shutting off water for non-payment of rents, still the authority should be exercised with discretion and reasonableness. Especially is this so in view of the interest of the public health. In the event that your council contemplates shutting off the water of a hospital, I would advise that adequate notice be given to the local health authorities and to the State Board of Health, so that they may take such necessary action to protect the public health.

EDWARD J. DEVITT,
Assistant Attorney General.

August 18, 1939. 624d-5

224

Planning Commission—Regulate the future physical growth of local improvements—L37, C287.

Grand Rapids Village Attorney.

Laws 1937, chapter 287, is an enabling act which authorizes all municipalities of the state having a population of 50,000 inhabitants or less to formally adopt plans for the future physical development of the municipalities. The act contemplates that the municipalities may carry on such planning by means of the filing of a map of the platted and unplatted area of the municipality. After the adoption of such a formal plan and the filing of a map, the municipality is authorized to regulate the future physical growth of the municipality with relation to public building, street arrangement and improvements, parks, playgrounds, public utility services and other similar developments.

The governing body of the municipality is authorized to approve all plats of land within the municipality or within a distance of two miles from its limits. In the event that a proposed plat is not in conformity with the general plan and map previously adopted by the city council, the approval of the plat may be denied. No plat may be filed without first having been approved by the governing board of the municipality. Provision is made for public hearings before either a city plan or plat is adopted.

By section 7 of the act, the governing body of the municipality is authorized to create a planning commission to carry on the duties conveyed to the municipality by the act.

The several questions presented in your letter are restated and answered as follows:

1. "Must all plats of territory within two miles of the village limits be approved by the village council before they may be filed?"

Answer, yes, providing the village has adopted a plan for the future growth of the city. Section 4 provides that:

"The governing body of any municipality is authorized by resolution to approve all plats of land hereafter proposed within that municipality or within two miles of its limits in any direction, * * *"

2. "Has the council the power to approve any such plat outside of the village limits and within the two-mile limit if it fails to conform to the map described in Section 3?"

Technically, yes. Section 4 provides:

"* * * After the adoption of planning regulations established under a city plan adopted pursuant to the provisions of this act, approval may be denied if the proposed plat fails to conform to the said plan or with any reasonable regulation of the municipality applicable thereto. * * *"

It was contemplated by the legislature that plats filed would conform to the city plan. Of course, the city may change the city plan first adopted, but I think that the legislature also contemplated that all plats filed should conform to the city plan as adopted. The question is answered in the affirmative because of the use of the word "may" indicating the intention of giving the city council a certain amount of latitude.

3. "Even though the village has not yet carried on any city planning activities, must all plats within the village and within two miles thereof be noticed for public hearing before approval by the council?"

The law is merely an enabling act, it is not mandatory. If the village has not adopted a city plan, the provision of section 4 requiring the approval of the city council as a condition precedent to the filing of a plat is not applicable.

EDWARD J. DEVITT,
Assistant Attorney General.

December 10, 1940. 59a

REAL ESTATE

225

Council—Authority to execute lease extending beyond terms of office of councilmen—L1885, C145.

Village Attorney, Arlington.

You state that the village of Arlington owns an auditorium, the main part of which has been rented to a private party who uses it for showing motion picture shows. You further state:

"In December, 1938, the Village Council entered into a written contract with the Lessee to lease said building to him for a period of one year commencing January 1, 1939, with an option to continue the lease for another year, providing the Lessee gives 30 days notice of his intention to exercise the option before the expiration of the lease. The present Council took office in January, 1939.

"Under the terms of the lease the village is forced to furnish heat, light and power and the present Council has determined that the rental received is not sufficient to pay the expense of operating the place."

You ask if the former village council had authority to lease the building for a term extending beyond their term of office.

I assume that there is no question but what the city council had authority to lease the building in the first instance. That is to say, that the facts present brought it within the rule which authorizes the leasing of municipal property when it is not needed for public purposes and when the lease there-

of does not interfere with the public use. The case of Anderson v. City of Montevideo, 137 Minn. 179, seems to authorize such action by the council. See also McQuillin's Municipal Corporations, Second Edition, Volume 3, Section 1247, and cases cited.

So far as I can find, our Supreme Court has never directly passed upon the power of a municipal body to give a lease of municipal property for a term extending beyond the terms of the members of the council or governing body.

In construing the power of municipal bodies to execute contracts and leases extending beyond the terms of the members constituting the body, the courts have made a clear distinction between the exercise of strict governmental powers on one hand and the exercise of business or proprietary powers on the other. In exercising governmental powers, the authority of the council is limited so that no action taken by the body is binding upon its successors. In exercising business or proprietary powers, municipal bodies may ordinarily bind their successors in office. See McQuillin's Municipal Corporations, Second Edition, Volume 3, Section 1356.

So it is that contracts for public utilities, such as water supply, gas and electricity, are considered as relating to the business affairs of a municipality rather than the legislative or governmental powers, and no objection may be interposed to a contract binding the municipality beyond the term of office of the officers making the contract. Rock Island v. Central Union Tel. Co., 132 Ill. App. 248. Higgins v. San Diego, 118 Cal. 524. 45 Pac. 824. 50 Pac. 670.

A case analogous to the one you present was considered in Biddeford v. Yates, 104 Maine 506; 72 Atl. 335; 15 American and English Annotated Cases 1091, in which it was held that a city council could give a lease to municipal property for a term extending beyond the terms of the members of the council. There the court considered the leasing of municipal property as the exercise of a business or proprietary power of the municipality. In commenting on this the court said:

> "A corporation or individual dealing in the letting of property might find it of the highest importance to make a lease today to take effect months or even years hence. They might find it equally detrimental to be limited in their power to thus anticipate the future. This idea is so apparent as a business proposition as to become self-evident."

It is to be noted that the lease in that case was to take effect after the expiration of the terms of office of the members of the board who executed the lease.

It has also been held that a city council may accept a lease from a third person for a city market place for a term not to expire until after such council would be out of office. See Gale v. Village of Kalamazoo, 23 Mich. 344; 9 American Reports 80. There the court looked upon the power of a village to accept a lease as the exercise of a business or proprietary power of the council. There the court said:

"The legislative power of the village might be called into exercise, in order to the giving of the proper authority for the contract, but in entering into the contract, the village must be regarded in the light merely as an individual proprietor * * *."

Some indication of how our Supreme Court might view the proposition you submit may be gathered from reading the case of Ambrozich v. City of Eveleth, 200 Minn. 473, 274 N. W. 635. There the court held that the city council of Eveleth had the power to accept a ten year lease of a building housing a public rest room and city offices on the last day that the members thereof were in office. The court said:

"A municipality is continuous. While the personnel and membership of its council and governing board changes, the corporation continues unchanged, and a contract entered into by its council is the contract of the corporation. The city council may exercise its power throughout its term. It can make no difference, so far as the question of power is concerned, whether it be exercised on the first or the last day of the term."

Citing several cases, including Manley v. Scott, 108 Minn. 142; 121 N. W. 628.

The court in that case considered a lease in which the city was the lessee not the lessor, as in your case, but the holding and language of the court is at least persuasive as to the probable view it would take when considering a fact situation such as you present.

On the basis of the foregoing, I am of the opinion that our courts would hold that your village council, in giving a lease to the auditorium, would be exercising one of its proprietary or business powers and they, therefore, could properly make a lease or give an option on a lease extending beyond the term of office of the members of the council executing such contract.

This opinion construes only the powers of the council to execute the lease and option in question and does not determine the validity of the exercise of the power. No facts are presented upon which we may express an opinion in that regard.

EDWARD J. DEVITT,
Assistant Attorney General.

January 18, 1940. 469a-9

226

Council—Authority to lease unused city building to American Legion Council for long term at nominal rent—Winona charter.

City Attorney, Winona.

From your statement of facts, it appears that the City of Winona owns a lot upon which is located a small fire station building which is no longer

needed for any public purpose. The local American Legion Council desires to secure a long term lease of the premises at a nominal rental. You ask our opinion as to the legality of such a lease.

Your City Charter, Chapter 1, Section 1, gives the City power "of contracting and being contracted with," and the power to "purchase, lease, take and hold such real, * * * property," as may be required for city purposes. Chapter 4, Section 15, of your Charter gives the City Council authority to "direct the sale and conveyance of any real estate, or the sale and transfer of any buildings or personal property of any kind, owned by the city and which is no longer needed for city purposes."

I cannot find any specific authority vested in the Council to lease city property, but the granting of the general authority to "direct the sale and conveyance" of real property carries with it the lesser power to grant a lease. It has been held that if a municipal corporation has the power of acquiring property (as has yours) it also has the power to dispose of it. Wyatt v. Benson, 4 Abb. Pr. (N. Y.) 182, 187.

It further appears that the property in question is no longer needed or used for a public purpose; accordingly, it may be sold or leased in the interests of the public welfare. Fussell, et al., v. Forest City, 145 Ark. 375; 224 S. W. 745.

In Anderson v. Montevideo, 137 Minn. 179, the court held that where a city acquired a building for municipal purposes, and subsequent conditions obviated the necessity of its use for public purposes, it could be leased to a private individual for private purposes.

The term of the lease should be for a "reasonable time," and such should be determined by the Council in the exercise of their judgment. Long term leases are frowned upon by the courts except they contain a covenant authorizing the city to terminate the lease at will when the building is needed for some public purpose.

In fixing the amount of rent, the Council may consider the nature of the organization leasing the property, the purposes for which it is leased, and the extent to which the general public welfare will be advanced by virtue of the occupancy of the property by the organization in question. The fact that the American Legion is not a profit making organization and that it is a patriotic service group may well argue for a lower rental. However, a municipality is not authorized to give away its property or expend money for purposes other than corporate ones. Agnew v. Brall, 124 Ill. 312; 16 N. E. 230. And it has been held that if a lease of municipal property is for a grossly inadequate sum, relief will be granted to the taxpayer on the grounds of fraud. Perkins v. Reservoir Park Fishing & Boating Club, 130 Ill. App. 128. It is the duty of the City Council to determine the amount of rent. Their judgment in that respect will not be disturbed if it is apparent that they exercised good judgment in the light of all of the facts and circumstances.

EDWARD J. DEVITT,
Assistant Attorney General.

September 28, 1939. 59a-40

TOWN WARRANTS

227

Statute of limitations—Procedure where holders unknown—Liability for interest.

Fillmore County Attorney.

You refer to certain outstanding town warrants, owned by unknown holders, which the board now desires to pay. These warrants have been registered, but the register does not disclose the names of the holders. You ask if there is any procedure by publication to call in these warrants so that interest payments thereon may be stopped.

We answer this: No. Our statutes prescribe no procedure by publication or otherwise for the stopping of interest on outstanding town orders.

We have held that the statute of limitations bars a town order six years from the time there is money available for its payment (Op. Nov. 27, 1928; Op. Aug. 21, 1935; § 1071, M. M. S. '27). The statute of limitations begins to run when the right of enforcement accrues (Brannon v. White Lake, 95 N. W. 284). Absence of funds is a matter of defense to be pleaded (McKinney v. Great Scott, 160 Minn. 437).

Town orders are not negotiable in the sense the holders take them free from defenses against the original payee. They are merely assignable (Kalman v. Grant, 167 Minn. 458; State ex rel. v. Johnson, 181 Minn. 511).

Your precise question has not been passed on by this office or our Supreme Court. I have not been able to find cases in other states. See 63 C. J., p. 185, et seq.; 26 R. C. L., p. 816, et seq.; 29 Fourth Dec. Dig., Towns 50. In many jurisdictions such warrants do not bear interest, so the question could not arise.

It seems strange that a town can be compelled to pay interest on an outstanding warrant after there are funds available in the town treasury to pay the principal. The town's obligation was to pay the sum specified in the warrant in the order of its registration, when money applicable comes into the treasury. It does not seem likely the legislature intended to give the holder of a warrant, whether known or unknown, the power to prolong the town's liability for interest.

If the town should see fit to advertise it has funds available for these warrants and that it will not pay interest on them after a day certain, it would be acting in accordance with the usual financial practices, and its action might receive judicial sanction. However, as I have indicated, the question is a close one and might be decided either way by a court.

ROLLIN L. SMITH,
Special Assistant Attorney General.

August 15, 1939. 442b-9

SOCIAL WELFARE

CHILDREN

228

Adoption—Consent of unmarried minor mother—M27, § 8626.

Director of Social Welfare.

You inquire whether an unmarried mother who is but seventeen years of age may legally give consent for the adoption of her child.

Section 8626, Mason's 1927 Minnesota Statutes, provides:

> "Except as herein provided no adoption of a minor shall be permitted without the consent of his parents, but the consent of a parent who has abandoned the child, or who cannot be found, or who is insane or otherwise incapacitated from giving such consent, or who has lost custody of the child through divorce proceedings or the order of a juvenile court, may be dispensed with, and consent may be given by the guardian, if there be one or if there be no guardian, by the state board of control. In case of illegitimacy the consent of the mother alone shall suffice. In all cases where the child is over fourteen years old his own consent must be had also."

The question of whether the mother is "otherwise incapacitated" is one of fact which may not be determined by the attorney general.

The requirement of the mother's consent is the recognition by the legislature "that there is a right springing from the natural affection between parents and child that cannot be taken away." In re Adoption of Kure, 197 Minn. 234, 236, 266 N. W. 746. Consequently the purpose of the requirement of such consent is to protect this right of the mother, and it would appear that it is solely for this purpose for our Supreme Court has said:

> "* * * It would be error to order the adoption of the child without the parents' consent no matter how unreasonably they may withhold." In re Adoption of Kure (supra).

It is therefore my opinion that if the mother is of sufficient age and discretion to fully realize the consequences of her consent, the fact that she is a minor would not incapacitate her nor render her consent unnecessary.

KENT C. van den BERG,
Special Assistant Attorney General.

April 11, 1940. 840b-2

229

Delinquent—Liability of place of settlement for medical care after commitment—M27 § 3159.

Rice County Attorney.

You state that recently a young girl was found delinquent by the juvenile court of Rice County and committed to the guardianship and custody of the House of Good Shepherd at St. Paul, Minnesota. That it was discovered that she had a severe case of venereal disease and the House of Good Shepherd sent her to Ancker Hospital after refusal by the University Hospital to accept her. That Ancker Hospital is now making a claim against Rice County for the care of the girl. You then inquire whether the "county or the place of residence" of this girl is liable.

In answering your inquiry, I am assuming that the girl in question is a poor person within the meaning of Section 3159, Mason's Minnesota Statutes 1927, and also that your county is operating under the township system. It is my opinion that the township of the girl's legal settlement is liable for the cost of her treatment. The commitment by the juvenile court does not change the financial responsibility of the place of the girl's settlement.

KENT C. van den BERG,
Special Assistant Attorney General.

March 20, 1940. 840a-5

230

Dependent—Aid—Appropriations—Budgeting and allotment—Liability of counties and state—Effect of increase in federal funds—M38, §§ 8688-3 to 8688-26; L39, C367.

Director of Social Welfare.

Concerning the payment of aid to dependent children.

1. You say it is estimated that the appropriation made by the legislature for aid to dependent children by Laws 1939, Chapter 367 ($1,200,000 for year ending June 1, 1940, and $900,000 for year ending June 1, 1941), will be insufficient to pay the state's share of such aid for the next biennial period at the present cost level of the program, and you inquire which of the following courses of action should be pursued:

(a) To pay the state's full share of the costs on the scale of aid now in force as long as the money lasts, facing the practical certainty that the amount appropriated for the fiscal year ending June 30, 1940, would be exhausted before the end of the year;

(b) To divide the available appropriation for state aid for the fiscal year ending June 30, 1940, into twelve equal parts, one part for each month

of the year, and distribute the monthly allotments among the counties proportionately according to their expenditures for aid to dependent children;

(c) To require all county agencies to hold up for investigation all new applications coming in during the next five or six months, thereby postponing the time when payments will begin on such applications and effecting a sufficient saving to bring the total payments within the available funds.

Aid to dependent children is provided under Laws 1937, Chapter 438 (Mason's 1938 Supplement, Sections 8688-3 to 8688-26), known as the 1937 Aid to Dependent Children Act, or, for convenience, as the ADC Act.

Under sections 5 to 9 of the act (Mason's 1938 Supplement, Sections 8688-7 to 8688-11) the amount of assistance granted in each case is determined by the county agency (county welfare board) subject to review by the state agency (director of social welfare as successor to the state board of control), and subject to appeal from the state agency to the courts.

Section 12 of the act (Mason's 1938 Supplement, Section 8688-14) imposes on the county board of each county the duty to appropriate annually and from time to time such sums as may be needed to carry out the provisions of the act. This is considered to be a mandatory provision. Of course there is a limit to the financial capacity of a county. Many counties of the state have already reached that limit, and are in severe financial distress. However, the law requires them to finance the provisions for aid to dependent children to the extent of their ability.

Under section 13 of the act (Mason's 1938 Supplement, Section 8688-15), the county must pay to each recipient in the first instance the amount of aid allowed. The county may then apply for reimbursement from state and federal funds to the extent of two-thirds of the cost. Under the present law the final outcome is that the county bears one-third of the expense, the state one-third, and the federal government one-third, in the cases entitled to federal aid. As to other cases coming under the state law but not under the federal law, the county bears one-third and the state two-thirds. This is on the assumption that state and federal aids are paid in full.

You state that there is a bill pending in congress to increase the share payable by the federal government to one-half in the federal aid cases. If this bill should pass it would relieve the difficulty. However, we cannot assume that it will pass, so we must proceed to deal with the situation as it now stands.

Under section 14 of the ADC Act (Mason's 1938 Supplement, Section 8688-16), payments of federal and state aid are made to the counties monthly in advance upon estimates submitted by the county agencies to the state agency. Adjustments of over-estimates or under-estimates are made in the succeeding month. As a result of this practice, county agencies may adjust their allowances of aid more or less according to the amount of state and federal aid which they receive. No doubt this is a commendable practice. It goes without saying that all public agencies ought to limit their expenditures or commitments to available funds. However, strictly as a matter of law, the county agencies would not be authorized to limit their grants of aid merely

because the federal and state money received in any particular month happened to fall below their current needs. The primary duty of providing sufficient funds is imposed upon the county boards, regardless of the amount of reimbursement received from the state or the federal government.

It appears that under present federal acts and regulations, the amount of federal aid is measured by the total amount paid by the counties and the state together. It is not necessary that the state's contribution should equal that of the counties. Hence, if the counties should pay the full cost of aid to dependent children in the first instance, as the law requires them to do, there would be no loss of federal aid merely because the state appropriation for reimbursement happened to fall somewhat short of the full amount authorized by the ADC Act. The counties would simply have to absorb the deficiency. Whether this would affect the actual total burden upon the taxpayers of a particular county or not would depend on the relation between state and county tax revenues produced in the county. Taking the state as a whole, it would make no difference, since all the money paid by the state and the counties together must come from taxpayers within the state.

It must be remembered that the provisions of the ADC Act calling for payment of a certain share of the costs by the state do not in themselves make an appropriation of money. Every state activity is necessarily limited by the appropriations which are made therefor. Section 9 of Article 9 of the state constitution prohibits payment of money from the state treasury except in pursuance of an appropriation by law. The new reorganization act, Laws 1939, Chapter 431, Article II, section 16 (b) prohibits the making of any payment or the incurring of any obligation against any appropriation unless there is a sufficient unencumbered balance to meet the same. The result is that if the specific appropriation made by the legislature for state aid to dependent children for any fiscal year should be exhausted, payments of state aid would have to stop until further funds were made available.

However, that would not of itself require or authorize the stoppage or reduction of payments by the counties. All county boards are expressly authorized and required to appropriate all the funds needed from time to time, and the only restriction upon them would be the legal or practical limits upon the capacity of the counties to raise funds by taxation.

An important consideration in this connection is that taxes must be levied annually. While the county boards are required by the ADC Act to make whatever appropriations are needed from time to time, they cannot make such appropriations beyond the amount for which taxes have been levied. The county boards of the state generally will proceed to make their next annual tax levies at their regular meetings on July 10, 1939. However, the proceeds of these levies will not begin to come in until the spring of 1940, although they may be anticipated to some extent within the established rules. For the most part, payments of aid by the counties for the next six months or more must be made from the proceeds of taxes levied a year ago, so far as still available, plus amounts received from federal and state aid.

While the ADC Act requires the counties to pay the full cost in the first instance, the county boards presumably do not actually levy a sufficient

amount of taxes for that purpose. Their practice, as we understand it, is to estimate their total needs for the coming year, deduct what they expect to get from state and federal aid, and levy taxes enough to make up the difference.

If the counties of the state are financially able to absorb the deficiency which is in prospect for the coming fiscal year as a result of the insufficiency of the state appropriation, the solution of the problem is apparent—simply inform the county boards of the estimated amount of state and federal aid which will be available to them, and advise them to levy taxes sufficient to produce what will be needed in addition thereto to pay the full cost of aid to dependent children under the law. In the present situation, disregarding the possibility that congress may increase the federal aid or that funds may be provided from some other source, we see no escape from submitting that proposition to the county boards.

At the same time the county agencies should be admonished to administer the law with strict economy so as to keep the cost within the funds available. They should understand that the primary responsibility for administration of the law rests upon them, not upon the state agency, and that the aggregate cost of the program depends almost entirely on the degree of efficiency and economy practiced by the county agencies in handling individual cases.

Referring to the three alternative methods of handling state funds which you submit for consideration, we do not believe that method (c), involving an arbitrary postponement of action on new applications for several months, would be lawful. Section 7 of the ADC Act (Mason's 1938 Supplement, Section 8688-9) requires the county agency to act upon every application for assistance within a reasonable time. Section 9 (Mason's 1938 Supplement, Section 8688-11) authorizes appeals to the state agency in case of unreasonable delay. The spirit of the act enjoins promptness upon all authorities charged with its administration. The law does not specify what is a reasoanble time for acting upon an application, nor do we assume to give an express definition. However, it must be conceded that an arbitrary delay of several months would be entirely unreasonable. Therefore method (c) is ruled out of consideration.

As between method (a) (paying state aid in full as long as the money lasts) and method (b) (spreading the appropriation equally over the twelve months of the fiscal year), it is impossible to answer positively that one plan or the other should be adopted. Proper distribution of the money depends on both legal and practical considerations.

From the legal standpoint, the counties might insist that under the ADC Act they are entitled to have their claims paid in full as long as the money lasts. On the other hand, regard must be had to the provisions of the reorganization act, Laws 1930, Chapter 431, Article II, section 16, requiring periodical allotment and budgeting of funds with a view to probable further needs from time to time during the period covered by the appropriation so as to prevent a deficit. The latter act, together with the limitations necessarily imposed by the amount of money actually appropriated, must be con-

strued as controlling over the provisions of the ADC Act, so far as there is any conflict.

From the practical standpoint, it must be kept in mind that there is a large volume of pending cases in which aid has already been allowed. The county agencies have made these allowances and the county boards have made their previous tax levies and appropriations on the assumption that the state and federal aid would be paid in full. A sudden reduction in the rate of payment of state aid would doubtless necessitate curtailment of payments in needy cases, and might also entail loss of federal aid so far as the counties were not able to meet the allowances in full.

On the whole, it seems advisable to adopt a plan of allotment of the state appropriation for the coming fiscal year which combines to some extent both methods (a) and (b), that is, to make the allotment for the first quarter, beginning July 1, 1939, sufficient to pay the state aid in full only for such time as may be absolutely necessary to enable the county agencies to make proper adjustments and at the same time avoid loss of federal aid, then level off on a lower scale for the remainder of the fiscal year so as to make the appropriation last until the end of the year. It is not necessary that allotments be equal for all the months of the year. Changes in conditions which are likely to occur from time to time may be taken into consideration, so far as they can be anticipated. However, the appropriation must be spread in such a way as to meet the requirements of the entire fiscal year, so far as practicable.

Of course it is not the province of this office to determine the details of budgets or allotments. We simply advise that the plan above suggested seems to meet the requirements of the situation and that it will be in compliance with the law. Working out of the financial details rests with you as director, subject to the approval of the commissioner of administration.

We note that in the appropriation act in question, Laws 1939, Chapter 367, section 3, the legislature appropriated for aid to dependent children $1,200,000 for the fiscal year ending June 30, 1940, and $900,000 for the fiscal year ending June 30, 1941. Section 8 of the same act provides that the budgetary control as provided in the reorganization act of Session Laws 1939 shall not extend to nor apply to any appropriations herein made available for the fiscal year ending June 30, 1941. It follows that with respect to the budgeting and allotment of funds the foregoing observations do not apply to the appropriation made for the latter year, but they are applicable in other respects. The lifting of the budgetary restrictions from the appropriation for the second year of the biennial period does not affect the appropriation for the first year, nor does it authorize the relaxation of any of the restrictions or requirements applicable to the first year's appropriation, as herein set forth.

2. No immediate question is presented as to the use of the appropriation for the second year of the biennium. However, the program of aid to dependent children is a continuing one, and it is therefore advisable to anticipate and provide for future needs as far as possible. From the fact that the appropriation for the second year of the biennium is much less than for

the first year and is exempt from the budgetary restrictions of the reorganization act, it may be inferred that the 1939 legislature had in mind that the next legislature, which will meet in 1941, six months before the expiration of the fiscal biennium, would have an opportunity to make a deficiency appropriation to carry through to the end of the period. However, it is impossible to foresee what the next legislature will do. We do not intend at this time to suggest how the appropriation for the second year should be handled, but we think that in order to be safe the state and county authorities concerned should assume that the $900,000 appropriated for the second year was intended to last until sometime after the opening of the 1941 session of the legislature and that it should be conserved and used accordingly.

At any rate, expenditures and commitments of state funds for the first year of the biennium must be kept within the constitutional and statutory limitations hereinbefore discussed and may not be increased because of the less rigid restrictions which will prevail during the following year or because of the prospect of a deficiency appropriation by the succeeding legislature.

3. You inquire whether, in case the federal law should be amended so as to increase the share contributed by the government, the share now borne by the counties could be reduced below the one-third prescribed by the ADC Act. This question is answered in the negative. As already pointed out, the counties are required to pay the entire cost in the first instance. They may be reimbursed from state and federal funds, if available, up to a maximum of two-thirds of the cost but no more. To increase the present maximum would require further action by the legislature. Of course, all federal funds received for the purpose of aid to dependent children must be expended for that purpose. It is so provided in the ADC Act, section 16 (Mason's 1938 Supplement, Section 8688-20). Such federal funds are exempt from the annual lapsing provisions of the state reorganization act (Laws 1939, Chapter 431, Article II, section 17). However, as the state law now stands, if the federal contribution should be increased above the amount which, together with the state contribution, would be needed to cover the maximum reimbursement of two-thirds now authorized for the counties, it would merely reduce accordingly the amount which the state would have to pay.

CHESTER S. WILSON,
Deputy Attorney General.

June 28, 1939. 640a

231

Dependent—Continued absence from home—M40, §§ 8688-3 (c), L39, C195.

Benton County Attorney.

You state that a Mrs. J., a native of Kentucky, was married in 1918 and lived with her husband in said state until July 13, 1928. On that date her husband took his truck and went to the city looking for work. He has

not been seen since and no trace of him has been found. Mrs. J. moved to your county in March, 1930, worked at private employment until 1936 when she was assigned work on a WPA Sewing Project which has now terminated. You inquire whether or not her children are eligible to receive aid as dependent children.

It is our opinion that this woman is entitled to receive aid for her dependent children. We assume that such children come within the provisions of Section 8688-3 (c), Mason's 1938 Supplement, which was amended slightly by Chapter 195, Laws of 1939, so that it now reads as follows:

> " 'Dependent Child' as used in this act means a child under the age of 18 years who, if school facilities are available is regularly attending school, if physically able and above the minimum school age, or who is under compulsory school age, or who is physically unable to attend school, or who is over compulsory school age, but through physical or mental disability is unable to be employed, or who is over compulsory school age and unemployed, but where further schooling is inadvisable in the opinion of the county agency and his unemployment is without fault on his part, and who is found to be deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and whose relatives, liable under the law for his support, are not able to provide, without public assistance, adequate care and support of such child, and who is living with his mother, stepmother, grandmother, sister, stepsister, aunt or in a place of residence maintained by one or more of such relatives as his or their home."

We base our opinion on the fact that the husband has not been heard from for over 7 years and assume that the requirements regarding a search for him as set up by the State Agency, have been complied with. As stated in Sherman v. Minnesota Mutual Life Insurance Co., 191 Minn. at page 611:

> "In this state there is a common law presumption that a person no longer lives who has disappeared and has not been heard from for a period of seven years."

The State Agency has followed this theory for quite some time.

Section 8688-3 (d), Mason's 1938 Supplement, was also amended by Chapter 195, Laws of 1939, which now reads as follows:

> " 'Continued absence from the home' as used in this act means the absence from the home of the parent, whether or not entitled to the custody of the child, by reason of being an inmate of a penal institution under a sentence which will not terminate within three months after the date of application for assistance under this act, or a fugitive after escape therefrom, or absence from the home by the parent for a period of at least three months continuous duration together with failure on the part of the absent parent to support the child, provided that reasonable efforts have been made to secure support for such child from the defaulting parent, and, if such child shall have been abandoned in this

state, that a warrant for arrest shall have been issued for such abandonment."

You will note that the provision "continuous absence from the home" has been changed and now includes "by reason of absence from the home by the parent for a period of at least three months' continuous duration together with failure on the part of the absent parent to support the child, provided that reasonable efforts have been made to secure support for such children from the defaulting parent."

The 1937 Law, Section 8688-3, Mason's 1938 Supplement, required a complaint and warrant charging abandonment be issued as a prerequisite to receiving this aid in the case of an absence from home and a failure to support for a three months period. In some instances it was impossible for county attorneys to issue such complaints although an absence and a failure to support for such a period existed. Because no complaint could be issued —no aid could be given. By Chapter 195, Laws 1939, this situation was remedied so that now, where the three months absence and failure to support takes place, aid can be given even though it is impossible to issue a criminal complaint charging abandonment.

We do not advocate a change from the policy of issuing a criminal warrant where proper facts appear to justify a criminal action against the abandoning spouse, but as in this case, where such a complaint cannot issue, this woman's children are not now deprived of aid under this 1939 law. In other words, your question can be answered affirmatively under either the presumption of death theory, or Chapter 195, Laws of 1939.

HAYES DANSINGBURG,
Assistant Attorney General.

April 21, 1939. 840a-6

232

Dependent—Residence—M38, § 8688-6a.

Mower County Attorney.

You state:

> "On February 1, 1938, a family, husband and wife and minor children, who had resided in Freeborn County, Minnesota, for some two or three years, moved to a farm in Mower County and resided thereon for a period of eight months until October 1, 1938. The family then moved to Fillmore County and resided there for a period of two months approximately. Upon applying for relief they were returned to Freeborn County where they have since resided. The husband died in February, 1938, in Freeborn County."

and then call our attention to the seeming inconsistency of the payment of aid by two counties and ask:

"Would the fact that the parents continued their residence in Freeborn County for poor relief purposes, * * * affect the construction of the act?"

In my opinion, this fact does not affect the construction of the aid to dependent children law. The poor relief statutes are separate and independent from the statutes providing for aid to dependent children and the requirements for residence under the poor relief law are quite different from those for aid to dependent children.

Under the provisions of section 8688-13, Mason's 1938 Supplement Minnesota Statutes, Mower County is obligated to pay the aid to dependent children until the children have lived for one year in Freeborn County.

KENT C. van den BERG,
Special Assistant Attorney General.

July 12, 1939. 840a-6

233

Illegitimate child—Feebleminded mother—M27, §§ 8580, 8581, 3161.

Kanabec County Attorney.

You ask our opinion on the legal settlement for poor relief purposes under the following facts:

"A" was committed as a feeble-minded person to the guardianship of the State Board of Control on December 13, 1932, as a resident of your county. She left your county then having an illegitimate daughter therein, and was married. Such marriage was not void under Section 8580, Mason's Minnesota Statutes, but was voidable under Section 8581. She lived with her husband in "Y" county for about three years and then secured a divorce from him. She was given aid by the county of "Y," who was unaware of her previous commitment as a feeble-minded person. She was married November 21, 1934, and divorced in 1937, living with her husband in "Y" county during said period.

Section 3161, Mason's Minnesota Statutes 1927, did not exclude the time in which a poor person was under commitment as a feeble-minded person in determining legal settlement, but was so changed by an amendment of Chapter 68, Special Session of 1935. Even without the amendment, this office has repeatedly held that such feeble-minded person was incapable of changing the legal settlement and that it remained the same as at the time of commitment, with certain exceptions. A former opinion of this office, dated May 16, 1938, points out that two District Court decisions held that the settlement of a minor child followed a settlement of the parents, even though such child was under guardianship of the State Board of Control. We think it is equally true that the wife's place of legal settlement must follow that of

her husband, and that "A," by her marriage and by living in the county of "Y" for about three years, gained a new legal settlement in the county of "Y."

The legal settlement of the illegitimate daughter, who came into the county of "Y" and lived with her mother during the said period of three years, followed that of her mother and she has, therefore, also gained a legal settlement in county of "Y."

M. TEDD EVANS,
Assistant Attorney General.

September 22, 1939. 679k

234

Settlement—Minors—Same as parents.

Cottonwood County Attorney.

You state that your county has the township system of poor relief, and that "A" was a minor living with his parents in "X" township, in 1934 when the family moved to the village of "J," but lived in home furnished by "X" township. That "A" although now of age continued to live with his parents in the village of "Y," but in a house furnished and rent paid for by "X" township.

You are correct in your statement that his legal settlement was the same as his parents during the time that he was a minor, which was in "X" township. Apparently he has done nothing to change that situation or establish a different residence. However, we cannot pass on questions of fact, and can only say that "A" is in the same position as any other person and that the time in which he was receiving aid directly or indirectly from "X" township, is excluded from the time he must necessarily reside in the village of "J" in order to establish a new legal settlement there.

M. TEDD EVANS,
Assistant Attorney General.

September 14, 1939. 337d-4

235

Settlement—Minors—Where mother is living apart from father—M38, § 3161.

City Attorney, Fergus Falls.

You say that about five years ago, a woman married a mentally incompetent man, who was, shortly after the marriage ceremony, committed as

insane to the State hospital, where he has been since; that at the time she had two illegitimate children, of neither of which he was the father; that she and her two children went to North Dakota, where she has been for five years.

You ask our opinion on the following:

(1) as to legal status of this woman and of the two children as far as settlement is concerned;

(2) as to legal settlement of illegitimate children of a woman follows the legal settlement of the wife or of the husband;

(3) as to legal settlement of a wife who has voluntarily deserted her husband for a period of five years follows that of the husband;

(4) as to legal settlement of the illegitimate children follows the legal settlement of the mother, which in turn would grow out of the legal settlement of the husband.

Section 3161, Mason's 1938 Supplement (C. 102 and C. 138, L. 1937), so far as here material, reads as follows:

"* * * Every minor not emancipated and settled in his own right shall have the same settlement as the parent with whom he has resided. * * *

A settlement in this state shall be terminated and lost by:

1. Acquiring a new one in another state.

2. By voluntary and uninterrupted absence from this state for a period of one year with intent to abandon his residence in the state of Minnesota."

Section 2501 of Compiled laws of North Dakota for 1913, so far as here material, reads as follows:

"Illegitimate children shall follow and have the residence of their mother at the time of their birth. * * * Each minor whose parents, and each married woman who has no residence in this state, who shall have resided one year continuously in any county in this state, shall thereby gain a residence in such county. Every person who has resided one year continuously in the state, but not in any one county, shall have a settlement in the county in which he has longest resided within such year."

In our opinion, a person by voluntarily leaving the state and uninterrupted absence therefrom for a period of more than one year is presumed to have abandoned her legal settlement therein for poor relief purposes and to have acquired a new legal settlement elsewhere regardless of her intention with respect to settlement. The legal settlement of the unemancipated minor follows that of her mother, wherever her settlement may be. She was legally justified in deserting her husband, in view of the circumstances under which the marriage occurred, as this did not meet with the purpose contem-

plated by our marital institutions. Whether that would be considered wilful in case of divorce is a question of fact.

We are not aware of a law under which a pauper can be forcibly deported from one state to another. This must take place by mutual arrangement between the welfare boards of the respective states.

VICTOR H. GRAN,
Assistant Attorney General.

February 17, 1939. 339d-4

236

Settlement—Orphan—L39, C398.

Division of Social Welfare.

You state the following facts:

"A, born February 18, 1930, was placed by his father, B, in the home of C in Butler Township, Otter Tail County, on November 1, 1932, and he lived from that date in the home of C until December 9, 1938, when he was placed in the Children's Home Society for temporary care.

"B, the father of said child, died in Minneapolis on April 9, 1933. The mother of said child, D, died in March, 1930.

"C lived in Butler Township, Otter Tail County from and before November 1, 1932, until October, 1937, when C moved and resided as follows: In Wisconsin, October, 1937, to March, 1938; in Matawan, Minnesota, March, 1938, to May, 1938; in Minneapolis, May, 1938, to August, 1938; in St. Paul August, 1938, to date."

We are of the opinion that this orphan child has a legal settlement for poor relief purposes in Butler Township, Otter Tail County, Minnesota. Whether the boy is treated as a foster child, with his legal settlement following that of C, or whether he is treated as a separate individual with no family connections, said township is the only place in which he has lived long enough to establish a legal settlement. He could not obtain a legal settlement in Ramsey County, where he has resided since August, 1938, in less than two years because of the provisions of Chapter 398, Laws 1939, which became effective on April 23, 1939.

M. TEDD EVANS,
Assistant Attorney General.

October 30, 1939. 339o-2

237

Settlement—Relief—Aid from foreign county tolls two year period—M40, § 3161, L39, C398.

Director of Social Welfare.

You state that in the latter part of 1935 "X" with his three children, "A," "B" and "C," removed from McHenry County, North Dakota, to Scott County, Minnesota. Child "C" was placed in a home in Ramsey County; apparently "A" and "B" remained with their father in Scott County. From January, 1936, until October 1, 1938, McHenry County sent to "X" fifteen dollars in grocery orders each month for the support of the family. McHenry County, contending that the family has now a legal settlement in Minnesota, has discontinued the relief payments. You inquire as to the legal settlement of "X" and his three minor children.

In my opinion "X" and his family have not acquired a legal settlement in Scott County nor any county of the state of Minnesota for the purposes of poor relief. Though Section 3161, Mason's Minnesota Statutes 1927, as amended by Chapter 398, Laws 1939, provides that a person who has resided in any county of the state for two years continuously shall have a settlement therein. The said section also provides that the two year period shall be tolled "* * * each month during which he has received relief from the poor fund of any county or municipality or from funds supplied by the state of Minnesota or the United States or any department thereof * * *."

The fact that under the North Dakota law, as interpreted by the North Dakota agency, said "X" and family have lost their settlement in North Dakota, in my opinion, does not affect this ruling. Here "X" is seeking a benefit and privilege created by virtue of the Minnesota statutes. Consequently he must satisfy the prerequisites of those statutes, interpreted in the light of their language without regard to the statutory provisions of North Dakota. I know of no rule of conflict of laws or of comity between states which would permit a modification of the legislative intent as expressed in the Minnesota statutes so as to more equitably conform to the North Dakota law, as interpreted by their agencies.

KENT C. van den BERG,
Special Assistant Attorney General.

July 19, 1939. 840a-10

238

Settlement—Removal—From one county to another while receiving aid for dependent children from first county—M38, § 8688-13; L39, CC 195, 398.

Sherburne County Attorney.

You inquire:

"A family residing in County A was granted ADC by County A. The family moved from County A to County B and will have resided in County B one year on the first of July, 1939. In the interim, County A has been regularly granting ADC allowance. The particular question raised is; does the granting and payment of ADC by County A constitute such form of public relief as to prevent the acquiring of a residence in County B for such form of relief?"

Chapter 398, Laws of 1939, provides among other things that Section 3161 of the 1938 Supplement to Mason's Minnesota Statutes of 1927, shall be amended so as to read as follows:

"Every person, except those hereinafter mentioned, who has resided two years continuously in any county, shall be deemed to have a settlement therein, * * *. Every person who has resided two years continuously in the state, but not in any one county, shall have a settlement in the county in which he has longest resided within such two years, * * *. The time during which a person has received old age assistance or **aid to dependent children,** * * * and the time during the pendency of any suit to determine his legal poor settlement, * * * and each month during which he has received relief from the poor fund or any county or municipality or from funds supplied by the State of Minnesota or the United States or any department or departments thereof, except a recipient of assistance under the aid to the blind act, supplied as direct relief or in providing work on a relief basis and in lieu of direct relief, shall be excluded in determining the time of residence hereunder, except that a ward of the state public school shall have the legal settlement of the family with whom he has resided for two or more years under a written contract with the state public school providing for his care, education and treatment as a member of such family. * * *"

Under this provision, which is part of the general provisions for poor relief in Chapter 15 of Mason's Statutes of 1927, the family would be disqualified in acquiring a settlement in County "B" so long as they receive the aid for dependent children. This, however, applies only to the acquisition of settlement for purposes of the kinds of relief provided for by said Chapter 15, that is, poor relief either under the county or town system. In my opinion it does not affect acquisition of residence for the purpose of aid to dependent children, which is governed by the express provisions of Mason's Minnesota Supplement 1938, Section 8688-6, as amended by Chapter 195, Laws of 1939, and Section 8688-13 of the 1938 Supplement, under which one year's residence in a county is necessary for acquisition of residence for the purpose of aid to dependent children, and no suspension occurs by reason of continued payment of aid by the county of previous residence. Consequently, it is my opinion that in your case payment of aid by County "A" is no bar to the acquisition of residence in County "B" for similar aid.

KENT C. van den BERG,
Special Assistant Attorney General.

July 12, 1939. 840a-6

OLD AGE ASSISTANCE

239

Aid—Granted to counties under L. Ex. S. '37, C. 55, and L. '39, C. 367, § 4, based upon anticipated tax delinquencies, should be adjusted when actual tax delinquencies are known—If county in good faith levied an amount which, if collected, would have been sufficient to pay OAA according to reasonable estimates available at the time, L. Ex. S. '37, C. 55, § 3, will be satisfied.

Director of Social Welfare.

You inquire:

> "Is it possible and proper to reconcile the payments actually made for distressed county aid with figures now available which show the true difference between a county's collection for old age assistance purposes and the payments made under that program; and at this time to adjust the difference between the past amount paid as distressed county aid and the amount which should have been paid?"

Laws Extra Session 1935, Chapter 95, Section 34, provided for a method of aiding certain distressed counties for the fiscal year ending June, 1937. This was extended and supplemented by Laws 1937, Chapter 304; Laws Extra Session 1937, Chapter 55; Laws 1939, Chapter 367, Section 4.

The manifest legislative object expressed in these laws is to reimburse certain counties to the extent that their revenues because of tax delinquencies are inadequate to meet the financial obligation imposed upon the county by the old age assistance act. The legislature also provided that the county need not wait until the actual tax delinquencies could be ascertained, but might make application and receive supplemental aid on the basis of anticipated delinquencies. However, this did not change the legislative object; the primary intent was to supplement the old age assistance fund to the extent that it was deficient because of tax delinquencies (Laws Extra Session 1937, Chapter 55, Section 3).

It is, therefore, my opinion that as the amount of actual tax delinquencies become known adjustments should be made. It must, however, be noted that there is a limitation upon the extent to which the adjustment can be made in counties in which the estimated tax delinquencies were less than the actual tax delinquencies. This limitation arises because of the $250,000.00 annual maximum provided in Laws Extra Session 1937, Chapter 55, Section 2, and in Laws 1939, Chapter 67, Section 4, and is discussed in an opinion sent to you on November 29, 1939.

You also inquire:

> "If a county has in good faith levied an amount which if collected would have been sufficient to pay old age assistance according to the best and most reasonable estimate available at the time of making the levy, has that county fulfilled the appropriate requirement of the above

cited Section 3; and may distressed county aid be paid the county assuming other requirements are met?"

Laws Extra Session 1937, Chapter 55, Section 3, provides, among other things, that the distressed county shall certify that:

"* * * there was levied an amount of money, which, if collected, would have been sufficient to pay old age assistance therein. * * *"

At the time the tax levy is made out, there is no way of determining the amount necessary to insure a levy sufficient to meet the demands for old age assistance except on the basis of anticipated claims for old age assistance. It is, therefore, my opinion that if a county has in good faith levied an amount which, on the basis of reasonable estimates then available would be sufficient to pay the county's share of the old age assistance grants, their certification to those facts will satisfy the above quoted portion of Chapter 55.

KENT C. van den BERG,
Special Assistant Attorney General.

November 14, 1940. 521w

240

Claims—Against the estate of deceased recipient—M40, §§ 974-17, 3199-14, 3199-26.

Director of Social Welfare.

You state:

"In one county recently the county agency filed a claim against the estate of a deceased old age assistance recipient for the recovery of old age assistance paid. The only property against which the claim could lie was a piece of land for which the administrator was accepting the best offer of $800 payable in annual installments of $100 each. Other claims filed against the estate were considerably in excess of the total value of the property. The person with the largest claim offered other holders of claims 75 cents on the dollar, he to wait the eight years and collect the $800 on the contract. It was the opinion of the county attorney that this was the best settlement the county could make for its claim of old age assistance.

"In another county claim for old age assistance paid a deceased recipient was filed in probate court. The inventory of the estate lists a homestead and a contract for deed on which the balance due is $1,300 payable in installments of $100 annually, plus interest. The county welfare board's claim for old age assistance paid the deceased recipient amounts to $900. The attorney in the case to expedite closing of the estate has offered $400 immediately in settlement of the $900 claim."

You ask:

"Does a county welfare board have the authority in its discretion to compromise its claim against the estate of a deceased old age assistance recipient for the amount of assistance paid him, if it appears in the best judgment of the county agency and its attorney, who is the county attorney, that the compromise settlement will realize as great a part of the claim as can be reasonably expected under the circumstances of an individual instance?"

Your problem appears to be two-fold: (1) whether a county welfare board has the legal capacity to compromise claims in a proper case; (2) assuming the general capacity to compromise claims, whether a compromise and settlement would be justified in the illustrative fact situation set forth in your letter.

The legal capacity of a county welfare board to compromise claims:

It has been held that a grant of power to sue and be sued carries with it the power to compromise and settle claims. In Oakman v. City of Eveleth (1925), 163 Minn. 100, 203 N. W. 514, the Court states at page 102 of the opinion:

"It would be a reflection upon justice to say that a city could sue and be sued, but that it must always carry the litigation to final judgment. The power to compromise grows out of and is incident to the power to sue and be sued. This power embraces the power to finish litigation, decide how far it shall be carried, and when and in what manner it may end."

This principle has been applied to actions by county governments. Washburn County v. Thompson, 99 Wis. 585, 75 N. W. 309.

Section 974-17, Mason's 1938 Supplement to Mason's Minnesota Statutes 1927, as amended by Chapter 407, Laws 1939, charges the county welfare board with the duty to administer all forms of public relief and public welfare and also requires that the board

"shall supervise, in co-operation with the Board of Control, the administration of all forms of public assistance which now are or hereafter may be imposed on the State Board of Control by law, including aid to dependent children, old age assistance, veterans' aid, aid to the blind, and other public assistance or public welfare purposes. The duties of the County Welfare Board shall be performed in accordance with the standards, rules and regulations which may be promulgated by the State Board of Control in order to comply with the requirements of the Federal Social Security Act and to obtain grants-in-aid available under said act."

Section 4 (a), Chapter 95, Extra Session Laws 1935-36, (Section 3199-14, 1938 Supplement Mason's Minnesota Statutes) provides:

"The county agencies shall administer the old age assistance system in their respective counties under the supervision of the state agency, and shall make such reports, prepare such statistics, and keep such

records and accounts in relation to old age assistance as the state agency may authorize."

Section 3199-26, Mason's 1938 Supplement, as amended by Chapter 315, Laws 1939, grants the state or county agency the power to order, in certain cases, the county attorney to bring suit against the children or spouse of an old age assistance recipient, and this action is to be brought in the name of the county. Section 3199-25, allows a claim against the estate of a deceased old age assistance recipient under certain circumstances therein set forth. A former opinion of this office has held that the county agency is a proper party to file this claim (Opinion Attorney General, January 6, 1937 (521-g-1)).

Because of these broad powers conferred upon the county welfare board, it is my opinion that the rule adopted by our Supreme Court in Oakland v. City of Eveleth, supra, would apply to county welfare boards. However, though it may be said that the county welfare board has the general capacity to compromise these claims, it is also my opinion that the state agency may exercise specific supervision over the compromise of such claims. This supervision might be exercised through a regulation of the state agency requiring the approval by the state agency of all claims to be compromised. Such a regulation would be justified because of the duties of supervision imposed upon the state agency and also because a portion of the money collected by the county welfare board is to be reimbursed to the state agency and to the Federal government.

Whether the specific claims set forth in your letter are such as might be compromised depends upon the facts surrounding the individual claims.

The Attorney General has no authority to decide such questions of fact. All we can do is to point out the applicable rules of law. The final decision must be made by the administrative agencies concerned, under these rules.

It must be noted that there are definite limitations imposed upon the general power or capacity to compromise claims. If the amount of the claim can be collected, then the county welfare board may not compromise such claim. If the debtor estate is of such financial condition so as to raise substantial doubts as to whether the claim can be collected in full, then, the county welfare board, in the exercise of sound discretion and good faith, may compromise the claim for such amount as it believes is all that can reasonably be collected. In doing this the county welfare board is held to the exercise of good faith and honest judgment. It must appear from the facts that it is to the best interests of the public to effect such a compromise.

KENT C. van den BERG,
Special Assistant Attorney General.

October 2, 1939. 521g

241

Claims—Of Children for taxes, etc.—L. 39, C. 315.

Rock County Attorney.

You inquire:

1. "Do the claims of children for taxes and improvements paid on the homestead paid prior to January 1st, 1940 take the priority over the old age assistance lien on the homestead?"

Laws 1939, Chapter 315, provides that the lien of the state shall take priority over all other liens subsequently filed, except claims of children for money actually expended by them in permanently improving the homestead of the recipient or in payment of the taxes or encumbrances thereon. This exception is not limited to such claims which would arise subsequent to January 1, 1940, but applies to all such claims. Consequently, the answer to your first inquiry is in the affirmative.

2. "If the answer to question No. 1 is 'Yes', what evidence of payment of taxes and of payments for improvements is required of the children to establish their prior claims?"

3. "What steps should the children take to establish the priority of their payments for taxes, etc.? When should such steps, if any, be taken?"

Both the lien of the state and the claim of the children will be realized after the decease of the parents. In order to recover on their claims the claimants must present adequate proof of those claims. There is no definite rule as to what evidentiary facts are necessary to prove any claim, except that the evidence of such claim must be properly admissible in the court of law. It would seem that a receipt from the county treasurer to the contributing child would be proof of payment of taxes by that child. However, this does not mean that the child might not adequately prove his claim without such a receipt.

4. "Suppose a man and his wife have been receiving old age assistance several years and that the board in fixing such amount of such assistance allowed an amount for taxes on the homestead. Suppose that the monies so allowed were not used for taxes but was spent by the recipients on living expenses; and that one of the children paid the taxes on the homestead out of his own funds. Is his claim for taxes advanced prior to the old age assistance lien? If so, would not this in effect be asking the state to pay the taxes twice, once to the recipients and once in repayment to the child?"

If the child can prove to the satisfaction of the court that he actually paid the taxes, the fact that the recipient of old age assistance had been given money by the county for the purpose of paying those taxes, but used the money for other purposes, would not defeat the priority of the child's claim unless it appeared that the child connived with the recipient

in such diversion of the money, or knew of the diversion and took no steps to prevent it. In any such case, the facts should be carefully scrutinized in order to prevent fraud, and before the child is allowed priority for his claim he should be required to show that he was not in collusion with the recipient.

KENT C. van den BERG,
Special Assistant Attorney General.

November 24, 1939. 521p-4

242

Claims—Whether or not homestead subject to payments of—where there are no children left surviving—M38 §§ 8992-27(C), 3199-25.

Kanabec County Attorney.

You state:

> "The question is whether or not the homestead of the deceased recipient, or other property ordinarily exempt from debts, is subject to the claim of the County Agency for the amount of the old age assistance paid to the deceased recipient."
>
> "This question comes up specifically with reference to a recipient who has died leaving neither spouse nor children but four brothers as his only heirs. No will was filed making a disposition of the homestead and the four brothers have filed a petition for summary distribution of the estate."
>
> "I have a further question arising in this case as follows: This homestead was mortgaged in the sum of approximately $500 and the value of the property is perhaps at least double that amount or more. Can the County Agency or State Agency step in to protect their interests in this property and do anything about paying payments on the mortgage to preserve the property until such time as it can be sold; or must a sale be had at sacrifice for whatever the property might bring over and above the mortgage now existing?"

Mason's Minnesota Statutes, 1938 Supplement, Section 8992-27 (c) provides:

> "Where the homestead is disposed of by a will which does not otherwise provide and in all cases where the homestead descends to the spouse or children or issue of deceased children, it shall be exempt from all debts which were not valid charges thereon at the time of decedent's death; in all other cases, it shall be subject to the payment of the items mentioned in Section 29."

Section 3199-25, provides:

"On the death of any person who receives any old age assistance under this or any previous old age assistance law of this state, or on the death of the survivor of a married couple, either or both of whom received such old age assistance, the total amount paid as old age assistance to either or both, without interest, shall be allowed as a claim against the estate of such person or persons by the court having jurisdiction to probate the estate. The statute of limitations which limits the county agency or the state agency, or both, to recover only for assistance granted within six years shall not apply to any claim made under this act or reimbursement for any assistance granted hereunder."

In our opinion the homestead is subject to the payment of the claim for old age assistance furnished to the decedent where decedent left no spouse or children or issue of deceased children. The claim of the county agency for old age assistance is allowable as claims of other creditors against the estate. The estate cannot be closed in the summary proceedings.

In answer to your second question, it is our opinion that the county agency or state agency cannot legally make payments on the mortgage or taxes against property of decedent to preserve the same until sold.

VICTOR H. GRAN,
Assistant Attorney General.

April 5, 1939. 521g

243

Guardianship—Official duty of county attorney—M27 §§ 3199-13, 3199-22; 3199-28.

Lac Qui Parle County Attorney.

You inquire: (1) Is it the duty of the county attorney to handle all legal proceedings in connection with the appointment of a guardian for a recipient of old age assistance? (2) Is it the duty of the county attorney to subsequently represent the guardian without making a charge for such services?

The duties of the county attorney in this state are prescribed by the statutes, and he has no official obligation to perform duties not enumerated therein. In connection with the old age assistance act, the duties of the county attorney are stated in Section 3199-22, Mason's 1938 Supplement, as follows:

"* * * The county attorney of each county shall be the attorney for the county agency in all matters pertaining to this act."

There is no provision in the old age assistance act for the appointment of a legal guardian for a recipient of old age assistance who is

found to be incapable of taking care of himself or his money. Section 3199-28, Mason's 1938 Supplement, provides for the payment of assistance to "any responsible person in trust for such recipient." The requirement for the appointment of a legal guardian is found in a regulation adopted by the state agency in compliance with a rule of the federal social security board, making the adoption of such a regulation a prerequisite to federal approval of the Minnesota old age assistance act. Such a state regulation is authorized by Section 3199-13 (b) and (d), Mason's 1938 Supplement, giving the state agency power to make rules and regulations and to cooperate with the federal social security board in any reasonable manner as may be necessary to qualify for federal aid for assistance.

However, passing a regulation requiring applicants who are not competent to handle their own affairs to have legal guardians in order to qualify for old age assistance would not enlarge the statutory duty of the county attorney. Such a regulation would merely impose an additional requirement with which applicants who are affected must comply in order to become eligible for old age assistance. Compliance with this requirement is the problem of the applicants, not that of the county welfare board or the county attorney.

It may be perfectly proper for the county welfare board and the county attorney, in their discretion, to use their good offices to assist applicants in securing the appointment of guardians. However, no legal obligation rests upon them to do so. We understand that the practice of giving such aid to applicants needing guardians has become more or less general throughout the state. We see no objection to the continuance of this practice, provided it goes no further than assisting applicants in the routine procedure of securing the appointment of guardians by the probate court. However, it would be improper for the board or the county attorney to act in behalf of an applicant or his guardian in any matter that might involve a possible conflict of duty.

It is the duty of the county welfare board to check up on the guardians of recipients of old age assistance to see that the allowances paid to them are properly expended for the benefit of their wards. It is the duty of the county attorney to act as attorney for the county welfare board in that behalf. Obviously it would be improper for him to act also as attorney for the recipient or the guardian in connection with any matter relating to old age assistance, or to receive any compensation from them for any such service.

Accordingly we answer your questions as follows:

(1) It is not the legal duty of the county attorney to handle any legal proceedings in connection with the appointment of a guardian for a recipient of old age assistance, but he may voluntarily assist in securing the appointment of a guardian in such a case, provided he makes no charge for his services and does not act as attorney for the recipient or the guardian in any capacity which might conflict with his duties as attorney for the county welfare board.

(2) Because of the duty resting upon the county attorney to act as attorney for the county welfare board in checking up the accounts of guardians of recipients of old age assistance, it would not be proper for the county attorney to act as attorney for any such guardian after the latter's appointment with respect to any matter relating to old age assistance.

The opinion rendered by the office of my predecessor to P. M. Lindbloom, county attorney, under date of March 2, 1938, is superseded so far as it may be in conflict with the views herein expressed.

J. A. A. BURNQUIST,
Attorney General.

October 20, 1939. 121b

244

Lien—Attaches against property owned by recipient—Will not attach against property owned by recipient's spouse—L. 39, C. 315.

Director of Social Welfare.

You inquire whether the amount of assistance paid to an old age assistance recipient will give rise to a lien against property owned by the recipient's spouse within the meaning of Laws 1939, Chapter 315.

In my opinion no lien will arise in such a case. Laws 1939, Chapter 315, Section 1 provides that a lien shall attach against the property owned by the recipient. In my opinion this would not give rise to a lien against the property owned by the recipient's spouse.

J. A. A. BURNQUIST,
Attorney General.

December 26, 1939. 521p-4

245

Lien—Certificates—Registered title—Registrar of titles need not memorialize upon owner's duplicate certificate of title—L. 39, C. 315, M40 § 3199-26.

Director of Social Welfare.

You ask:

> "May not the registrar of titles memorialize the old age lien certificates upon the certificates of title in his office without memorializing the same upon the owner's duplicate certificate of title?"

The answer to your inquiry depends upon whether the lien imposed by Laws 1939, Chapter 315, arises by operation of law or whether it is necessary to secure a written instrument from the recipient consenting to the lien. If the lien arises by operation of law, then the registrar of titles may memorialize the same without memorializing it upon the owner's duplicate certificate of title.

Section 3199-26 (2), as amended by Laws 1939, Chapter 315, Section 1, provides:

> "No person shall be paid old age assistance without first giving the state a lien on all his property situate within the state as hereinafter provided."

This subsection considered alone would indicate an intention that the lien will arise upon an act of giving by the recipient. However, this subsection must be construed in the light of the other provisions of Chapter 315 and of its purposes and practical application. It must also be noted that this subsection is limited by the words "as hereinafter provided."

Subsection 3 thereof provides that the total amount of old age assistance paid the recipient, including funeral expenses, "shall be" a lien upon all the real property belonging to the recipient. Subsection 4 thereof provides that no old age assistance shall be given until a certificate containing certain information concerning the recipient and the amount of his grant shall be prepared by the county agency and filed with the register of deeds.

Subsection 5 thereof provides:

> "Thereupon the lien hereby imposed shall arise. * * *"

In Hawkins v. Social Welfare Board, 1939, 148 Kan. 760, the Kansas Supreme Court held that the Kansas old age assistance lien law, which contains provisions similar to the Minnesota act, gave rise to a lien by operation of law upon receipt of old age assistance by a recipient.

> "* * * The recipient of old-age assistance applied for and accepted the old-age assistance granted her under the terms of the statute. That application, the grant of assistance, and the acceptance of that assistance constituted a contract between the plaintiff and the official boards having to do with the matter of the old-age assistance granted to her. Plaintiff entered into that contractual relation with defendants on the only terms they were authorized to deal with her—the terms of the statute—so she must be held to have consented to the lien which the statute enacted as a condition of the granting of the old-age assistance she thus obtained."

It is my opinion that the same principle applies under the Minnesota law, that the recipient impliedly consents to the lien by accepting old age assistance, and that the lien imposed by Chapter 315 arises by operation of law upon the filing of the prescribed certificate by the county welfare board. The case is similar to that of a mechanic's lien, which arises by operation of law as a result of the action of the owner in ordering materials

furnished for or work done upon his property. There the lien is evidenced by the claimant's affidavit, which may be recorded by the register of deeds, or, in case of registered land, may be filed and memorialized by the registrar of titles without production of the owner's duplicate certificate.

This conclusion is supported by a consideration of the practical application and effect of the law which the legislature must be deemed to have had in mind. The records of the division of social welfare show that during 1939 some 66,000 residents of this state received old age assistance. To obtain written evidences of liens signed by the recipients and their spouses, where necessary, would necessitate an expense virtually prohibitive in view of the funds available for the administration of the old age assistance program.

A far more important consideration is the fact that if it were necessary to obtain such evidences of liens, in many cases needy and otherwise eligible persons would be deprived of their assistance. Chapter 315 prohibits the payment of old age assistance until the lien has been perfected. If written evidences of liens had to be obtained from old age recipients before old age assistance grants could be paid, it would, in a great many cases, interrupt and delay payments to recipients. In most cases signature of the recipient's spouse would be required. In such cases, if the spouse was incapacitated or absent, no old age assistance could be paid until such time as his or her signature could be obtained. In cases where recipient's spouse was incompetent because of illness, old age, mental disability, or otherwise, payments would be delayed until a guardian could be appointed and authorized by the probate court to sign in behalf of his spouse. This would involve expense and delay.

In our opinion it was not the intention of the legislature, by enactment of the lien law, to interfere in any way with the prompt allowance and payment of old age assistance.

Therefore, it is our opinion that the registrar of titles may memorialize the old age lien certificates upon the certificates of title in his office without memorializing the same upon the owner's duplicate certificate of title.

KENT C. van den BERG,
Special Assistant Attorney General.

January 8, 1940. 521p-4

246

Lien—Certificates—Release or satisfactions to be permanently filed— M40 § 3199-26(6).

Kanabec County Attorney.

You inquire:

"If an old age lien is satisfied or released, is it proper for the Register of Deeds to mark the lien 'satisfied' or 'released' and return

the original to the recipient, his heirs or assigns, as chattel mortgages are returned in the case of satisfactions? Or is it the duty of the Register of Deeds to hold the original lien in his office and merely show the satisfaction of record?"

Laws 1939, Chapter 315 (Section 3199-26 (6), Mason's 1940 Supplement) provides that the register of deeds shall keep a record of any releases or satisfactions of the lien. Subsection 10 thereof provides that upon discharge of the lien by payment thereof, the county agency shall issue a satisfaction and file the same with the register of deeds in each county where the certificate is filed.

In my opinion the act contemplates that the register of deeds shall keep a permanent record of liens, releases and discharges.

If the lien certificate and the release or discharge thereof were not on file, there would be no way in which an attorney checking the title could determine whether the instrument recorded in the lien docket as a satisfaction was a valid satisfaction.

It is therefore my opinion that the register of deeds must keep both the lien certificate and the release or satisfaction thereof in permanent files.

KENT C. van den BERG,
Special Assistant Attorney General.

May 29, 1940. 521p-4

247

Lien—Joint tenancy interest—M40 § 3199-26(5).

Director of Social Welfare.

You inquire whether the lien of the state provided for by Laws 1939, Chapter 315, may be enforced against property held in joint tenancy in the case where the old age assistance recipient dies prior to the death of his co-tenant.

Section 3199-26 (5), Mason's 1938 Minnesota Supplement, as amended by Laws 1939, Chapter 315, expressly provides that the lien therein created shall attach to the joint tenancy interests of the recipient. There is no indication that the legislature intended by this provision to modify the law relating to joint tenancy.

Consequently the answer to your inquiry depends upon: (1) whether a joint tenant has any interest in the joint tenancy which survives his decease upon which the state's lien may be enforced; (2) whether the acceptance of old age assistance destroys the joint tenancy.

(1) Whether the joint tenant has any interest in the joint tenancy which survives his decease. The distinguishing feature of a joint tenancy is the right of survivorship, by virtue of which the surviving joint tenant takes the entire estate. Under the right of survivorship the surviving joint tenant takes the entire estate by way of purchase and not by way of inheritance; in other words, his interests derive from the original grant of joint tenancy and not from the deceased joint tenant whose interest is exhausted upon his death. Consequently the surviving tenant takes the property free and clear from the debts of his deceased co-tenant.

Coke Upon Littleton, 185.

Johnston v. Johnston, 173 Mo. 91, 73 S. W. 202, 96 A. S. R. 486.
Wood v. Logue, 167 Ia. 436, 149 N. W. 613.

(2) Whether the acceptance of old age assistance destroys the joint tenancy. Blackstone, in his Commentaries, sets forth four essential elements of joint tenancy (2 Blackstone Commentaries 180). These are unity of interest, title, time, and possession. Though the case of Kemp v. Sutton, 233 Mich. 249, 206 N. W. 366 (see 10 M. L. R. 325, 327), creates some doubt as to the necessity of unity of interest (see also N. Horler's Estate, 180 App. Div. 608, 168 N. Y. S. 221), the courts have generally considered the four unities as essential elements.[1] It has been stated as a corollary of the above rule that an act of a joint tenant which destroys any of the four unities will destroy or sever the joint tenancy and transform it into a tenancy in common.

In re Wilford's Estate (1879), 11 Ch. Div. 267.

Thornburg et al. v. Wiggins et al., 135 Ind. 178, 34 N. E. 999, 41 A. S. R. 422.

United States v. Robertson, C. C. A. 7th Circ., 183 Fed. 711 (Cert. den. 220 U. S. 616).

The severance of the joint tenancy destroys the right of survivorship, leaving each co-tenant an undivided interest in common.

In re McKelway's Estate, 221 N. Y. 15, 116 N. E. 348.

Spadoni v. Frigo, 307 Ill. 32, 138 N. E. 226.

This undivided interest in common remains in the estate of the deceased co-tenant and may be reached by his creditors.

A conveyance of a joint tenant of his interest destroys the unity of title and interest and constitutes a severance.[2]

Gwinn v. Comm. of Internal Revenue, 287 U. S. 224, 228.

[1]Edmonds v. Internal Revenue Commissioner, C. C. A. 9th Circ., 90 Fed. (2) 14; Swartzbaugh v. Sampson, 11 Cal. App. (2) 451, 54 Pac. (2) 73; Liese v. Hentze, 326 Ill. 633, 158 N. E. 428; Case v. Owen, 139 Ind. 22, 38 N. E. 395; Appeal of Garland, 126 Me. 84, 136 Atl. 186; Farr v. Trustees of Grand Lodge, 83 Wis. 446, 53 N. W. 738; Bassler v. Rewodlinski, 130 Wis. 26, 109 N. W. 1032; American Oil Co. v. Falconer, 136 Pa. S. C. 598, 8 Atl. (2) 418.

[2]However, it has been held that a deed in escrow by a joint tenant who dies before the conditions occur upon which the escrow agent is to make delivery does not constitute a severance. Green v. Skinner, 185 Cal. 435, 197 Pac. 60; see comment at 35 H. L. R. 89.

Spadoni v. Frigo, 307 Ill. 32, 138 N. E. 226.

Attorney General ex rel. Treasurer v. Clark, 222 Mass. 291, 110 N. E. 299.

In re Suter's Estate, 258 N. Y. 104, 179 N. E. 310.

Midgley v. Walker, 101 Mich. 583, 60 N. W. 296, 45 A. S. R. 431.

A contract for a deed of his interest by a joint tenant will in equity constitute a severance.

Brown v. Raindle (1796), 3 Ves. Jun. 255, 30 E. R. 998.

Gould v. Kemp (1834), 2 Myl. & K. 304.

In re Wilford's Estate (1879), 11 Ch. Div. 267.

In re Hewitt (1894), 1 Ch. Div. 362.

Naiburg et al v. Hendriksen, 370 Ill. 502, 19 N. E. (2) 348.

The theory of this rule seems to be that equity will consider done that which in equity should be done; hence, the destruction of the unity of title. However, it has been held that a contract by a joint tenant to sell the entire estate as distinguished from the interest of the vendor joint tenant will not constitute a severance.

Kurowski v. Retail Hardware Mutual Fire Ins. Co., 203 Wis. 644, 234 N. W. 900.

A mortgage by a joint tenant of his interest severs the joint tenancy though the mortgagee obtains title only for purposes of security. Hence it would seem that the alienation of the title even for a limited purpose is sufficient to constitute a severance.

Simpson's Lessee v. Ammons, 1 Binney (Pa. 1806) 175, 2 Am. Dec. 425.

York v. Stone, 1 Salk. 158, 91 E. R. 146.

Watkinson v. Hudson, 4 L. J. Ch. 213.

It has also been held that mutual treatment by the co-tenants of the property as though it were held as a tenancy in common may, under certain facts, constitute a severance, the theory being that such treatment implies an agreement of the co-tenants to sever. This point appears never to have been raised directly[3] in the American courts. However, it seems well settled by the English courts.

Gould v. Kemp (1834), 2 Myl. & K. 304.

In re Wilford's Estate (1879), 11 Ch. Div. 267.

Wilson v. Bell (1843), 5 Ir. Eq. R. 501.

Williams v. Hensman (1861), 1 John & Hem. 546.

[3]In Lacy v. Overton, 9 Ky. (2 A. K. Marsh 440) 793, the court refused to admit evidence tending to show a verbal division of the co-tenancy.

It has been held that an execution and sale of the interest of a joint tenant during his lifetime will sever the tenancy.

Midgley v. Walker, 101 Mich. 583, 60 N. W. 296, 45 A. S. R. 431.

Spikings v. Ellis, 290 Ill. App. 585, 8 N. E. (2) 962.

However, it has also been held that the mere lien of a docketed judgment does not constitute a severance upon the theory that the lien does not constitute an estate, interest or right in property and that it merely gives the right to levy on the land to the exclusion of subsequent creditors. Consequently, there being no right of property or possession involved until after the execution and sale, there has been no act which disturbs the four unities.

Musa v. Segelke & Kohlhaus Co., 224 Wis. 432, 272 N. W. 657, 111 A. L. R. 168, 171.

Peoples Trust and Savings Bank v. Haas, 328, Ill. 468, 160 N. E. 85.

Power v. Grace, 1932 Ont. Rep. 357, 2 Dom. L. R. 793.

Lord Abergavenny's Case (1607), 3 Coke 411, 78a-79a.

Ex parte Williams (1872), L. R. 7 Ch. 314.

As it appears from the above cases, the courts have found a severance where there has been a change in the title or possession of the co-tenancy, and have refused to find such a severance short of a change in the title or possession.[4] Consequently it is my opinion that receipt of old age assistance, thereby creating the lien on the land, does not constitute a severance. However, whether or not there is in fact a joint tenancy must be carefully considered. The mere fact that the recipient's interest was derived from a joint tenancy deed would not necessarily establish the fact of a joint tenancy at the time of the death of the recipient, for such tenancy may have been severed subsequent to the original deed by an act on the part of the recipient or his co-tenant.

The discussion of the principles herein involved I believe has already answered your question as to the right of recovery against a tenant in common. The interest of a tenant in common does not expire at his death but continues in his estate and may be reached by his creditors.

As to your last inquiry, Chapter 315 provides two methods for the enforcement of the lien of the state. It may be foreclosed in the manner provided by law for the enforcement of mechanics liens or the debt secured by the lien may be presented as a claim against the estate of the deceased recipient.

KENT C. van den BERG,
Special Assistant Attorney General.

May 20, 1940. 521p-4

[4]Abrams v. Nickel, 50 Ohio App. 500, held that an appointment of a guardian for a joint tenant severs the joint tenancy. This court arrives at its conclusion in a rather summary manner. It is probable that the Minnesota court under our guardian statute, which does not vest title in the guardian, might arrive at an opposite conclusion. cf. Humphrey v. Buisson, 19 Minn. 221 (182).

248

Lien—Mortgage—Execution by recipient—running to daughter in an amount equal to the money furnished by daughter for purchase of homestead—M40 § 3199-26, L. 39, C. 315.

Yellow Medicine County Attorney.

You state that both a husband and wife are receiving old age assistance from your county; that in 1936 they purchased a home for $1500.00, $900.00 of which was furnished by their daughter; that the daughter received a demand note in the sum of $900.00 signed by the parents; that the daughter lives with the parents part of the time.

You inquire if the father and mother should now give the daughter a mortgage for the amount of their debt, would such require the cancellation of their old age assistance.

The answer to your inquiry depends upon a determination of facts. The Attorney General may not make this determination, and consequently must limit his opinion to the discussion of the applicable rules of law. Laws 1939, Chapter 315, Section 1 (5), provides as follows:

> "* * * Such lien shall take priority over all other liens subsequently acquired, except that such lien shall not take priority over the claims of children of the recipient for money actually expended by them in permanently improving the homestead of the recipient or in payment of the taxes or encumbrances thereon."

In my opinion, purchase money furnished by a child of a recipient would come within the above quoted section. The claim of the child for money so expended would be prior to the lien of the state. A mortgage granted to the child, if in an amount equal to that so expended by the child, would not in any way prejudice the lien of the state. Consequently, the contemplated mortgage, providing it secured the daughter only to the extent of the money furnished by her, would not disqualify the mortgagors from receipt of old age assistance by virtue of Laws 1939, Chapter 315, Section 1 (11), which provides:

> "Any recipient who has heretofore transferred or who hereafter transfers or disposes of his property in order to avoid the application of this section shall be disqualified from receiving old age assistance."

The evidence in each case must be carefully considered and scrutinized in order that the lien law may not be defeated by means of fictional devices.

KENT C. van den BERG,
Special Assistant Attorney General.

November 16, 1939. 521p-4

249

Lien—Mortgage—May be released to refinance a mortgage prior to the state's lien—M40 § 3199-26, L. 39, C. 315 § 9.

Director of Social Welfare.

You state:

"A question has arisen with reference to the release of an old age assistance lien, pursuant to the provisions of Laws 1939, Chapter 315, in a case where the recipient desires to refinance a prior recorded mortgage, which is about to be foreclosed. The refinancing may be accomplished either by renewing the mortgage with the original mortgagee or by mortgaging the property to a third party who will satisfy the existing mortgage and himself take a first mortgage on the property.

"Before refinancing can be accomplished the mortgagee insists that the lien for old age assistance granted thus far be released in order that he may record his mortgage and thus give it preference over the state's lien. May this release of our lien in favor of that mortgage be effected by the execution of a waiver, or would it be necessary to execute the regular release form, permit the mortgage to be recorded, and then have the county agency file a second old age assistance lien certificate?"

Laws 1939, Chapter 315, Section 9, authorizes the release of the state's lien in cases where the county agency is satisfied that the collection of the amount paid as old age assistance will not be jeopardized or where the release of the lien is necessary for the maintenance and support of the recipient, his spouse, minor or incapacitated children. When the necessity for which a release is to be given can be satisfied by the partial release to a single creditor, and a release to all other possible creditors would not be within that necessity, in my opinion a release to a specific creditor may be granted under the authority of this section.

KENT C. van den BERG,
Special Assistant Attorney General.

July 16, 1940. 521p-4

250

Lien—Statements—Purchasers of Torrens title not bound by record filed with Register of Deeds—M40 § 8271, L. 39, C. 315.

Registrar of Titles.

You inquire:

"* * * Are purchasers of registered titles bound by the record of lien statements filed with the Register of Deeds, and if so, should

an exception of these liens be noted on all outstanding certificates in the office of the Registrar of Titles? * * *"

Section 8271, Mason's 1938 Minnesota Supplement, provides as follows:

"Every person receiving a certificate of title pursuant to a decree of registration, and every subsequent purchaser of registered land who receives a certificate of title in good faith and for a valuable consideration, shall hold the same free from all encumbrances, and adverse claims, excepting only such estates, mortgages, liens, charges and interests as may be noted in the last certificate of title in the office of the registrar, and also excepting any of the following rights or incumbrances subsisting against the same, if any, namely:

1. Liens, claims or rights arising or existing under the laws or the constitution of the United States, which this state cannot require to appear of record.

2. The lien of any tax or special assessment for which the land has not been sold at the date of the certificate of title.

3. Any lease for a period not exceeding three years when there is actual occupation of the premises thereunder.

4. All rights in public highways upon the land.

5. Such right of appeal, or right to appear and contest the application as is allowed by this chapter.

6. The rights of any person in possession under deed or contract for deed from the owner of the certificate of title."

There is no indication that the legislature intended to repeal or modify the above section by the enactment of Laws 1939, Chapter 315. Consequently, it is my opinion that purchasers of registered title are not bound by the records of the lien statement filed with the register of deeds.

On October 24, 1939, Mr. Walter W. Finke, director of social welfare, being in accordance with these views, issued a statement to all registers of deeds in which he stated:

"* * * The filing of the regular lien certificate, which contains no description of property, does not encumber property title to which is registered (Torrens title), and does not serve as notice to a purchaser of such property. * * *

"Where Torrens title property is concerned, the county agency will file with the Registrar of Titles a special type of certificate containing a description of the property against which the lien is placed. * * *"

KENT C. van den BERG,
Special Assistant Attorney General.

December 11, 1939. 521p-4

251

Net income—Amount attributed to support of dependents is to be deducted—L. Ex. S. 35, 36 C. 95 § 5(b).

Director of Social Welfare.

Not until today was my attention called to an opinion given to you by a Special Assistant Attorney General on January 13, 1939 relative to the construction of Section 5 (b) of Chapter 95, Special Session Laws 1935-1936, as amended.

After giving the matter due consideration, and to give said section a reasonable and just interpretation, I am of the opinion that such part of the income of the applicant as he must necessarily use for the subsistence of needy dependents whom he is by law required to, and actually does, support should not be considered a part of the net income available to the applicant himself.

In other words, the net income to be added to the old age assistance which together shall not exceed a maximum of $30.00 per month under said provision should not include that portion of his income which is necessarily expended by the applicant for the subsistence of needy dependents whom he is legally obligated to, and does in fact, support. Any other construction would, in my opinion, in certain cases completely nullify the purpose of the act.

Under said section the amount and payment of old age assistance shall be fixed with due regard to conditions in each case, and in compliance with the old age assistance act such rules and regulations must be established by the state agency as to prevent abuses in the administration of the section herein construed as well as of other provisions of the law.

Any part of the opinion of January 13, 1939 inconsistent herewith is hereby superseded.

J. A. A. BURNQUIST,
Attorney General.

March 27, 1939. 521a

252

Residence requirements—Distinction between domicile and residence—Sections 6 & 8, Chapter 95, Extra Session Laws 1935 and 1936, Section 3199-16, 3199-18—Formula to determine which county must assume the disposition of individual case—M40 § 3199-11 to 3199-47. L. Ex. S. 35, 36 C. 95, L. 39 C. 398.

Director of Social Welfare.

You inquire:

"Does Chapter 95, Special Session Laws 1935-36, as amended, impose any residence requirement which excludes any resident of the state who has resided therein five years during the nine years immediately preceding the application for old age assistance and has resided therein continuously for one year immediately preceding the application?"

In my opinion, Chapter 95, Special Session Laws 1935-36 (Section 3199-11 to 3199-47, Mason's Minnesota Statutes, 1938 Supplement), as amended, imposes no limitations which exclude from old age assistance a resident complying with the limitation described in your inquiry.

The duties of actual administration of the Minnesota old age assistance law are imposed upon the various counties throughout the state. Upon the state agency are imposed duties of supervision and coordination of county activities.

If an applicant complies with Sections 6 and 8 of Chapter 95, Extra Session Laws of 1935-36 (Section 3199-16, 3199-18, Mason's Minnesota Statutes, 1938 Supplement), he thereby establishes his eligibility to old age assistance in so far as requirements of residence are concerned. Section 9 of Chapter 95, Extra Session Laws of 1935-36 (Section 3199-19) merely provides a formula to determine upon which county within the state shall be imposed the duty of considering and determining the disposition of an individual eligible applicant, and does not set forth the residence requisites for eligibility of the applicant to receive aid from the state.

It is my opinion that Chapter 398, Laws 1939, defines "settlement" for the purpose of poor relief only and does not in any manner impose limitations upon an applicant's eligibility for old age assistance.

In my opinion the requirement of residence as used in subsection 6 (c) of Chapter 95, Extra Session Laws of 1935-36 (Section 3199-16 (c)), depends solely upon the actual residence of the individual applicant and is thereby distinct from the common law concept of domicile. Under the Minnesota act a married woman is capable of acquiring a residence in Minnesota within the meaning of this act even though the domicile of her husband may be without the state.

J. A. A. BURNQUIST,
Attorney General.

September 20, 1939. 521t-2

253

Settlement—Temporary absence from state—M27 § 3161, M40 §§ 3199-11 to 3199-47.

Director of Social Welfare.

You inquire:

"We respectfully ask your opinion on a question involving the legal settlement status of a recipient of old age assistance who is absent from the state.

"Section 5 (a) of Chapter 95, Special Session Laws 1935-36 reads in part as follows:

'* * * Temporary absences from the state may be allowed a recipient by permission from the county agency in accordance with the regulations of the state agency, and may be continued where the recipient can receive from a relative or otherwise, a substantial amount of gratis service or subsistence not available in this state.'

"According to Mason's Minnesota Statutes 1927, Section 3161 as amended:

'* * * A settlement in this state shall be terminated and lost by: * * * voluntary and uninterrupted absence from this state for a period of one year with intent to abandon his residence in the State of Minnesota.'

"If a recipient of old age assistance under the terms of Section 5 (a), Chapter 95, Special Session Laws 1935-36 is absent from the state by permission of the county agency, and in accordance with the regulations of the state agency, for a period of one year or more, does such absence cause the recipient to lose his settlement in this state?

"If such absence does not in itself cause loss of settlement in this state, does the fact that the absence is allowed the recipient by the continuing permission of the county agency preclude the possibility of intent of the recipient to abandon his settlement in this state?"

In our opinion absence from the state for a period over one year under successive permissions of the county agency is not an uninterrupted absence from Minnesota for a period of one year within the meaning of Section 3161, Mason's Minnesota Statutes 1927, and does not in itself, and in the absence of other facts, terminate the recipient's settlement in this state. The result might be otherwise if it could be shown that the recipient actually intended to abandon his residence in this state. So long as the recipient obtains permission from the county agency to remain out of the state, he indicates an intention to retain his residence in Minnesota and is not within the purview of Section 3161, Mason's Minnesota Statutes 1927.

VICTOR H. GRAN,
Assistant Attorney General.

March 13, 1939. 521t-2

RELIEF FUNDS

254

Budget—Transfer of surplus funds to the Old Age Assistance fund— M38 § 3199-34(b).

Roseau County Attorney.

You inquire:

> "I would like your opinion as to whether or not it would be legal to revise the Welfare Fund Budget so that more money can be allocated to Old Age Assistance and less to the Poor Account as the Old Age Assistance Account is likely to be 'short' this year. Both these accounts are included in the budget and this total would not be affected by the transfer of some money from the poor account to the Old Age Assistance account. This transfer would affect only the allocation of taxes collected into the Welfare Fund to the two accounts—poor and Old Age Assistance."

In my opinion the board of county commissioners may authorize the adjustment in the welfare budget as described in your inquiry. This may be done under Section 3199-34, 1938 Supplement to Mason's Minnesota Statutes of 1927, subsection (b), which provides:

> "Any county may transfer surplus funds from any county fund, except the sinking or ditch fund, to the general fund or to the county old age assistance fund in order to provide moneys necessary to pay old age assistance awarded under this act. The money so transferred shall be used for no other purpose, but any portion thereof no longer needed for such purpose, shall be transferred back to the fund from which taken."

KENT C. van den BERG,
Special Assistant Attorney General.

October 11, 1939. 5211-2

255

Burial—Expenses—Claim of City—L. Ex. S. 35-36, C. 95 § 14.

Director of Social Welfare.

You enclosed a copy of the quit claim deed whereby "X" and his wife, on January 11, 1922, conveyed to the City of Little Falls:

> Lots 11 and 12, Block 14, of Water Power Addition No. 2 to City of Little Falls.

The deed was recorded on February 11, 1922, and reserves the life estate to grantors. The city claims that this was given in consideration

of support or relief furnished the grantors now deceased. You say that "X" 's wife received old age assistance from the County Welfare Board since April 1, 1936, to the time of her death, December 24, 1938.

You ask:

> "Whether or not Morrison county may legally grant old age assistance funeral expenses under the provisions of Section 14, Chapter 95, Special Session Laws of 1935-1936, when the city was the beneficiary of the estate."

Our opinion is that X's wife left no estate. Therefore, the county may legally pay such funeral expenses. The claim of the city seems reasonable and conclusive.

VICTOR H. GRAN,
Assistant Attorney General.

February 28, 1939. 521j-2

256

Burial—Liability of county for the expense—M27 § 3176(b), 3184.

Lac qui Parle County Attorney.

This office held, as far back as December 31, 1919, that where a person dies and leaves insufficient means to defray the expense of burial, the law imposes an obligation on the county board of the county in which such person dies to defray the expense of burial out of county funds. This is true even though such county may be operating under the township system of caring for the poor. Opinion 713, Attorney General's Report of 1920. That opinion is limited to persons "who die in this state without having a legal settlement therein."

As to paupers having a settlement in the state, and who die therein, the expense of burial should be paid (a) by the county, if operating under the county system of poor relief (Mason's Minnesota Statutes of 1927, Section 3176), or (b) by the township in which the pauper had his settlement if the county is operating under the township system of poor relief (Mason's Minnesota Statutes of 1927, Section 3184). Opinion March 6, 1940 (339-C).

ROLLIN L. SMITH,
Special Assistant Attorney General.

June 6, 1940. 339c-1

257

Food Stamp Plan—County Welfare Board—Contributions to and expenses in administration thereof—Cooperation with federal government— M40 §§ 974-16, 974-17(b), 974-18.

Kandiyohi County Attorney.

You state that the county board of Kandiyohi county, which has the township system of caring for the poor, has been considering the feasibility of participating in the so-called "Food Stamp Plan" for the distribution of surplus commodities. Participation by your county would mean the establishment of a $10,000 perpetual revolving fund. You add that contributions and disbursements to and from this fund will be made by the various township boards and village councils within your county. You first ask whether the county board can establish such a fund and secondly whether the county may provide clerical help and offices in connection with its administration.

Section 974-16 of the 1940 Supplement to Mason's Minnesota Statutes provides that the salary, office, traveling and other "necessary expenses" of the county welfare board shall be paid by the county. We assume on the facts that your county is within neither of the exceptions specified in section 974-11 (b) and (c). The duties of the county welfare board are specified in part as follows in subsection (b) of section 974-17 of the same supplement.

> "The County Welfare Board, except as provided in Section 1, Subdivision (b) (Section 974-11 (b)), shall be charged with the duties of administration of all forms of public assistance and public welfare, both of children and adults, and shall supervise, in cooperation with the Board of Control, the administration of all forms of public assistance which now are or hereafter may be imposed on the State Board of Control by law, including aid to dependent children, old age assistance, veterans aid, aid to the blind, and other public assistance or public welfare purposes. The duties of the County Welfare Board shall be performed in accordance with the standards, rules and regulations which may be promulgated by the State Board of Control in order to comply with the requirements of the Federal Social Security Act and to obtain grants-in-aid available under said act."

We interpret the phrase "necessary expenses" contained in section 974-16 above mentioned to be the expenses essential to the performance of the county welfare board's duties specified as quoted. See section 974-18, ibid., which provides for submission of the budget of the county welfare board to the board of county commissioners.

In an opinion dated March 8, 1939, this office ruled that the county board does not have authority to make levies to defray the cost of general poor relief subject to the exceptions therein noted. The problem you present is, therefore, to determine whether the $10,000 revolving fund may, more appropriately, be described as an administrative device in connection with

public assistance and public welfare; or whether it may, more appropriately, be described as a levy to defray the cost of poor relief. This involves further consideration of the Food Stamp Plan in somewhat greater detail.

As I understand your question, the $10,000 fund is to be supplied by Kandiyohi county, and as per our telephone conversation beneficiaries may fall into two general groups. The first group may be considered to include those on direct relief. They will be given food stamps by the local township and village authorities who are to purchase such stamps from the county authorities. You do not specify how these stamps are to be acquired by the township or village boards. We assume that the details of such purchase may be worked out with the federal and local authorities in such manner as to comply with section 3184, Mason's Minnesota Statutes of 1927. In the second group may be included WPA workers, recipients of old age assistance, recipients of aid to the blind and recipients of aid to dependent children, who may purchase out of their own aid checks stamps with which to obtain groceries or foods. The $10,000 supplied by the county would be used to purchase $10,000 worth of stamps. These stamps would in turn be sold either to the township and village officials for distribution to those on direct relief, or to WPA workers, or the other recipients of aid specified in the second group. The people who receive these food stamps would then take them to the grocery store, or other food distributors, who would supply the surplus foods in exchange for the stamps. This grocer or distributor would, in due course, turn in these food stamps to the federal authorities who would redeem them in cash. The federal authorities, or more specifically, the Surplus Marketing Administration, having already received the $10,000 would have been reimbursed in advance. As the county made additional sales of stamps, either to the village and municipal authorities or to the recipients of aid specified above, its funds would be augmented and new stamps could be purchased. In this sense you describe the fund as a revolving fund and call it perpetual for the reason that no part thereof is ever transferred from it except by rotation as described.

On these facts, it appears that no part of the $10,000 would ever be used for direct relief but that it would be continuously used for the purpose of making food stamps available for sale to village and township authorities for their distribution and for sale to WPA workers and to recipients of aid to dependent children, recipients of old age assistance and recipients of aid to the blind.

You will note that in the statute quoted earlier in this opinion, there is a provision that the county welfare board is to be charged with the administration of all forms of public assistance, including aid to dependent children, old age assistance and aid to the blind. Earlier in the same statute, there is a provision that the county welfare board is to be charged with the duty of administrating all forms of public assistance. Although your letter does not so state, I assume that the $10,000 revolving fund is to be established by the county as a condition precedent to federal aid given in the Food Stamp Plan.

The revolving fund should be set up in such a way as to insure that no part of it is disbursed for relief and in such way that the county may be assured of its return in full on termination of the plan. Also such arrangements should be provided for with grocers, recipients or others as to enable town and village boards to comply with section 3184, Mason's Minnesota Statutes of 1927. We understand that this revolving fund is being established in order to obtain federal aid under the Food Stamp Plan.

In view of all these considerations, it is our opinion that the $10,000 revolving fund is an administrative device for the distribution of public assistance to the groups of recipients as specified above, and that it is not a direct allotment for relief, which would be beyond the power of the county to make under our former opinion as enclosed. Consequently, your first question may be answered in the affirmative.

WILLIAM W. WATSON,
Special Assistant Attorney General.

November 1, 1940. 125a-64

258

Reimbursement—Township system—Money expended for work projects not subject to reimbursement—M40 § 3195-1.

Le Sueur County Attorney.

You state:

> "The County of Le Sueur operates under the township system of poor relief. The City of Waterville, of this county, has filed a statement with the County pursuant to Section No. 3195 of Mason's Minnesota Statutes for the year 1927, for expenses incurred and paid by them in excess of one mill claiming reimbursement in the sum of 75%. Among the items contained in said statement are moneys paid for gas, oil and materials, and labor on W.P.A. work, which include cement, gas, oil, the cost of hauling sand and gravel, repairs to tools, repairs to trucks and rental of trucks."

You then inquire whether the above items are properly chargeable, and has the county authority to make reimbursement for the same.

Section 3159, Mason's Minnesota Statutes 1927, provides that the proper political subdivision shall furnish the required support "as hereinafter provided."

Section 3184 provides that in counties having the township system the board or council shall grant such relief as they deem necessary,

> "* * * by paying for the board and care of the applicants, providing transportation to their homes, paying rent, furnishing provisions,

clothing, fuel and medical attendance, and burying the dead. They shall pay no cash to any poor person, and shall allow no bill for goods furnished or services rendered to him, unless a member of such board or council shall certify in writing that the account is correct and just; that the goods or services were necessary for his relief, were actually delivered or rendered, and were of good quality; and that the prices charged are reasonable. Every such bill shall specify the name of the person for whom the goods or services were furnished or rendered, and the amount charged for each person."

In my opinion Section 3195-1, et seq., Mason's 1940 Minnesota Supplement, provides for reimbursement for such expenditures authorized by Section 3184, Mason's Minnesota Statutes 1927.

In my opinion Section 3184 would not authorize expenditure from poor funds for work projects. The authorization for any such project is governed by the laws regulating the expenditures by the political subdivisions for such improvement as result from these projects.

KENT C. van den BERG,
Special Assistant Attorney General.

July 10, 1940. 339m

259

Reimbursements—Monthly basis—M40 § 3195.

City Attorney St. Cloud, Minnesota.

You state the city of St. Cloud has been disbursing its own relief funds and billing the county each month for 75% of its expenditures in excess of 1 mill; that Stearns County is on the township system of poor relief; that with the relief load as it has been in recent years, you know without waiting until the end of the calendar year that the city's expenditure will exceed 1 mill and that the amount raised by the 1 mill levy is expended within the first two months. You then ask the following two questions:

1. "In a county operating under the Town System of poor relief, where it is known before the end of the calendar year that the expenditures made by the city of the second class will exceed an amount of 1 mill of the taxable value of the property in such city, may the county board reimburse such city for 75% of the amount in excess of such 1 mill without waiting until after the end of the calendar year?"

2. "If the foregoing question is answered in the negative, then I would like your opinion on this question: After such city has actually expended an amount equal to 1 mill of the taxable value of property,

may the county from that time on reimburse the city on the basis of monthly bills submitted?"

Your first question should be answered in the negative, except as it relates to the answer to your second question.

Answering your second question, we can see nothing in Section 3195, Mason's 1940 Supplement, which would prevent the county from reimbursing the city each month, after such date as the city has actually expended an amount equal to the proceeds of their 1 mill levy.

The statute merely says that the county shall become liable for reimbursement up to 75% of such excess, and as soon as the city has exhausted the amount raised by such 1 mill levy the county becomes liable for the amount of reimbursement and may, if they choose, after that time reimburse to the extent of 75% on each month's relief payments without waiting until the expiration of the calendar year.

M. TEDD EVANS,
Assistant Attorney General.

October 11, 1940. 339m

260

Suitable Employment—Powers and duties of state and local authorities—Employment in lieu of direct relief—L. Ex. S. 37, C. 89, L. 39, CC. 245, 436.

City Attorney, Minneapolis.

In regard to various questions pertaining to relief.

(1) We think that you are clearly correct in your statement that the provisions of section 7, Chapter 89, Extra Session Laws 1937, section 1, Chapter 245, Laws 1939 (the deficiency relief appropriation act), and section 12, Chapter 436, Laws 1939 (the new general state relief appropriation act), were intended to apply only to the administration of the state funds appropriated by these acts, respectively. In fact, all these provisions are so limited by the express terms of the acts in question.

(2) You say that the employment referred to in these provisions is employment offered by a public agency in lieu of direct relief. By this we understand that you mean that if suitable employment were offered by some public agency, employable recipients would be required to accept it in lieu of direct relief. This we think is correct, subject to the further observations below made as to the application and effect of these provisions. We think that the effect would be the same if suitable private employment were offered. In any case the question as to what is suitable employment must be determined by the local relief agency on the facts of each case.

(3) We agree with you that, generally speaking, employment offered by WPA or any other public agency is employment in lieu of direct relief for the purposes of the present state relief act, Laws 1939, Chapter 436. In fact, we think it is immaterial by what agency, whether public or private, the employment is provided. The controlling factor is whether or not the work is suitable. This, as above stated, must be determined by the local agency upon the facts of each case, whether the work is provided by a public agency or by a private employer.

(4) We agree with you that the provisions of the state relief act do not directly control the administration of relief funds raised by municipalities or other local subdivisions. In other words, the provisions of this act do not operate as amendments of previous laws or charter provisions governing the raising and expenditure of local relief funds. However, as you indicate, the act itself authorizes the legislative emergency committee and the state relief agency (director of social welfare) to withhold state funds from a county or municipality which fails to administer local relief in accordance with the requirements imposed under the state law. To this extent the state authorities have a measure of indirect control over the expenditure of local funds.

(5) We agree with you that the state relief act recognizes the general rule of law that the primary obligation for providing for relief rests upon the local subdivisions (that is, upon the counties, where the county system is in force, and elsewhere upon the municipalities or towns). This is indicated, as you point out, by section 10 of Chapter 436, authorizing the legislative emergency committee to withhold funds from any county or municipality which, in the opinion of the state administrator, spends funds in conflict with the purposes of the act, or which is not granting proper aid to needy and destitute persons.

(6) We do not quite follow you, however, in the proposition that it is the duty of municipalities to care for their poor without regard to how they have arrived at that condition, if statutory responsibility cannot be imposed upon relatives liable under the poor laws. It may be the duty of the various counties and municipalities, as the case may be, to see that relief is given to all who are actually destitute. Certainly no one should be permitted to die from privation. That is not to say, however, that relief is to be dispensed indiscriminately without regard to considerations of fairness and common sense. It has always been the duty of local relief agencies, irrespective of the provisions of the recent state relief appropriation acts, to examine into the merits of every application for relief and to determine whether or not the applicant was actually in need and without lawful and reasonable means of supporting himself. The applicant's past history, training, physical ability to work, and willingness to take work when offered are all matters that relief agencies commonly consider and should consider, together with actual necessity, in passing on such cases, whether they are spending state funds or local funds. Obviously, where funds are limited the more needy and deserving cases must be given priority over those which are less meritorious. Here again the

merits of the various cases must be determined by the local agencies upon the facts.

(7) We agree with you unqualifiedly that civil authorities may not enforce compulsory labor upon applicants for relief. As far as we know this has never been attempted or even suggested in this state. The constitution forbids involuntary servitude except as punishment for crime. That does not mean, however, that the authorities may not deny relief or restrict the amount of relief granted to one who wilfully refuses to work for his own support when a reasonable opportunity is offered. As already indicated, we think that under the old laws as well as the new acts that is a factor which the relief agencies may and should take into consideration in dispensing relief. Necessarily a large measure of discretion is vested in those agencies, on whom the responsibility for making the decisions rests. No hard and fast rules can be laid down. Each case must be dealt with on its own merits.

(8) Conceding that the denial of relief in case an applicant refuses to accept a reasonable opportunity to work is the only remedy in the hands of the authorities, the question as to the adequacy of that remedy, or how far it should be pursued in any given case, is largely a matter for the sound judgment of the local authorities having jurisdiction of the case, subject to the general principles which we have pointed out, also subject to such rules as may be prescribed by the state authorities with respect to the distribution of state funds.

(9) We do not follow your concluding statement that it is the duty of municipalities to care for their poor, unless directed to do otherwise by higher authority. There is no higher authority which can give any such direction. All the state authorities can do is to withhold state funds appropriated by the state relief act in case the local agencies fail to comply with the requirements imposed under that act. Such action by the state authorities would not in any degree relieve the local agencies from the primary duty to care for the poor which is placed upon them by the general laws.

CHESTER S. WILSON,
Deputy Attorney General.

July 18, 1939. 339i

261

Supplemental Aid—Receipt of earnings as National Guardsmen—Board of Public Welfare of Minneapolis.

City Attorney, Minneapolis.

You state:

"Among those in groups receiving supplemental relief are families wherein a contributing member is enlisted in the Minnesota National

Guard and receiving therefor from $4.00 to $50.00 per month. To date, such earnings have been figured on the same basis as all other earned income in determining eligibility for public relief and in the supplementation of incomes below relief standards."

Your first question is as follows:

"1. Is there any legal objection to the present practice of the Board of Public Welfare in figuring the earnings of National Guardsmen on the same basis as all other earned income in determining eligibility for public relief and computing the same?"

We call your attention to our opinion of July 18, 1939, the original of which you have and in which we said:

"It has always been the duty of local relief agencies, irrespective of the provisions of the recent state relief appropriations act, to examine into the merits of every application for relief and to determine whether or not the applicant was actually in need and without lawful and reasonable means of supporting himself."

Please be advised that there is no legal objection to the present practice of the Board of Public Welfare of Minneapolis in so far as state laws are concerned. We do not understand from your letter that you desire us to review the ordinances of the City of Minneapolis in connection with either this or your second question.

Your second question is as follows:

"2. Would there be any legal objection to the adoption, by the Board of Public Welfare, of the rule and policy of disregarding entirely the earnings of such Guardsmen in determining eligibility for public relief and computing the same?"

We believe the reasoning of our opinion to you of June 27, 1936, concerning the eligibility for relief of veterans receiving federal adjusted service certificates is controlling with respect to this second question. We still adhere to that opinion and refer you thereto for the authorities indicating that a regulation ignoring facts and circumstances would, in the situation here presented, be invalid.

WILLIAM W. WATSON,
Special Assistant Attorney General.

April 19, 1940. 339i

RELIEF HOSPITALIZATION

262

Emergency Case—Non-resident—Township wherein person is found, not township wherein accident took place primarily liable—M40 § 3186(2). Red Lake County Attorney.

You state:

"On January 16, 1940, an automobile collision occurred on State Trunk Highway No. 2. At the place where the collision actually occurred, the center line of Trunk Highway No. 2 is the dividing line between Polk and Red Lake Counties. An eye witness to the accident states that the collision occurred on the Polk County side of the highway.

"As a result of the collision, a minor child of a non-resident pauper was critically injured. She was picked up and taken to a hospital in Pennington County where she received hospitalization and medical care until April 10, 1940. This was an emergency case and accepted by the hospital and doctors as such."

You then inquire:

"Assuming that the collision occurred on the Polk County side of Trunk Highway No. 2, which county is liable for hospitalization and medical care furnished this child?"

You do not state whether the counties involved operate under the town system or the county system. I shall assume that both Polk and Red Lake counties are operating under the township system of poor relief.

It is my opinion that the primary obligation is upon the township wherein the pauper is found and that such township may be reimbursed for the cost of such care from its county.

In Town of Iona v. County of Todd, 135 Minn. 183, 160 N. W. 669, it was conceded that "primarily and in the first instance it is the duty of the town where such person becomes a public charge to furnish the necessary relief to such a pauper."

At the time this case was decided the statute then in force did not permit a recovery of the township against its county in cases where the pauper had no residence in the state. This was subsequently amended so that now the township may recover from the county in such case. (Laws 1917, chapter 39, Mason's 1940 Minnesota Supplement, section 3186 (2).) So it would seem that the rule now is that the township wherein the pauper is found is primarily liable but has a claim for reimbursement against its county. Opinion 243, 1928 report.

Which of the counties here involved is ultimately liable raises a question of fact which may not be determined by the attorney general. You have asked me to assume that the accident took place in Polk county. The test is, the place where the pauper is found which is not necessarily the

place where the accident took place. In opinion No. 358, 1938 report it appears that "X", a resident of Iowa, boarded a freight train at Marshalltown; that while the freight train was switching at Waseca, Minnesota, he sustained injuries; that he was not discovered until the freight train arrived at New Ulm. The question then arose as to whether the county of Waseca or the county of Brown was liable for the cost of medical care. The attorney general held that the place of the accident was not controlling but that the county wherein the pauper was found was liable for the cost of such care.

KENT C. van den BERG,
Special Assistant Attorney General.

November 1, 1940. 339g-2

263

Emergency Operations—Reimbursement by county of settlement to county of residence—M27 §§ 4577 et seq.

Sauk Center City Attorney.

You state that a seventeen year old girl residing in Stearns County suffered an attack of acute appendicitis while in Stearns County; that a physician was called and sent her to a hospital at St. Cloud, where immediately upon her arrival an operation was performed by the physicians on the hospital staff; that the girl was a pauper having a poor settlement in Todd County. You also state that this was an emergency operation and that although the physician did not contact the proper authorities, said authorities have ratified or will ratify the operation and hospitalization of the patient; that Stearns County has an arrangement under Mason's Minnesota Statutes of 1927, Section 4577, et seq., whereby cases are taken care of in the St. Cloud Hospital in lieu of the University Hospital. You then inquire:

> "If the City and Stearns County pay for this hospitalization in accordance with the Minnesota General Hospital Act, above referred to, can they obtain reimbursement from Todd County in accordance with the provisions of the poor law?"

The answer to your inquiry depends upon a determination of fact which may not be made by the attorney general. Consequently I am assuming that an emergency gave rise to the immediate necessity for the operation performed and that the patient was a pauper having poor settlement in Todd County; that the proper local authorities have ratified the granting of the hospitalization and medical care.

In County of Redwood v. City of Minneapolis, 126 Minn. 512, 148, N. W. 469, a person who had a poor settlement in the city of Minneapolis was residing in Redwood County, and while in Redwood County was so seriously burned that it was necessary that she have immediate medical attention. Redwood County paid the bills for her care and attention and then brought

suit against the City of Minneapolis for reimbursement. The court sustained an order of the lower court allowing a new trial upon the theory that the poor settlement of the patient was in the city of Minneapolis and that consequently under G. S. 1913, Section 3083, the county furnishing the relief is entitled to reimbursement from the place of poor settlement. The provisions of G. S. 1913, Section 3083, are in substance the same as of Mason's Minnesota Statutes 1927, Section 3186, subsection 2, as amended by Laws 1939, Chapter 68. In my opinion the principle in this case would apply with equal force to the facts outlined in your letter. I can see no basis for distinction between medical care furnished and hospitalization furnished. It is my opinion that Section 4577, et seq., and Section 3164-19, et seq., Mason's Minnesota Statutes 1927, do not amend or modify Section 3186, but are merely supplemental thereto.

KENT C. van den BERG,
Special Assistant Attorney General.

May 31, 1940. 339g-2

264

Maternity cases—M40 § 3164-19.

Dakota County Attorney.

You inquire:

> "Can the County Board of Commissioners of Dakota County legally authorize and provide hospitalization in maternity cases when the sole purpose for such hospitalization is the delivery of a child and care of the child and mother after birth even though it is shown that the expectant mother is an indigent person?"

Section 3164-19, Mason's Minnesota Statutes, 1940 Supplement, provides that the county board may hospitalize indigent residents "who are afflicted with a malady, deformity, or ailment of a nature which can probably be remedied by hospitalization * * *."

In my opinion the birth of a child is not a malady, deformity or ailment within the meaning of the statute. Pregnancy is a normal physiological condition. In Rasicot v. Royal Neighbors of America, 18 Ida. 85, 108 Pac. 1048, 138 A. S. R. 180, the court said:

> "Pregnancy is not per se a condition of unsound health nor is it a disease or ailment. * * *"

However, this does not mean that no maternity case may be hospitalized. If, after examination of the expectant mother, the attending physician has reason to anticipate that complications will attend delivery of the child and that therefore sound medical practice would require hospitalization, then, in my opinion, hospitalization would be justified.

KENT C. van den BERG,
Special Assistant Attorney General.

July 10, 1940. 339g-2

265

Medical care—Reimbursement by county of legal settlement—M40 §§ 3164-19, et seq., 3164-21, 3173, 3186, 4579, 4580, 4584.

Swift County Attorney.

You state and inquire:

> "Under Section 4584 of the Minnesota Statutes is noted an opinion of the Attorney General dated November 3, 1938 stating that the cost of hospitalization is paid by county of residence rather than by county in which person has settlement for poor relief purposes. I have read this opinion and believe that it **only** refers to cases where the county of residence sends the pauper to the University Hospital. Would you kindly inform me if I am correct in assuming that in cases where a pauper is living under the jurisdiction of any other municipality than that of the legal settlement, the municipality of the legal settlement instead of the municipality of the residence shall pay for all medical attention given in emergency cases by a physician or a hospital in the municipality of the legal residence even though the municipality of the legal settlement has not authorized the expense and further that the physician and doctor may collect directly from the municipality of the legal settlement charged with the support of the pauper for poor relief purposes."

In my opinion, the opinion of the attorney general under date of November 3, 1938, would apply with equal force to a case of hospitalization under Section 3164-19, et seq. Both acts provide for payment of costs by the county of the patient's residence as distinguished from settlement. See Sections 3164-21, 4579, 4580, 4584.

If the patient is a poor person within the meaning of the poor laws, then, in my opinion, if the case be one which comes within either Section 3173 or Section 3186, as amended by Laws 1939, Chapter 68, the county of residence may obtain reimbursement from the county of legal settlement.

KENT C. van den BERG,
Special Assistant Attorney General.

July 19, 1940. 339g-2

266

Reimbursement—State no authority to reimburse county for charges to patients treated, When Minnesota General Hospital unable to receive them—M27 § 4584, M40 §§ 3164-19 et seq.

Clay County Attorney.

You inquire whether the state has authority to reimburse the county

for charges to patients referred to the Minnesota General Hospital which was unable to receive them, thus necessitating treatment in other hospitals.

You are advised that the state has no authority to reimburse the county for such charges.

Section 4584 of Mason's Minnesota Statutes of 1927, relating to the Minnesota General Hospital, provides that such hospital shall draw upon each county for the expense of treating indigent patients sent there by the county.

Sections 3164-19 et seq., Mason's 1938 Minnesota Supplement, authorize the county board to contract with local hospitals for treatment of indigent patients, and Section 3164-21 provides that such expense shall be paid by the county of the patient's legal residence.

Thus, you will note that in both cases the county is the ultimate source of payment.

Since the facilities of the University Hospital are offered to the public and to the counties only so far as such facilities can be available, we do not see how there could be any obligation on the state to reimburse your county; and we know of no means or law under which the state could do so.

M. TEDD EVANS,
Assistant Attorney General.

December 9, 1939. 1001c-1

267

X-rays—Board and room of special nurses and professional services of doctor—M27 § 3164-19 et seq.

Carver County Attorney.

You state:

> "The statement has been submitted to the County Commissioners of Carver County, Minnesota, in which charges are made for drugs, laboratory, oxygen, x-rays, chest aspirations, board and room of special nurses and professional services of a doctor in connection with treatment administered to an indigent person, this person having been taken to a private hospital with the consent of the County Board."

You then inquire whether or not the county can legally pay for the expenses enumerated above under Section 3164-19, et seq.

I am assuming that the services rendered were rendered after the proper investigation and application had been filed, as is provided for by Section 3164-20, and that the only issue raised by your request is whether

or not the various items listed by you can be said to be within the term "hospitalization" as used in the act.

In my opinion the term "hospitalization" as used by this act includes all necessary and proper services rendered to a patient while at the hospital as a part of the treatment for which he was hospitalized.

Whether any particular item referred to in your letter can be said to be a necessary and proper service must be determined upon the facts of each individual case, having due regard to sound medical practice.

KENT C. van den BERG,
Special Assistant Attorney General.

July 5, 1940. 339g-2

SETTLEMENT

268

Acquisition—Two periods of less than the requisite time, separated by a residence in another county, cannot be tacked together or combined so as to comply with the statutory requirement.

Norman County Attorney.

You state that "X" had a settlement in Norman County; that on November 12, 1936, "X" went to Clearwater County, where he stayed until July 30, 1937, upon which date he went to Grand Forks County and worked there in the harvest fields for four or six weeks; that the work was of a temporary nature; that at the expiration of the four or six weeks he returned to Clearwater County and continued to reside there until May 5, 1939, when he was taken to the Sanatorium at Walker, and is now a patient there. You also state that on September 15, 1938, "X" was placed on the surplus commodities rolls. You then inquire in which county "X" has his settlement for poor relief purposes.

The settlement of "X" will retain in Norman County unless it can be shown that he has resided in Clearwater County a sufficient length of time to have acquired a settlement there. On July 30, 1937, when "X" went to Grand Forks County he had not resided in Clearwater County a sufficient length of time to have acquired a settlement there. Consequently, he retained his old settlement in Norman County.

Whether or not "X" now has a settlement in Norman County depends upon whether he has since his return from Grand Forks County resided within Clearwater County the requisite period. You do not state the exact date of "X's" return to Clearwater County. Assuming "X" returned there on September 1, 1937, the question becomes whether "X" has resided in Clearwater County a sufficient length of time subsequent to September 1, 1937. The eight months and eighteen days during which "X" resided in

Clearwater County prior to his going to Grand Forks may not be charged to Clearwater in determining his present settlement. In City of Detroit Lakes v. Village of Litchfield, 200 Minn. 349, 353, 274 N. W. 236, our court said:

> "* * * no single person coming from another state can obtain a pauper settlement until he has resided one year continuously in this state. Two periods of less than a year each separated by a five months' residence outside the state cannot be tacked together or combined so as to comply with the statutory requirement of a residence for one year continuously in the state. * * *"

In my opinion the same principles will apply to a controversy between counties within the state. It should be noted that in this state the court found that the intervening residence without the state was temporary only and that the claimant intended not to change his residence. The court said that this fact does not have much bearing on the conclusions of law.

> "* * * Intention of the pauper with respect to settlement is not of much significance. The fact of remaining or living at a place regardless of intention to make it one's domicile is what counts in determining a pauper's settlement. Town of Smiley v. Village of St. Hilaire, 183 Minn. 533, 237 N. W. 416."

Whether the time during which "X" received surplus commodities is to be excluded raises a question upon which there is not sufficient information in your inquiry to form an opinion.

Hence, if "X" returned to Clearwater County on or before September 1, 1937, it would appear that on September 2, 1938, he would have acquired a settlement there. Laws 1939, Chapter 398, which raised the requisite period of residence from one to two years, was approved on April 22, 1939. This amendment is not retroactive so that if "X" has resided in Clearwater County one year prior to the effective date of Chapter 398, then the one year period will apply.

If "X" returned on September 15, 1939, or subsequently, then if the method of distribution of surplus commodities comes within the term of the two former opinions (October 3, 1939, February 7, 1940), then the months during which "X" received these surplus commodities should be excluded in determining the period of residence.

KENT C. van den BERG,
Special Assistant Attorney General.

November 14, 1940. 339o-2

269

Absence from State—M40 § 3161.

Swift County Attorney.

You ask if the fact that your county welfare board gave relief to a person living in another county and thus cause such months to be deducted from the period in which such person could gain settlement in that county, resulting in the person being moved back to your county, throw the burden of supporting such poor person on the county instead of the political subdivision which was his legal place of settlement?

No. A person who has not lost his legal settlement by absence from the state for one year, as provided in Section 3161, Mason's 1938 Minnesota Supplement, retains his legal settlement for poor relief purposes wherever it is, until he gains a new one pursuant to such section as amended.

Therefore, the only test in determining your question is whether he has gained a new settlement in any other subdivision. We call your attention to the case of Equality Township v. Star Township, 274 N. W. 219.

M. TEDD EVANS,
Assistant Attorney General.

November 29, 1939. 339o-4

270

Absence—Temporary—L. 39, C. 398.

Stearns County Attorney.

You state:

"Are we correct in assuming that where a person has a legal settlement in one county, that it will take two years to establish such settlement in another county?

"A person having a settlement in Mahnomen County, came from that County to Stearns County in April, 1938, remaining in Stearns County two months; he then moved to Meeker County where he remained three months; then he returned to Stearns County and remained there for a period of five or six months before relief was granted.

"In determining this person's settlement, may we assume that since he had a residence in Mahnomen County, Minnesota, it would in any event require two years to establish settlement in another county in Minnesota, or must we go back two years from the time relief is granted the poor person and determine whether he has resided during

the two year period, longer in Stearns County than he did in Mahnomen County. * * *"

Your first question is answered in the affirmative. In the case of City of Willmar v. County of Kandiyohi, 167 Minn. 178, the court held that a poor person who has a legal settlement in a particular county retains such settlement until he acquires a new one in another county, or loses it by removing from the state. The court said:

"* * * It is conceded that Peterson had a legal settlement in Stevens county before removing to Willmar. He retains that settlement until he acquires a settlement elsewhere or loses it by removing from the state. County of Steele v. County of Waseca, 166 Minn. 180; 207 N. W. 323. To acquire a settlement elsewhere he must reside continuously for one year in another county."

Under Chapter 398, Laws 1939, two years residence is required.

In our opinion, if this person's legal settlement was in Mahnomen County prior to April, 1938, it continued to be there until he acquired a new settlement. He did not lose it by his temporary absence therefrom, nor did he acquire a new legal settlement in either of the other counties mentioned by his few months stay there. It is not necessary in this case to "determine whether he resided during the two year period longer in Stearns County than he did in Mahnomen County." We assume you mean Mahnomen and not Meeker County in the last paragraph of your letter. You do not state whether or not this person has a family.

VICTOR H. GRAN,
Assistant Attorney General.

July 20, 1939. 339o-2

271

Employe on WPA project—Non-relief worker—M40 § 3161.

Yellow Medicine County Attorney.

You state:

"These two men, former residents of Yellow Medicine County, went to work on a WPA project at Appleton in Swift County and were gone from Yellow Medicine County for a period of more than one year. They were the owners of trucks and contracted their services to the WPA at Appleton. They were never certified by the County Welfare Agency and were non-relief workers. However, during the time that they were so employed they did obtain their checks through the WPA office.

"The question is whether, under the circumstances, they obtained a residence in Appleton or whether they are still residents of Yellow

Medicine County. I am assuming and which I understand to be a fact, that they took their families and moved to Appleton at the time when they were getting their wages up there. At the present time, they have returned to Yellow Medicine County and are asking for relief."

We understand that your question is particularly directed to the fact that these men were paid by WPA check for work done on a WPA project although they were non-relief workers.

In our opinion the clear import of Section 3161 is that only the time during which a person receives **relief**, whether it be direct or work relief, shall be excluded in determining that person's legal settlement:

" * * * The time during which a person * * * has received relief from the poor relief fund of any county or municipality or from funds supplied by the State of Minnesota or the United States or any department or departments thereof (except a recipient of assistance under the aid to the blind act) supplied as direct relief or in providing work on a relief basis and in lieu of direct relief, shall be excluded in determining the time of residence hereunder. * * *"

This section was amended by Chapter 398, Laws 1939, by requiring two years' residence instead of one and adding the part in parenthesis in the quotation, besides other matter not pertinent to this inquiry.

Accordingly, if a person is employed by a federal agency but his employment is not on a "relief basis," we are of the opinion that the time during which he is so engaged as a non-relief worker is not to be excluded under Section 3161 in determining his legal settlement for poor relief purposes.

VICTOR H. GRAN,
Assistant Attorney General.

August 14, 1939. 339o-2

272

Family residing elsewhere.

Stearns County Attorney.

You inquire:

"whether or not a man can establish a new settlement for poor relief purposes in the township where he is employed while his family has been placed temporarily with his parents in another township."

I know of no law which would disable such a person from acquiring a new settlement for poor relief purposes because his family is temporarily residing elsewhere. You do not state whether the family is receiving relief at the place of temporary residence, and I assume they are not.

As to the general principles involving the determination of a family settlement by the husband, I refer you to the cases of Kramer v. Lamb, 84 Minn. 469, 87 N. W. 1024, and City of Willmar v. Village of Spicer, 129 Minn. 395, 152 N. W. 767.

It is my opinion that a husband is under no disqualification from acquiring a new settlement where his family is temporarily residing elsewhere. This opinion must not be construed as holding that this particular person has in fact established a new settlement apart from his family. Such determination could be made only after a careful analysis of all the facts and circumstances surrounding the case.

KENT C. van den BERG,
Special Assistant Attorney General.

March 11, 1940. 339o-2

273

Federal surplus commodities—Conditions of distribution—M40 § 3161.

Director of Social Welfare.

On September 18, 1939 this office rendered an opinion holding that the receipt by a person of surplus commodities constitutes relief within the meaning of Mason's 1938 Supplement, Section 3161, as amended by Laws 1939, Chapter 398, and hence that the time during which surplus commodities are received by such person should be excluded in determining his settlement for poor relief purposes. This ruling should be followed in all cases where federal surplus commodities are distributed through the system now in force, under the direction of the state relief agency, to meet the actual needs of destitute persons whose eligibility for relief has been officially determined by the county relief agency or in such other manner as the state agency may direct. We call your attention to this so that the opinion above mentioned may not be applied indiscriminately to all cases of distribution of surplus commodities. If a case should arise where such commodities are distributed under conditions different from those above stated, it should be referred to this office, with a full statement of the facts, for a further opinion.

CHESTER S. WILSON,
Deputy Attorney General.

October 3, 1939. 339o-4

274

Federal surplus commodities—Months during which same received to be deducted in determining residence—M40 § 3161.

Benton County Attorney.

You ask:

> "Does the receipt by a person of a federal grant or of surplus commodities constitute relief so that the month or months during which these items were received may be deducted from the period of residence for settlement purposes?"

Chapter 398, Laws 1939, amending Section 3161, 1938 Supplement to Mason's Minnesota Statutes 1927, reads in part as follows:

> "The time during which a person * * * has received relief from the poor fund of any county or municipality or from funds supplied by the State of Minnesota or the United States * * * supplied as direct relief or in providing work on a relief basis and in lieu of direct relief, shall be excluded. * * *"

The State Relief Agency in its SC-Letter No. 363, dated June 19, 1939, to executive secretaries of various Welfare Boards, says:

> "Certifying agencies are charged with the responsibility of determining the eligibility of individual recipients or groups of recipients to receive surplus commodities, and should constantly bear in mind the fact that commodities are to be issued 'in addition to' rather than 'in substitution for' other forms of relief or income."

In my opinion your inquiry is answered in the affirmative. The receipt by a person of surplus commodities constitutes relief within the meaning of the act cited. Consequently, the months during which surplus commodities are received by such person should be excluded in determining his settlement for poor relief purposes.

VICTOR H. GRAN,
Assistant Attorney General.

September 18, 1939. 339o-4

275

Insane persons—Ability of discharged patient to acquire settlement though he has not been restored to capacity.

Pipestone County Attorney.

You inquire:

> "Mrs. X, an adult having a settlement in County A, is committed to the State Hospital for the Insane from County A. After being in the

hospital for several months she is discharged to the custody of her son who resides in County B. She is not restored to capacity. Can she, after living in County B for the required length of time, be eligible to receive public assistance from County B?"

Your inquiry raises a question of fact which may not be determined by the attorney general. However, the following analysis may be helpful.

A person committed to the state hospital as an insane person is subject to the following two factors, each of which may disable said person from acquiring a settlement: (1) Lack of capacity to have an intent necessary to acquire a settlement, and (2) legal restraint of liberty.

(1) As to the capacity to acquire an intent, this will be a material factor depending upon whether the question involved is a settlement for poor relief purposes or for old age assistance. Intent to make a home has been held to be a necessary element of settlement for purposes of old age assistance, In re Application of Seidel, 204 Minn. 357; whereas for purposes of poor relief intent is held to be of negligible significance. See City of Detroit Lakes v. Village of Litchfield, 200 Minn. 349. The distinction is based upon the theory that poor relief is essentially an emergency matter, whereas old age assistance is in the nature of an award bestowed by the community on its aged members for past services and good citizenship. See In re Application of Seidel, supra, at page 361.

Assuming that intent becomes a material element, then whether or not any person is capable of such an intent is a fact which must be determined in each case. There are many forms of insanity which would not necessarily disable a person affected therewith from a capacity to form an intent. Consequently, the mere fact that one has been committed as insane would not ipso facto preclude his capacity to form an intent though it may be evidence thereof. However, a discharge would also be evidence to the contrary.

(2) Legal restraint of liberty. Though the authorities are not entirely in accord it would seem that the majority rule is that one under legal restraint of his liberty cannot acquire settlement (Op. of Atty. Gen. No. 658, 1934). Whether or not Mrs. X is under such a restraint from the hospital or its agents would depend upon the nature of her discharge. If the discharge is complete and the hospital exercises no authority over her either directly or through her son, then in my opinion she would be capable of acquiring settlement notwithstanding the fact that she has not petitioned the probate court and has not received from them a restoration to capacity.

KENT C. van den BERG,
Special Assistant Attorney General.

January 29, 1940. 248b-7

276

Removal—Person may not be removed from freehold—County may not separate husband and wife.

Village Attorney, Osakis, Minn.

You state and inquire:

"Something like 18 months ago Mrs. 'A', divorced, moved here from the southern part of the State with her children. She was at that time receiving Aid for Dependent Children and has continued receiving the same, the same now being paid by this County.

"About 8 months ago she purchased, under contract for deed, a home here.

"About 2 months ago she married 'B', who had been here since about January 1st, 1940 and who had been a resident and has a legal settlement in Lac Qui Parle County.

"Shortly after said marriage both 'A' and 'B' signed an application for relief. This was denied and notice served upon 'B' to return to his legal settlement, which County acknowledges its liability and is willing to accept him.

"We are also serving notice on 'A' to return to her legal settlement.

"In your opinion, is there any reason why either or both 'A' and 'B' cannot be removed to their respective legal settlements?"

In my opinion the proposed removal is subject to the following objections:

1. Removal of "A" to the county of her former residence would be inconsistent with two well established principles of law. (1) A county may not by removal of a pauper family separate husband and wife. (2) At the time of her marriage "A" took the settlement of her husband. See City of Willmar v. Spicer, 129 Minn. 395.

2. Though our supreme court has not passed on the point, it has been held that a county may not remove a pauper from his freehold. In Town of Londonderry v. Town of Acton (1830), 3 Vt. 122, the court said:

"* * * The principle that a man cannot be removed from his freehold seems, in all causes where it is mentioned, to be recognized as the settled law, and all the statutes which have been passed on the subject of the removal of paupers have been made to yield to this well known and established principle. Indeed, to reside on the freehold was considered as a right derived under Magna Charta, and one of which the person could not be deprived unless for crime."

In Walden v. Cabot, 25 Vt. 523, the court held that the same rules apply to an equitable freehold estate. On the basis of this line of authority, together with the earlier English cases which are in accord, the attorney

general, in an opinion dated February 8, 1936, held that a person who owns a freehold equity in an estate upon which he lives could not be removed to the county of his legal settlement.

KENT C. van den BERG,
Special Assistant Attorney General.

July 24, 1940. 339o-3

277

Removal—To places of—M27 §§ 3186, 3173.

Carlton County Attorney.

This office has uniformly held that the local authorities have no power to remove paupers against their will to another state. We are not aware of the decision of any District Court or of our Supreme Court holding to the contrary. Nor are we aware of any legislative act overcoming this interpretation of the law. Accordingly, you are advised that in the first case described by you the Texas family now on relief in your county cannot be forcibly transported back to Texas.

As to the other family on relief in Carlton County the situation is different. You say this family has a settlement in another county of this state, and that this county is willing to receive and support them.

You are referred to the provisions of Subdivision 2, Section 3186, Mason's Minnesota Statutes of 1927, which provides that when a person not having a legal settlement shall make application for relief, the mayor shall warn him to depart and if he refuses to go and is likely to become a public charge the mayor may in writing "require any constable or marshal of the town, city or village to convey him to the place of his settlement, if he have a settlement in this state." If you are under the county system of caring for the poor see Section 3173, Mason's 1927 Code, which, under similar circumstances, empowers the chairman to issue an order to the sheriff requiring him to convey the pauper to his place of settlement. This right of removal exists only after application for relief has been made.

While there is no express authority for the payment of traveling expenses of paupers who voluntarily return to their place of residence outside the state, such expense has been frequently paid by the public authorities and has never been seriously questioned in cases where the place of the pauper's settlement has signified its willingness to assume responsibility for future care.

Such situations as you describe are sometimes referred to the State Board of Control for advice (Director of Social Welfare). It might be

wise for you to discuss these cases with the Board with the hope of securing some practical suggestion.

ROLLIN L. SMITH,
Special Assistant Attorney General.

February 9, 1939. 339e-2

278

Time of application—M40 § 3161, L. 39, C. 398.

Director of the Division of Social Welfare.

The question has been raised as to the effect of the provisions of Laws 1939, Chapter 398, Section 1, amending Mason's 1938 Minnesota Supplement, Section 3161, with respect to the determination of settlement for poor relief.

On April 22, 1939, the act was approved and therefore became effective on April 23, 1939. The act changed the period of residence requisite to legal settlement from one to two years and added old age assistance and aid to dependent children to the other forms of public assistance receipt of which would extend the time required for acquisition of a new settlement.

There appears to be nothing in the 1939 amendment which would indicate an intention on the part of the legislature that the amendment is to be given a retroactive effect. Consequently, the amendment can be construed as being prospective only. In re Settlement of Venteicher, 202 Minn. 331. Hence, in my opinion, the amendment would not affect any settlement already acquired under the old law before April 23, 1939, the effective date of the amendment. The procedure for determination of settlement for relief purposes would therefore be as follows:

1. Ascertain whether before April 23, 1939, the effective date of the new law, the applicant had established a settlement under the old law, Section 3161, as it stood prior to the amendment. If so, he would be entitled to receive relief under that settlement until changed as provided by the new law.

2. If the applicant had not established a settlement under the old law before April 23, 1939, determine his settlement at the time of application under the new law, except that receipt of old age assistance or aid to dependent children before April 23, 1939, would not extend the time required for acquisition of settlement. Under the law laid down by the Supreme Court in the Venteicher case (supra) receipt of old age assistance or aid to dependent children would extend the period of residence requisite to legal settlement only after the new law became effective, beginning April 23, 1939. However, if any such assistance or aid was received at any time from April 23 to April 30, 1939, inclusive, the entire

month should be excluded in counting the time of residence for settlement purposes under the law for reckoning time by entire month prescribed by Section 3161.

3. The Venteicher case involved the amendment to Section 3161 made by Extra Session Laws 1935-1936, Chapter 68, passed January 24, 1936, whereby direct relief and works relief from state and federal funds were added to the forms of assistance receipt of which would extend the time required for acquisition of a new settlement. The court held that the provisions applied only to time elapsed after the amendment was passed, subject to the rule above mentioned for reckoning time by entire months. Some cases may yet involve application of the 1936 amendment. In any such cases if the period of residence began on or before January 24, 1936, the rule above stated should be taken into consideration in the determination of settlement.

J. A. A. BURNQUIST,
Attorney General.

October 25, 1939. 339o-2

STATE DEPARTMENTS

ADMINISTRATION

279

Fire Departments—Aid to—Power to reduce expenditure under—M27 §§ 3723 to 3725, 3738 to 3740, 1938. M40 § 3750-10, L. 39, C. 431.

Commissioner of Administration.

You state:

"Sections 3723 to 3725 and Sections 3738 to 3740 as amended by 3750-10 of Mason's Minnesota Statutes provides for the annual payment to municipalities of an amount equal to the two per cent tax on fire insurance premiums written within such municipalities. This payment to municipalities is in many cases exactly equal to the tax collected by the State under the provisions of Section 3347 as amended.

"The 1939 Legislature made an appropriation of $145,000 for the purpose of paying the two per cent 'Aid to Fire Departments'. A balance of more than $3,000.00 remains from the appropriation for the fiscal year just ended."

You ask:

"If our office finds that income for the Revenue Fund will not be sufficient to meet all appropriations, have we the authority to reduce the allotments of 'Aid to Fire Departments'? If such allotments are reduced so that the aid must be pro-rated at 92%, for example, will

the obligation of the State to the municipalities be discharged by the paying of the lesser amount?"

The Reorganization Act, Laws of 1939, Chapter 431, Article II, Section 16, provides:

> "In case the commissioner shall discover at any time that the probable receipts from taxes or other sources for any appropriation, fund, or item will be less than was anticipated, and that consequently the amount available for the remainder of the term of the appropriation or for any allotment period will be less than the amount estimated or allotted therefor, he shall, with the approval of the governor, and after notice to the agency concerned, reduce the amount allotted or to be allotted so as to prevent a deficit."

This authority applies to appropriations to all state agencies within the scope of the Reorganization Act, unless there is something in the language of the Appropriation Act itself or the law authorizing the expenditure which removes it from the exercise of such authority. In the case before us we are dealing with a fixed tax collected for a specific purpose. The measure or yardstick by which the payments made to the municipalities in which the tax has been collected are determined is the amount of such tax. Under this measure there can never be a payment to any municipal subdivision of more than the amount which has been collected for such purpose in that particular place.

The statute specifically imposes upon the state auditor the duty to issue and deliver to the state treasurer his warrant for an amount equal to the amount so collected in the particular subdivision which is to receive the warrant. The statute also imposes a specific duty upon the state treasurer to honor the warrant so prepared by the state auditor and directs him to pay the warrant out of the general fund of the state. It is true that there is a specific appropriation of $145,000 for the current fiscal year. However, in view of the duty imposed upon the state auditor and state treasurer, the effect of this appropriation is to confirm the payments so to be made and to place a maximum thereon.

It appears to us that there is a difference between statutes authorizing ordinary expenditures and a statute like the one under consideration which imposes upon the state auditor a mandatory duty to make and deliver his warrant for an amount determined by an exact rule also laid down in the statute. The legislature, presumably, because the amount to be repaid is fixed by the amount which has been paid in, intended that the state auditor should have no discretion in the matter, but made it mandatory for the auditor to perform a certain duty. In the absence of language clearly evidencing the intent of the legislature to give the commissioner of administration authority to reduce an expenditure to be made by the auditor under the mandatory language of this statute, we must hold that the power conferred upon the commissioner of administration by said Section 16 is not applicable to this particular expenditure.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

September 2, 1939. 640a

APPROPRIATIONS

280

Annual—Balance on hand does not revert to general fund—L. 37, C. 446, L. 39, C. 431.

Commissioner of Administration.

You state that in April, 1937, the legislature passed a bill allowing the Disabled American Veterans of the World War $10,000.00 a year for assistance to disabled World War Veterans, and that there is a balance remaining in the funds appropriated pursuant to this act in the amount of $10,000.00, which is standing to their credit on the books of the State Auditor.

You inquire, "does this balance carry over into the fiscal year beginning July 1, 1939, or does it revert to the general revenue fund?"

Chapter 446 of the Laws of 1937 provides in part as follows:

> "There is hereby annually appropriated from the general revenue fund of the State of Minnesota, the sum of ten thousand dollars ($10,000.00), to be expended by the Disabled American Veterans of the World War of Minnesota for the purpose of assisting World War Veterans in the preparation and presentation of their claims to the United States Government for compensation and other benefits to which they are entitled as a result of disabilities incurred in military service."

This act took effect and was in force from and after its passage. It was repealed by section 42, Chapter 422, Laws of 1939.

Section 17 (a), Article II, Chapter 431, Laws of 1939, the Reorganization Act, provides for the reversion of appropriations to the state treasury which remain unexpended and unencumbered at the close of any fiscal year and is inapplicable to funds appropriated for special purposes by standing, continuing or revolving appropriations. It appears that the auditor and the agency to which the funds were appropriated have proceeded on the assumption that $10,000.00 was immediately appropriated upon the passage of the act for the fiscal year ending June 30, 1937, another $10,000.00 available July 1, 1937, for the ensuing fiscal year, and another $10,000.00 was available July 1, 1938, for the ensuing fiscal year. Mason's Minnesota Statutes for 1927, section 117-1, defines fiscal year as follows:

> "That the period of 12 months ending at midnight between June 30th and July 1st, be and hereby is designated as the fiscal year of the state of Minnesota."

Expenditures and commitments have been made by the agency to which the funds were appropriated in accordance with the act. It is my opinion that this amounts to a reasonable practical construction of the act which was apparently in accord with the intention of the legislature.

Presumably, the 1939 legislature was informed of the situation, yet it did not expressly cancel the unexpended balance. The appropriation act in question should be construed merely as cutting off further annual appropriations and not as eliminating the balance for the last year already appropriated. It is my further opinion that the balance on hand is available for the purpose of the act until it is withdrawn.

JOHN A. WEEKS,
Assistant Attorney General.

July 19, 1939. 640a

See Laws '41, Ch. 548.

BOARDS

281

Accountancy—Examination fee—Reexamination—Return of fee if applicant rejected—M27 § 5703, L. 39, C. 431.

Minnesota State Board of Accountancy.

You inquire as to the proper procedure to be followed by your board in the matter of charging for examinations, reexaminations and in making refunds.

Mason's Minnesota Statutes of 1927, Section 5703, provides in part as follows:

> "Said state board of accountancy shall charge for each examination and certificate provided for in this act a fee of twenty-five dollars to meet the expenses of such examination. This fee shall be payable by the applicant at the time of making his initial application, and shall not be refunded, and no additional charge shall be made for the issuance of a certificate to any applicant. * * *"

The statute expressly provides that the fee shall be payable by applicant at the time of making his initial application and shall not be refunded. However, in view of the language which precedes this statement, which says that the board shall charge for **each** examination and certificate, it seems clear the legislature intended that the money be not refunded after an examination is taken or a certificate issued. If the legislature only intended that your board should charge for an examination or a certificate, then they could not have meant that the money should not be refunded if the application were rejected and the person not permitted to take the examination or be given a certificate.

Your practice of holding checks of applicants attached to the applications and returning them in event they are rejected is a very practical and permissible way of handling this matter. The so-called Reorganization Act does not prevent this practice as Article VIII, Section 13, Chapter

431, Laws 1939, exempts professional and licensing boards from its provisions and limitations.

As to reexaminations, you were advised under date of December 7, 1922, that your board might adopt a rule allowing applicants who have passed two subjects out of the three to be reexamined in the third without payment of an additional fee but where he fails the second time in the same subject and desires to be reexamined, he would be required to pay another fee of $25.00, for which he would be entitled to examination in all subjects.

You are also advised at this time that the expression "each examination" meant a complete examination in all the subjects and did not mean the examination in each separate subject.

JOHN A. WEEKS,
Assistant Attorney General.

October 23, 1940. 882f-1

282

Hairdressers—Manager—Operator—Legal age requirement—Not waived by marriage—M27 § 5846-28.

Minnesota State Board of Hairdressing and Beauty Culture Examiners.

You inquire whether a woman becomes of age when she marries.

What you intended to ask, no doubt, was whether marriage emancipates a woman from certain legal restrictions placed on minors, and more specifically from the provisions of the hairdressing law, Mason's Minnesota Statutes of 1927, Section 5846-28, subsection (c), which requires that the manager-operator be a person of legal age.

Your inquiry is answered in the negative. Marriage frees a minor of parental control. State ex rel. Scott v. Lowell, 78 Minn. 166, 80 N. W. 877, 46 L. R. A. 440. Minors after marriage are deemed to be emancipated from parental control not by virtue of their age, but by the marriage relation, which is inconsistent with subjection to the control of their parents. Lundstrom v. Mample, 205 Minn. 91, 285 N. W. 83. But marriage does not remove the parties thereto from the operation of the general laws of the state enacted in the interest of public welfare. State ex rel. Johnson v. Wiecking, 200 Minn. 490, 274 N. W. 585. In the last cited case the court said, "No one would claim that marriage now frees either party from the penal laws of the state."

JOHN A. WEEKS,
Assistant Attorney General.

September 28, 1940. 33b-9

283

Pharmacy—Emmenagogues can only be sold under direction of registered pharmacist—L. 37, C. 354.

Minnesota State Board of Pharmacy.

You submit advertisements which contain an appeal to women, designating certain preparations as "periodic delay tablets; effective for most stubborn cases, from one to three months' delay," in which they also state that "never a woman disappointed." You also enclose cover of the box upon which is printed the ingredients of said tablets, to wit:

Ferrous Sulphate; Po. Aloes; Ergotin; Cotton Root; Black Hellebore; Oil of Savin.

You state that these drugs have physiological properties as an emmenagogue and also quote from the U. S. Dispensatory the effects from the use of these drugs and that they are all commonly used as abortifacients.

Your inquiry as to whether the sale of these tablets or preparations by one not a registered pharmacist is illegal under the pharmacy law is answered in the affirmative. The term "drug" as defined by Section 1 (d), Chapter 354, Laws of 1937, means:

> "All medicinal substances and preparations recognized by the United States Pharmacopoeia and National Formulary or any revision thereof, and all substances and preparations intended for external and internal use in the cure, mitigation, treatment or prevention of disease in man and other animal, **and all substances and preparations,** other than food, **intended to effect the structure or any function of the body of man or animal."**

Section 16, Chapter 354, Laws of 1937, provides:

> "(a) It shall be unlawful for any person to compound, dispense, vend or sell at retail, drugs, medicines, chemicals and/or poisons in any place other than a pharmacy except as hereinafter provided."

Such exceptions are not material to this opinion. Section 27 (d) of said act provides in part as follows:

> "Nothing herein shall apply to or interfere with the manufacture, wholesale vending, or retailing of non-habit forming, harmless proprietary medicines when labeled in accordance with the requirements of the State or Federal Food and Drug Act. * * *"

The above sections of the Pharmacy Law are applicable in the instant case, unless the preparation can be classified as a harmless proprietary medicine. The word "drug" has a comprehensive meaning which is more than ample to cover the ingredients of which you inquire. The following definitions from the United States Dispensatory would clearly remove these drugs from the "harmless" classification.

ERGOT: The long continued and free use of Ergot is highly dangerous even when no immediate effects are perceptible. Large doses are liable, it is true, to produce abortion in pregnant women.

COTTON ROOT BARK: The attention of the medical profession was called to Cotton Root Bark by Bouchelle in 1840, who stated that it was a popular abortifacient among the negro slaves.

BLACK HELLEBORE: In overdoses produces inflammation of the gastric and intestinal mucous membrane with violent vomiting, hyper-catharsis, vertigo, cramp, and convulsions.

OIL OF SAVIN: Highly irritant. It has been used for the purpose of criminal abortion and in a number of such cases has caused death, the symptoms being violent abdominal pains, bloody vomiting and purging, diminution or suppression of urine, disordered respiration, unconsciousness, convulsions, and fatal collapse.

The next question to be decided if these drugs are not in the harmless class is whether they are proprietary medicines. Dictionary definitions of "proprietary" are as follows:

"Belonging to ownership; as, proprietary rights; belonging, or pertaining, to a proprietor. Proprietor is one defined as one who has legal right or exclusive title to anything. * * * An owner."
State vs. Woolworth, 184 Minn. 54, 237 N. W. 817:

"A proprietary medicine is a medicine which has a secret formula."

State vs. Jewett Market Company, 209 Iowa, 567, 228 N. W. 288.

Obviously drugs sold in packages containing the ingredients contained therein would not be considered having a secret formula.

JOHN A. WEEKS,
Assistant Attorney General.

February 1, 1939. 337c-3

284

Pharmacy—Licensing of pharmacies in state and municipal institutions— L. 37, C. 354. M38 §§ 5808-1 sub. (a), 5808-20.

Minnesota State Board of Pharmacy.

You refer to Sections 5808-1, sub. (a) and 5808-20, M.M.S. '38, and ask whether or not dispensaries in state, county, and city institutions where prescriptions are compounded and drugs and medicines dispensed must be annually registered as in other cases.

An examination of the act or which these sections were originally a part—c. 354, L. 1937—indicates your inquiry should be answered in the negative.

Some clearer expression of a legislative intent to subject such dispensaries to the statutory licensing requirements must be secured before we can hold otherwise.

The title of chapter 354 was an act, "providing for the regulation of the practice of pharmacy; regulating sale of drugs, medicine, chemicals and poisons; providing for a state board of pharmacy, defining its powers and duties; setting forth the requirements for regulation and licensing of pharmacists, **pharmacies, and other places**; definitions and penalties."

It is with the legal regulation of pharmacy as an occupation that the legislature had to do. State v. Donaldson, 41 Minn. 74. The expression, "and other places" in the title is to be construed under the rule of **ejusdem generis**, as though it read, "and other such like places," to-wit: like pharmacies.

The title indicates the legislature had in mind the regulation of commercially operated drug stores, and the text of the act bears this out. The definition of pharmacies is given as, "a drug store or other established place regularly registered by the State Board of Pharmacy at which drugs, medicines, chemicals, and poisons are compounded, dispensed, vended or sold at retail." (§ 5808-1 sub. (a) supra).

By "established place" the legislature referred to a place similar to a drug store.

There is authority for the proposition that it will not be presumed in the absence of express statutory declaration that the legislature intended to require a county to pay an excise tax on the use by it of gasoline in the performance of its governmental functions. O'Berry v. Mecklenberg, 67 A.L.R. 1304 and note. In that decision the general principle applied was that general statutes do not bind the sovereign unless expressly mentioned in them. Laws are primarily made for the government of the citizen and not of the state herself. State v. Garland, 29 N. C. 48.

The licensing requirements imposed by Chapter 354, supra, are for the purpose of controlling and limiting the exercise of the business of pharmacy. We do not believe dispensaries in state, county, and city hospitals and institutions, all of which are agencies of the state or of its political subdivisions, are within the spirit and purpose of the act in question and so advise you.

ROLLIN L. SMITH,
Special Assistant Attorney General.

August 15, 1939. 337b-2

285

Pharmacy—Prescriptions—Writing in ink—Typewriting—L. 39, CC. 102, 193.

Minnesota State Board of Pharmacy.

You inquire if prescriptions for barbital which have been typewritten but signed by the doctor comply with the barbital law.

Section 4, Chapter 102, Laws 1939, as amended by Chapter 193, Laws 1939, provides in part as follows:

> "For the purposes of this act, a prescription for barbital is void unless (1) it is written in ink * * *."

A prescription which is typewritten except for the signature complies with the requirements of the act in this respect. Typewriting and printing are kinds of writing. Anderson v. Kentucky, 121 S. W. (2nd) 46, 47. Typewriting is writing within the contemplation of the statute. New Masonic Temple Association v. Globe Indemnity Company (Neb.) 279 N. W. 475, 478. Typewriting is writing within requirements of statute. Miller v. Board of Commissioners, 171 Okla. 553, 43 P. (2nd) 734. Typewriting has largely taken the place of handwriting and may be considered as handwriting. Hunt v. Dexter etc., 91 N.Y.S. 279, 283; 100 App. Div. 119. "Writing" has also been held to include printing. Sears v. Sears, 77 Ohio St. 184, 82 N. E. 1067, 17 L.R.A. (N.S.) 353, 11 Ann. Cas. 1008.

The writing with a typewriter is writing with ink inasmuch as the characters are imposed upon the paper by means of ink or an inked ribbon.

The Ohio constitution provided that the names of signers of initiative and referendum petitions shall be written in ink, and it was held that this provision was complied with if the names were written in indelible pencil. Thrailkill v. Smith, 106 Ohio St. 1, 138 N. E. 532, 533.

JOHN A. WEEKS,
Assistant Attorney General.

January 29, 1940. 337c-3

EMPLOYEES

286

Civil Service—Political activity—What constitutes—L. 39, C. 441.

Department of Civil Service.

You state that an employee of the department of agriculture in the classified service of the state and subject to the provisions of Chapter 441, Laws 1939, the Civil Service Act, is a member of the Bill Posters' Union,

and has been since 1938, and would like to know if he could stamp and post bills, including those of candidates for political offices, during his vacation time and such other time as he may be on leave of absence.

The work about which such employee inquires is of a private nature and for which he will receive remuneration. He could have performed this work and charged therefor prior to the enactment of the civil service law. A state employee's time is his own after his hours of work, during vacation periods, and while on leave of absence. During such times he may participate in activities of his own choosing which do not violate the law and do not interfere with his regular employment. Unless the Civil Service Act imposes some restriction which did not formerly exist, the inquiring employee may carry on the activities which he has mentioned.

There is nothing in the Civil Service Act which now restricts such activity unless it is contained in Section 29, quoted as follows:

> "No officer or employee holding a position in the classified service of this state shall, directly or indirectly, solicit, or receive, or be in any manner concerned in soliciting, or receiving, any assistance, assessment, or subscription, whether voluntary or involuntary, for any political purpose whatsoever, or for any political party or affiliate thereof. No officer or employee in the classified service shall be a delegate or alternate to any political convention. No officer, agent, clerk or employee of this state shall directly or indirectly use his authority or official influence to compel any officer, or employee in the classified service to apply for membership in or become a member of any organization, or to pay or promise to pay any assessment, subscription or contribution, or to take part in any political activity. Any person who violates any provision of this section shall be guilty of a misdemeanor, and shall be punished accordingly, and if any officer or employee in the classified service is found guilty of violating any provision of this section, he is automatically separated from the service.
>
> "(2) Any officer or employee in the state classified service shall resign from the service upon filing as a candidate for public office."

An analysis of this section is now timely, as there has been some conjecture with regard to the extent of its limitations upon the activities of state employees. A law must be construed in the light of its purposes. It is my opinion that the first sentence of the aforequoted section merely restricts officials and employees in the classified service from soliciting or receiving financial assistance for political purposes or for any political party or affiliate. The evil to which this prohibition is directed is well known to all. Prior to the Civil Service Act, state employees were active in the solicitation of contributions for the campaigns of state officials and political parties, usually upon a percentage basis of other state employees' salaries or a percentage of the amount of business certain firms did with the state. The use of the words "soliciting, * * * receiving, * * * assessment, * * * subscription" in this provision strongly indicates that monetary assistance was what the legislature principally had in mind. The words

"any assistance" cannot be interpreted alone, but must be construed in harmony with the context of the remainder of the sentence.

Section 29 of the act in its original form (House File 601) included the words "contribute," "contributing," and the words "or contribution" after the words "solicit," "soliciting," and "subscription." These words were deleted by the legislature prior to the final passage of the act. The elimination of the words "contribute," "contributing," "or contribution," indicated that the legislature did not intend to prevent employees in the classified service from making voluntary contributions for political purposes or to political parties, but merely wished to stop the solicitation of funds by state employees. The tenure provisions of the act give the employee ample protection from coercion if he does not wish to make a voluntary contribution. It could not be seriously contended that a state employee in the classified service could not vote or have a right to express his opinion regarding candidates, political propositions or political parties and freely state which in his opinion he preferred. It is my opinion that this provision of the act only prohibits a state employee from soliciting or receiving financial or monetary assistance.

The second sentence is readily understood in its prohibition against acting as a delegate or alternate to any political convention.

The third sentence forbids any officer or clerk, or employee in either the classified or unclassified service from using his authority or official influence to compel any officer or employee in the classified service to apply for membership in or to become a member of any organization or to pay or promise to pay any assessment, subscription or contribution, or to take part in any political activity. This, of course, is to prevent influence which a superior officer might exercise over an inferior officer or employee from compelling the latter to contribute or render service in political matters. The penalty for violation is a misdemeanor and includes any person in the state's service, and in addition thereto those in the classified service are automatically discharged.

JOHN A. WEEKS,
Assistant Attorney General.

April 26, 1940. 644

See L. 1941, C. 394.

GOVERNOR

287

Appointment—Power to appoint same person to more than one office—Supt. Bureau of Criminal Apprehension and Supt. Highway Patrol are not incompatible offices—M27 § 128-1; M38 §§ 9950-6, 2554 sub. 18.

The Governor.

You inquire whether the same person may be appointed as Superintendent of the Bureau of Criminal Apprehension and as Chief Supervisor

of the State Highway Patrol, to draw only one salary, but to have the powers of both offices.

1. The appointment of the Superintendent of the Bureau of Criminal Apprehension is governed by Laws 1927, Chapter 224, Section 2, as amended by Laws 1935, Chapter 197, Section 1 (Mason's Statutes, 1938 Supplement, Section 9950-6). The Superintendent is appointed by the Governor for a term of two years, subject to removal by the Governor at pleasure. The salary of the Superintendent is fixed at $5000. He is required to devote his entire time to the duties of his office. He and his subordinates are required to cooperate with other peace officers of the state in enforcing the criminal laws. They have the same powers of arrest as sheriffs, but may not be employed to render police service in connection with strikes and other industrial disputes.

2. The appointment of the members of the State Highway Patrol, including a Chief Supervisor and Assistants, is governed by Laws 1929, Chapter 355, as amended by Laws 1935, Chapter 304, and Laws 1937, Chapter 30 (Mason's Statutes, 1938 Supplement, Section 2554, Subdivision 18). This is a part of the statute defining the general powers and duties of the Commissioner of Highways. The Chief Supervisor is employed by the Commissioner of Highways, without a fixed term, and would be subject to discharge by the Commissioner at pleasure. The salary of the Chief Supervisor is to be fixed by the Commissioner at not to exceed $4000.

In general, the members of the Highway Patrol are authorized to enforce the laws relating to the protection and use of trunk highways. Like the members of the Bureau of Criminal Apprehension, they have no power or authority in connection with strikes or industrial disputes.

3. The general rule is that two offices may be held by the same person unless they are incompatible or unless there is some constitutional or statutory provision to the contrary.

Dunnell's Digest, Section 7995.

State vs. Hays, 105 Minn. 399, 117 N. W. 615.

State vs. Sword, 157 Minn. 263, 196 N. W. 467.

Both offices are clearly under the executive branch of the government. Hence no constitutional question as to conflict with any other branch is involved.

4. The statute requires the Superintendent of the Bureau of Criminal Apprehension to devote his entire time to the duties of his office. Obviously such a provision cannot be taken literally. It must be given a reasonable construction. So construed, it may be understood to mean that the Superintendent must be ready to devote substantially all of his working time to the duties of the office, and must not engage in any other work, particularly private employment, which would materially interfere therewith. However, this provision does not, of itself, render the office of Superintendent of the Bureau incompatible with any other public office, nor prevent

the Superintendent from holding another public office, provided he can do so without materially interfering with his duties as Superintendent. It is conceivable that the Superintendent of the Bureau, although on hand and available at all reasonable times to perform the duties of that office, might find that those duties did not actually consume all of his time, and that he could well carry on at the same time the work of some other office, such as that of Supervisor of the Highway Patrol, without any serious conflict. At any rate, this is a practical question for the determination of the incumbent of the office and the appointing authorities. It has no bearing on the question of legal incompatibility.

State vs. Hays, supra.

5. In my opinion the offices of Superintendent of the Bureau of Criminal Apprehension and Chief Supervisor of the State Highway Patrol are not incompatible. In State vs. Hays, supra, the court 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."

Obviously the functions of the two offices, as defined by the statutes, are not at all inconsistent, and might well be exercised by the same person without conflict.

6. In connection with the matter, I call attention to Mason's Minnesota Statutes for 1927, Section 128-1, which provides as follows:

> "In filling any appointive state office which the law provides shall be filled by the governor, he may appoint to such office a person already holding a state office and such person may hold both such offices and perform the functions and duties thereof; but such person shall receive only the salary by law provided for the office first held."

In my opinion this section is not to be taken as exclusive, but rather as a declaration of the legislature in harmony with already existing rules of law and in furtherance of economy and efficiency in government. This provision would expressly authorize the Governor to appoint as Superintendent of the Bureau of Criminal Apprehension a person already holding the office of Chief Supervisor of the Highway Patrol. However, in such case the compensation for both offices would be limited by the terms of the statute to the salary attached to the office last mentioned.

7. On the other hand, it would be permissible, under the general rules already discussed, for the Commissioner of Highways to appoint as Chief Supervisor of the State Highway Patrol a person already holding the office of Superintendent of the Bureau of Criminal Apprehension, assuming that this was approved by the Governer, to whom the Superintendent of the Bureau is directly responsible. In such case the appointee might continue to draw the full salary provided for the office of Superintendent of the Bureau. However, he would not be entitled to any additional salary

for performing the duties of Chief Supervisor of the Highway Patrol. Public policy favors the consolidation of offices, where not essentially incompatible, in the interests of efficiency and economy, but it does not sanction the combination of two offices for the purpose of securing increased compensation for the incumbent.

J. A. A. BURNQUIST,
Attorney General.

January 14, 1939. 213f

288

School Officers—Removal proceedings—M27 §§ 6934, 6953, 6954, 9970, 2824.

The Governor.

You inquire what power, if any, you have to remove a clerk of a school district.

You are advised that the only authority vested in the Governor to remove elective public officials is conferred by Section 6954, Mason's Minnesota Statutes of 1927. School officers are not included in such enumerated list. The only school officer that you have power to remove would be a county superintendent of schools or any collector, receiver or custodian of public moneys. It does not appear that the clerk of a school district is a collector, receiver or custodian of public moneys within the meaning of these terms.

You further inquire that if the Governor does not have the power of removal, under what conditions this officer may be removed and the procedure to be followed. You do not state whether or not this is an independent or a common school district. If this is a common school district, I know of no statutory authority for the removal of such officer, and the only procedure would be to await the next election in said district and vote him out of office.

Section 6953, Mason's Minnesota Statutes of 1927, provides that every office shall become vacant on the conviction of the incumbent of an infamous crime, or of any offense involving the violation of his official oath. If such person has been or is convicted of such a crime, then a vacancy would occur which could be filled by the remaining members of the board.

Section 9970, Mason's Minnesota Statutes of 1927, states:

> "Whenever any duty is enjoined by law upon any public officer or person holding public trust or employment, every wilful neglect to perform such duty, and every malfeasance in office, for the punishment of which no special provision has been made, shall be a gross misdemeanor, and punished by fine and imprisonment."

You have given no facts concerning the actions of such officer. Consequently, we are not in a position to state whether or not, in our opinion, he has been guilty of malfeasance in office. However, in this connection I call your attention to the case of State ex rel. Martin versus Burnquist, 170 N. W. 201, 609, 178 N. W. 167 which held that the misconduct complained of against an elective public officer must have some relation to the performance of the officer's official duties. However, that case was the removal of an officer by the Governor under a statute authorizing such procedure.

In the event it is an independent district, Section 2824, Mason's Minnesota Statutes of 1927, states:

> "The school board of any independent district may * * * 4. Remove for proper cause any member or officer of the board, and fill the vacancy; but such removal must be by a concurrent vote of at least four members, at a meeting of whose time, place, and object he has been duly notified, with the reasons of such proposed removal, and after an opportunity to be heard in his own defense."

HAYES DANSINGBURG,
Assistant Attorney General.

June 22, 1940. 213g

289

Statutes—Approving of acts passed during the last three days of the legislative session—Acts passed last day of session when clock is covered—Cons. Art. 4 §§ 1, 11, 22.

The Governor.

You inquire:

(1) As to the law applicable to the signing of bills which are presented to you on and after April 17. That is, how much time the governor may take to approve, sign and file in the office of the secretary of state acts passed during the last three days of the session, and,

(2) As to the signing of bills in the event either branch of the legislature sees fit to cover the clock and continue in session after midnight of April 18, which is the last day for the passage of bills.

We answer your first question as follows. Section 11 of Article 4 of the state constitution contains the following provision pertinent to the question you ask:

> "If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he has signed it, unless the legislature, by adjournment within that time, prevents its return;

in which case it shall not be a law. The governor may approve, sign, and file in the office of the secretary of state, within three days after the adjournment of the legislature, any act passed during the last three days of the session, and the same shall become a law."

In asking your question we assume that you are using the word "passed" in the same sense as it is used in the provision quoted from the constitution. Inasmuch as the meaning of the term as used in that provision is material to your inquiry we shall first consider what that meaning is. This matter was definitely settled by the State Supreme Court in the case of Burns v. Sewell, 48 Minn. 425. That case involved the validity of the approval of an act passed by the legislature on April 19 and enrolled and sent to the governor on April 22. The legislature adjourned on April 23. The governor approved the bill on April 24. It was objected that the bill was not passed by the legislature within the last three days of the session and that therefore, the governor could not approve it after the session ended. If the term "passed" had been used in the ordinary sense that would have been true. But the Court held that the term as used here includes passing by the legislature, enrollment, signing by the presiding officers of the two houses and delivery to the governor. The Court said:

"What in this clause is the meaning of the word 'passed?' Ordinarily a bill is said to have passed one of the houses when the final vote in its favor in that house has been taken and announced. Is that the sense in which the constitution is to be understood when speaking of the passage of bills, not by one house, but by the legislature, with reference to action upon them by the governor? For that purpose, is a bill deemed to be passed so long as the house in which it is has control over it, and may reconsider its action upon it? We think not. Section twenty-one (21) of the article 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. That the word 'passed', as used in the constitution, may sometimes include the enrollment and signature by the presiding officers and sending to the governor, is apparent from section twenty-two (22) of the article, which provides that no bills shall be passed on the day of adjournment, and continues: 'But this section shall not be so construed as to preclude the enrollment of a bill, or the signature' and passage from one house to the other, or the reports thereon from committees, or its transmission to the executive for his signature, —provisions wholly unnecessary if the word could not include those things. The inconvenient consequences that might arise from using the word in section eleven (11) to indicate merely the final vote upon a bill are so manifest as to furnish a strong presumption that it is not used in that limited sense. It must happen at every session that the final vote on many bills is taken more than three days before the day of adjournment, but which bills it will be impossible to

have enrolled and signed, so that they may be sent to the governor, until less than three days remain. In such cases, if the time of passing them is to be computed from the vote, many of them must be lost for want of time on the part of the governor to examine them while the legislature is in session. We think that bills enrolled during the last three days of the session are within the meaning of the clause authorizing the governor to sign them within three days after the adjournment."

We have the further question whether Sundays and holidays are to be excluded in reckoning the period of three days. This question also has received a judicial answer. In the case of Stinson v. Smith, 8 Minn. 366 (Gil. 326), it appears that a bill was passed by the legislature on March 7 and delivered to the governor on the same day, that the legislature adjourned March 8 and that the bill was signed by the governor on March 12, Sunday intervening. The Court held that Sundays are to be excluded, saying:

"We are satisfied, however, that the intent and spirit of the instrument require a different construction; and that the purpose of the framers of the constitution was to give the governor three full working days, after the adjournment, for the consideration and filing of bills. Such time is expressly granted during the session of the legislature; and as the clauses occur in close connection, treating of the same subject matter, it does not seem unreasonable to hold that the exception of Sunday applies to the latter, although not repeated in terms. If it was thought proper to grant the executive three full working days for the consideration of bills during the session of the legislature, it is difficult to see why the same time should not be granted for the same purpose after the adjournment of that body. And indeed the reason is very much stronger for granting such time in the latter case, since it is notorious in the history of legislative bodies that a far greater number of important bills are usually passed during the last three days of the session, than within the same length of time, at any period previous during the session. We think, therefore, the referee committed no error in holding this objection not well taken."

In the recent case of State ex rel. Putnam v. Holm, 172 Minn. 162, the Court held that holidays may not be excluded in reckoning the three-day period.

Summarizing we express the opinion.

1. That the governor has three days after the legislature adjourns to act on any enrolled bill delivered to him on any of the last three days of the session.

2. That in reckoning these three days Sundays are to be excluded.
3. That in reckoning these three days holidays are not to be excluded.

Your second question is answered as follows:

"An enrolled bill properly authenticated in compliance with section 21 of article 4 of the constitution, is presumed to have been enacted in the manner required by the constitution. This presumption may be overcome by a reference to the legislative journals. The presumption of regular enactment is very strong and can only be overcome by evidence free from reasonable doubt. It is not overcome by a failure of the journals to show any fact which is not specifically required by the constitution to be entered therein, as, for example, the fact that a bill was properly read." Dunnell's Digest, Section 8898.

Article 4, section 1 of the constitution provides that no session of the legislature "shall exceed the term of ninety legislative days."

Section 22 of the same article provides:

"No bill shall be passed by either house of the legislature upon the day prescribed for the adjournment of the two houses."

The question is whether the evidence of the enrolled bill, properly attested by the officers of the two houses and signed by the governor, and the entries in the Journal of the Senate, can be impeached by parol evidence.

The authorities are almost unanimous that this cannot be done. The rule is stated in Vol. 25, Ruling Case Law "Statutes," Sec. 153, as follows:

"But even in the jurisdictions in which it is held that the courts may go behind the enrolled bill and inspect the legislative journals in determining a question as to the regular enactment of a law, this, according to the preponderance of authority, is the extreme limit to which it is permissible to go; the only evidence to which recourse can be had in determining whether a bill has been regularly enacted into a law is the duly authenticated enrolled bill and the legislative journals * * *. An enrolled bill cannot be impeached by the minutes of the stenographer of the house, * * * by entries on the original bills, nor by parol evidence that the facts stated in the journals are not true. The recitals in the journals of the legislature are conclusive." See also cases cited in annotations in 40 L. R. A. (N. S.) pages 30-33.

The precise question has apparently never been considered by the Minnesota Supreme Court, but the extreme caution with which the courts permit the use of the legislative journals to impeach an enrolled act would seem to indicate clearly that it would, under no circumstances, permit the impeachment of an enrolled act by parol evidence.

State v. City of Hastings, 24 Minn. 78.

Meisen v. Canfield, 64 Minn. 513.

State ex rel. Kohlman v. Wagener, 130 Minn. 424.

Jaques v. Pike Rapids Power Co., 172 Minn. 306.

In White v. Hinton, 17 L.R.A. 66, the Wyoming Supreme Court considered a question identical with that presented by your inquiry. The

court held that parol evidence could not be received to show that the law was passed after the time fixed by the constitution for adjournment of the legislature. After speaking of the weight to be given to the enrolled bill and the legislative journals, the court said:

> "By a consensus of authority almost unanimous these records are conclusive. Parol testimony cannot be admitted to impeach them. * * * If it should result from these principles that on rare occasions validity should be given to legislation not strictly regular in its enactment, the evil would be much less than the unsettling of the evidentiary foundation of all statutory law, and the weakening of the public faith in all existing legislative enactments which would result from throwing open the records of legislative action to impeachment by parol testimony whenever the interest or caprice of individuals may prompt them to such a course. It is not to be tolerated that the courts or the people should depend upon or resort to the recollection of individuals for the statutory law."

In our opinion the courts would not receive evidence intended to show that a bill was passed at a time other than that stated by the legislative journal.

JOHN A. WEEKS,
Assistant Attorney General.

April 17, 1939. 280

NOTARY PUBLIC

290

Requirements—Residence—Removal—Vacancy—M27 § 6953.
The Governor.

The only qualifications for the holding of the office of Notary Public in Minnesota are that the appointee shall be a citizen of this state, over the age of twenty-one years and a resident of the county for which he is appointed.

The Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside."

In Colgate v. Harvey, 296 U. S., page 427, the court holds that a citizen of the United States is ipso facto a citizen of the state in which he resides.

Residence in Minnesota for six months is a requirement for the exercise of the elective franchise but not for appointment to the office of

Notary Public. As soon as a citizen of the United States over twenty-one years of age becomes a resident of Minnesota, he may be appointed a Notary for the county in which his residence is established.

Section 6953, Mason's Minnesota Statutes 1927, provides that every office shall become vacant if the holder ceases to be an inhabitant of the state or, if a county office, he ceases to be an inhabitant of the county for which he was elected or appointed.

If, therefore, a Notary Public leaves Minnesota with the intention of ceasing to be an inhabitant of the state or leaves the county for which he was appointed with the intention of ceasing to be an inhabitant thereof, his office is vacant. If he again becomes a Minnesota citizen or a resident of the county for which he was appointed and desires to be a Notary Public, he must be reappointed.

If, however, a Notary Public is temporarily away from his residence with no intention of ceasing to be an inhabitant of Minnesota or the county for which he was appointed and does not acquire a domicile elsewhere and had no such intention when leaving, his absence from the state or said county will not alone create a vacancy in his office.

The facts in each particular case must determine the place of which he is an inhabitant and the existence or non-existence of a vacancy in his office. Unless there is a vacancy therein, he need not be reappointed a Notary Public but may act until the expiration of his notarial commission.

J. A. A. BURNQUIST,
Attorney General.

March 24, 1939. 320a

TAXATION

ABATEMENT

291

Church Property—Cons. Art. 9 § 1—M27 § 1983.

Commissioner of Taxation.

You have received an approved application for the abatement of accumulated taxes and assessments on the East 110 feet of Lot 8, Auditor's Subdivision No. 4, from the city council of St. Paul. The history of this property, so far as your question is concerned, commences in 1925, at which time it was purchased by one A. A turned possession of the same over to the * * * Church. There is nothing in the facts submitted indicating in what manner such possession was turned over to said church or how the * * * Church is organized. However, said church has used the property since that time for religious purposes and activities.

In 1931 A died, and this property passed to four heirs, two of which later conveyed to the remaining two heirs. These two remaining fee owners continued to leave the church in possession until October 19, 1939, at which time a deed was executed to the church. Neither A nor his heirs charged the church any rent or interest for the use of said property.

The petition asks for the abatement of the general taxes, penalty and interest for the years 1932 to 1937 and current taxes for 1938; also recommends that penalties and interest on special assessments be canceled provided payment is made within 30 days after the approval of the tax commissioner.

You inquire as to the power of the tax commissioner to abate and cancel such taxes.

Article 9, Section 1, of the State Constitution provides:

> "The power of taxation shall never be surrendered, suspended or contracted away. Taxes shall be uniform upon the same class of subjects, and shall be levied and collected for public purposes, but public burying grounds, public school houses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property and houses of worship, * * * shall be exempt from taxation * * *."

The general rule is that laws and constitutional provision exempting property from taxation are to be strictly construed. The test of property owned by such exempt organization is the same as applied to public hospitals, colleges, universities and charitable institutions, i.e. the use to which the property is devoted or about to be devoted. Generally speaking, all property reasonably necessary and primarily used and devoted to the proper purposes of the institution which is so located with reference to the main buildings or activities of the institution so as to be reasonably suited for such purpose is exempt from taxation. Such exemption does not include special assessments for local improvements.

However, in this case you have no ownership by the church organization. It is our opinion, to come within the exempt status as set forth in said Article 9, Section 1, of our constitution, which gives such property the absolute right of exemption, ownership of the property by the organization claiming exemption status is essential. Once ownership is established, then the general tests of use can be applied to determine whether or not such property should be exempt.

The fact that no rent or interest was charged for the property and that said property was used exclusively for religious purposes during the times the abatement of taxes is requested is of no significance in the absence of ownership as aforesaid to grant this property the absolute right of exemption under Article 9, Section 1.

However, Mason's Minnesota Statutes of 1927, Section 1983, states with reference to the power of the tax commission, which powers have passed to the commissioner of taxation:

"* * * It shall hear and determine all matters of grievance relating to taxation. It shall have power to grant such reduction or abatement of assessed valuations or taxes and of any costs, penalties or interest thereon as it may deem just and equitable, and to order the refundment in whole or in part of any taxes, costs, penalties or interest thereon which have been erroneously or unjustly paid. * * *"

In re Application of the People's Independent Telephone Company for Refundment of Taxes Paid on Real Estate, 156 Minn. 87, our Supreme Court said with reference to the above statute:

"The statute confers upon the commission, where a proper showing is made, power to order a refundment, in whole or in part, of any taxes paid. To determine whether such a showing has been made requires a high degree of discretion on the part of the commission."

In State ex rel. Kasper v. Minnesota Tax Commission, 137 Minn. 37, page 40, our Supreme Court said with reference to the above statute:

"It is a manifest purpose of the provision to give to the tax commission the right to abate or reduce a tax or assessment in cases where no right to such relief theretofore existed, and to give relief where taxing officers and the courts could not afford it under rules of law then existing. The limitation upon the power of the commission is that it shall only grant such abatement or reduction as it may deem just and equitable."

Also see In re Application of Calhoun Beach Holding Company, 205 Minn. 582, for the latest pronouncement of our Supreme Court relative to the power of the tax commission, which power passed to the commissioner of taxation.

It is apparent from the foregoing authorities that the power of the commissioner of taxation under Section 1983 is exceedingly broad, and he has the power to grant reductions or abatements under circumstances he may deem just and equitable. Each request for an abatement of taxes must be determined from the facts in that particular case. Under the facts here presented, we are of the opinion that it would not be an abuse of discretion for the commissioner of taxation to grant the relief requested.

HAYES DANSINGBURG,
Assistant Attorney General.

December 12, 1939. 414d-6

292

Special assessments; judicial ditch proceedings—M27 §§ 1983, 6703.

Commissioner of Taxation.

You ask whether or not the Commissioner of Taxation has power and authority to grant an abatement or reduction of assessments made in the

course of proceedings to construct a judicial ditch. You state that these proceedings were commenced prior to 1925, and that the assessments have been duly confirmed.

State, ex rel. Kasper v. Minnesota Tax Commission, 137 Minn. 37, holds that the Minnesota Tax Commission has power and authority under the provisions of what is now Section 1983 of the statutes to abate an assessment of benefits levied in proceedings to construct a county ditch. The court in that case expressly reserved a ruling on the question under consideration.

The applicable statutes appear in General Statutes of Minnesota for 1923, Section 6674, et seq. As pointed out in In re Judicial Ditch No. 9, 167 Minn. 10, at page 16 substantially the same procedure is provided for the construction of both county and judicial ditches. In both proceedings, the report of the viewers who have estimated the benefits to be derived from the establishment of the ditch are confirmed, in one case by the county board, and in the other by the court. A jury trial may be demanded; section 6687. The actual letting of the contract for the ditch is done by the county auditor or by all of the county auditors involved; section 6689. Section 6696 et seq., provides for the issuance of obligations of the counties to furnish the necessary funds and it is specifically provided that these bonds shall be general obligations of the respective counties.

After the ditch is established and the contract is let, the auditor of each county affected files a statement with the register of deeds, in which the amount that each tract of land is liable for on account of the construction of the ditch, is set forth. Section 6703, 6705. The amounts so appearing become liens upon the lands involved. Section 6705.

There being no substantial difference between proceedings for the construction of a judicial ditch and proceedings for the construction of a county ditch, the Commissioner of Taxation has the power and authority under Section 1983 to abate or reduce assessments levied in the course of judicial ditch proceedings. Such power existing in the Commissioner is not in any sense a review of or appeal from a decision of a court. As pointed out in State ex rel. Kasper v. Minnesota Tax Commission supra, the purpose of the statute is to provide for abatement of taxes in cases where neither administrative officers nor the courts could afford relief otherwise, and that the only limitation upon the power of the Commission is that it can only grant such abatement as it may deem just and equitable. In my opinion this power extends to assessments made in judicial ditch proceedings as well as to county ditch proceedings.

It is my further opinion that such assessments are "made or levied by any municipality for local improvements" within the meaning of Section 1983. The actual levy is made by the county auditor pursuant to the provisions of Section 6703. The intention of the legislature was to make both

forms of proceedings substantially the same. No reason exists why the same procedure, upheld in State ex rel. Kasper v. Minnesota Tax Commission should not apply to judicial ditch proceedings.

Your question is therefore answered in the affirmative.

PHILIP F. SHERMAN,
Assistant Attorney General.

August 15, 1939. 407d

ASSESSMENTS

293

City—Annexation—When completed—Where taxes should be assessed—M27 §§ 1919, 1984, 1985, 2017, 2034, 2191. City Charter of Austin.

Mower County Attorney.

It appears that acting pursuant to Mason's Minnesota Statutes 1927, Sections 1679 and 1680, certain lands in Lansing Township, Mower County, were annexed to the City of Austin and platted as Cedar View Addition. The resolution of annexation was adopted by the city council of the City of Austin on July 21, 1939, and filed for record with the register of deeds and the county auditor on or about September 9, 1939. You ask if the county auditor should tax the annexed land for the year 1939 in the City of Austin, in the Town of Lansing, or in both.

The annexation was completed on July 21, 1939, at the time the resolution was adopted, and the filing of a certified copy of the resolution with the county offices above named was not essential to the annexation. The statute provides (§ 1679) that the council "* * * may by resolution, declare the same to be an addition to such City, and **thereupon** such territory shall become a part of such city, * * *." See Opinion No. 5, Reports of the Attorney General, 1928.

There is no statutory provision governing the levy and assessment of taxes in cases of annexation under Sections 1679 and 1680. (For apportionment of tax levies in cases of cities of the first class under Laws 1929, Chapter 414, see Mason's 1938 Supplement, Section 1415-17.) Reviewing the tax statutes generally, we find that:

Section 1990 provides that the assessor shall perform his duties during the months of May and June of each year and must complete his assessments on or before the fourth Monday in June.

Section 1984 provides for the assessment of real property with reference to its value as of May 1st preceding the assessment.

Section 1985 provides for the assessment of property omitted from the listing of the assessor.

Section 2017 provides that in the case of personal property being moved from one district to another between May 1st and July 1st, it shall be assessed in the district in which the owner is first called upon by the assessor.

Section 2034 provides for the board of equalization meeting on the fourth Monday in June.

Section 2191 provides that taxes shall be a lien on the real property from and after May 1st of the year in which they are levied.

Section 2058 provides that the taxes as listed and assessed by taxing districts shall be certified to the county auditor on or before October 10th in each year.

The charter of the City of Austin provides in Chapter 6, Section 2, that all property within the city shall be subject to taxation and shall be assessed and collected in a manner provided for in the general laws of the state.

The charter, Chapter 6, Section 3, provides that all taxes shall be levied by resolution of the council at their first regular meeting in the month of October each year.

Township taxes are levied by vote of the people at the annual meeting held on the second Tuesday of March (see Section 1092), and such voting of taxes has been held to constitute a levy. State v. Lakeside Land Co., 71 Minn. 283, 291.

Generally speaking, property annexed to a municipality is subject to taxation, but not for the current year where the tax list is closed for such year. See McQuillin's Municipal Corporations, Second Edition, Revised Vol. 6, Section 2552. Several cases support the general proposition that in cases of annexation to cities after the tax list has been closed for the year, such annexed property is not subject to taxation in the city.

In the case of City of Latonia et al. v. Meyer, 27 Ky. Law Reports 746, 86 S. W. 686, the court reviewed the taxing statutes which in substance provided that the lien for taxes in that state (Kentucky) attached as of April 1 and the assessor was required to list and assess all property before May 1 in each year. The annexation in question was completed on May 23 of that year. The court held that the property could not be taxed for that year in the city to which the area was annexed. The court said:

> "The appellee's property was not situated within the corporate limits of the city * * * on the date at which it should be valued, or at the time the assessment should have been made. Only the property situated within the corporate limits of the city on the 1st day of April should have been assessed and required to pay taxes. * * * The fact that the property was annexed to the city did not give the municipality the right to impose a tax upon it, except at times provided by the statute. * * *"

To the same effect under varying but analogous statutes see Reynolds v. City of Asheville, 199 N. C. 212, 154 S. E. 85; Gilkey v. Asheville, 199 N. C. 218, 154 S. E. 93; Detroit Trust Co. v. Detroit, 248 Mich. 612, 227 N. W. 715; City of Gulfport v. Todd, 92 Miss. 428, 46 So. 541; Chattanooga v. Raulston, 117 Tenn. 569, 97 S. W. 456; Austin v. Butler, (Texas) 40 S. W. 340.

For cases upholding the validity of a tax in a similar situation, see Johnston v. Huntington, 71 W. Va. 106, 76 S. E. 142; City of Westport v. McGee, 128 Mo. 152, 30 S. W. 523; Abbott v. Sumter, 76 S. E. 146.

As bearing on the subject see City of Austin v. Butler, 40 S. W. 340.

Former attorneys general have expressed opinions in similar cases which are somewhat conflicting. On May 5, 1919, the attorney general held that where annexation proceedings had been instituted under Laws 1919, Chapter 446, and the property in question had been annexed to the city between May 1st and October 10th, the property could be taxed in both the township from which the property was taken and in the city to which it was added. See Opinion 842, Reports of the Attorney General for 1920. The reasoning there employed was that since the property in question was a part of the township in March, when the annual levy was made, it became subject to the lien for taxes on May 1st, according to what is now Section 2191 of Mason's 1927 Statutes, and that since it came within the city limits before the city levied its taxes for the year in question, it was also subject to the city's lien for taxes. This holding resulted in a double taxation, but this was held to be justified on the grounds that it resulted from the action of the majority of the owners of such property in petitioning for the annexation.

Again, on October 17, 1928, the attorney general held in a similar situation (Opinion No. 5, 1928 Reports) that levy having been made by the town in which the property was situated in March of the year in question, the town was entitled to receive the tax, and the city to which the property was annexed in July should not also tax such property. The opinion pointed out, after reviewing tax statutes in general, that it would be unfair to tax the property in both districts, that the time for completion of some of the steps in assessing the property had already passed when the annexation was made, and that the property should be taxed only in the town of which it was formerly a part.

Under the charter of Austin, the taxes are not to be levied until the first regular meeting of the council in October of this year. However, the city assessor has presumably already listed and assessed all of the property which was in the City of Austin in the months of May and June of this year, not including the property in question, which was no doubt listed and assessed in the town.

Considering the tax statutes generally, we conclude that the fairest result would be obtained by holding that the property in question should be taxed in the taxing district of which it was a part on May 1st when the lien attached. The annexed lands, in your case, should be listed in

the town of Lansing. The special assessments, however, should be listed in the political subdivision of which the land was a part at the time of the levy, which is in the City of Austin.

EDWARD J. DEVITT,
Assistant Attorney General.

September 27, 1939. 59a-1

294

Special—Forfeited lands—Local improvements—M27 §§ 1918-15 et seq. M40 § 2139-22, L. 39, C. 328.

Farmington Village Attorney.

You submit facts showing that the village of Farmington is just completing some street improvements as authorized by Mason's Minnesota Statutes of 1927, Section 1918-15, et seq., and that additional improvements are contemplated in the future. Certain property abutting the improvements has been forfeited to the State of Minnesota for non-payment of taxes. On the basis of these facts you ask several questions, which are answered seriatim.

1. "What is the effect of such an assessment (to pay for the improvements) where the property assessed is held by the state, having been forfeited to the state prior to the assessment?"

It is well settled that real property which is owned by the state cannot be charged with a lien for local improvements. Foster v. Duluth, 120 Minn. 484; In re Delinquent Real Estate Taxes, Polk County, 182 Minn. 437.

2. "Does a private party purchasing from the state have to pay the assessment which is spread over a period of ten years?"

If the property was owned by the state at the time of the assessment, no lien was thereby created, and the vendee of the property need not pay the assessments. If the assessment attached prior to the forfeiture of the property to the state, the assessment should have been cancelled by the county auditor. Mason's 1938 Minnesota Supplement, Section 2139-21. Laws 1939, Chapter 328.

3. "If not, is there any way that the village can protect itself as to improvements made near forfeited property?"

The statute (Mason's 1938 Minnesota Supplement, Section 2139-22, as amended by Laws 1939, Chapter 328) provides that in apportioning the proceeds of sale, the amounts chargeable against the tract sold **at the time of forfeiture** should first be paid, then the amount owing on any bond issue is to be paid. The remainder should be apportioned 20% to the state, 30% to the county, 20% to the city, village or township, and

40% to the school district. No provision is made for preferential reimbursement to the city, village or township for special improvements made after forfeiture of the land. The city, however, will share (20%) with the other political subdivisions in the general distribution. In order to insure a higher sale price in those instances where special improvements have been made after forfeiture, the county board should order a reappraisal of the land in question where such is deemed necessary.

The law as it now stands works an injustice on municipalities making special improvements on tax-forfeited lands since there is no provision for proportionate reimbursement after the time of the sale. It is a matter which could easily be remedied by legislative act and a subject which may well have the attention of the next legislature. We suggest that you call it to the attention of the members from your district at the next session.

4. "In arriving at the amount to be assessed per front foot, is the frontage of the forfeited land to be ignored or is it to be included in the assessment?"

No assessment should be made against the tax-forfeited land itself, for the reasons above stated. However, in determining the amount of the assessment per front foot on other land, the frontage of the tax-forfeited land must be taken into consideration, the same as if it were subject to the assessment. Otherwise the result would be to assess upon other land the benefits which actually accrued to the tax-forfeited land. This may not be done. That part of the cost which corresponds with the benefits to the tax-forfeited land must be borne by the village unless and until the legislature provides for reimbursement.

EDWARD J. DEVITT,
Assistant Attorney General.

February 15, 1940. 412a-26

Note: See opinion April 12, 1940 to Duluth City Attorney.

295

Special—Forfeited lands—Special improvements—L. 39, C. 328.

Duluth City Attorney.

You refer to an opinion dated February 15, 1940, and call attention to the answer to question number 4 discussed in that opinion, and ask us to cite authorities for the conclusion therein drawn. The question and answer read as follows:

"4. 'In arriving at the amount to be assessed per front foot, is the frontage of the forfeited land to be ignored or is it to be included in the assessment?'

"No assessment should be made against the tax-forfeited land itself, for the reasons above stated. However, in determining the amount of the assessment per front foot on other land, the frontage of the tax-forfeited land must be taken into consideration, the same as if it were subject to the assessment. Otherwise the result would be to assess upon other land the benefits which actually accrued to the tax-forfeited land. This may not be done. That part of the cost which corresponds with the benefits to the tax-forfeited land must be borne by the village unless and until the legislature provides for reimbursement."

The conclusion therein reached is based on the principle of law that special assessments are levied on the theory that the property assessed has received a benefit commensurate with the amount of the assessment made, and that where a special assessment is made in excess of the amount of benefit bestowed upon the property, such amounts to a taking of property without just compensation. Our view, that the property of adjoining owners could not be assessed for the special improvements accruing to the tax-forfeited property, is sustained, we believe, by the following cases: State ex rel. Oliver Iron Mining Company v. City of Ely, 129 Minn. 40, 151 N. W. 543; In re Assessment for Paving Concord Street, St. Paul, 148 Minn. 329, 181 N. W. 859; Armour v. Village of Litchfield, 152 Minn. 382, 188 N. W. 1006. In State v. City of Ely, supra, the court said:

"Special assessments for local improvements rest upon the theory that the property so assessed is specially benefited by the improvement, and **a special assessment which exceeds the amount of such special benefit is, as to such excess, a taking of private property for public use without just compensation.**" (citing cases)

The decision was cited with approval in the case of In re Assessment for Paving Concord Street, St. Paul, supra, in which case the court also said:

"* * * it is not to be overlooked that charging private property with a lien for public improvements is a taking for public use, and that, if property not benefited is assessed, or **if an assessment is greatly in excess of benefits, the taking is without just compensation and is unconstitutional.** * * *"

Both of the above cases are cited as precedent for the decision in Armour v. Village of Litchfield, supra.

In addition to the theory upon which the above cases are decided, it is also possible to attack such an excessive charge on the theory that it is an over-taxation or unequal taxation. See Rogers v. City of St. Paul, 22 Minn. 494. See also State ex rel. City of St. Paul v. District Court of Ramsey County, 75 Minn. 292, 77 N. W. 968.

I am of the opinion that if property adjoining tax-forfeited property is assessed pro rata for the cost of making the special improvements on

such tax-forfeited property, it would amount to the imposition of special assessments in excess of the special benefit conferred upon the property assessed, and would, therefore, be a taking of property without just compensation, within the meaning of the above rule. On the authority of the above cases, we advised City Attorney McBrien that in determining the amount of the assessment per front foot on the land, the frontage of the tax-forfeited land should be taken into consideration the same as if it were subject to the assessment.

EDWARD J. DEVITT,
Assistant Attorney General.

March 12, 1940. 412a-26

296

Special—Forfeited lands—Street improvements—L. 35, CC. 278, 386—City Charter of Stillwater.

City Attorney, Stillwater.

It appears that Mr. "H" purchased two lots in the city of Stillwater in May, 1939, pursuant to Laws 1935, Chapters 278 and 386, as amended by Laws 1939, Chapter 328, said laws providing respectively for the forfeiture of tax delinquent lands and the sale thereof. In 1938 certain local improvements were made in the street fronting the two lots in question.

The first improvement was the treating of the street with tarvia. The special assessment for this improvement was confirmed and established by the city council at its meeting in November, 1938.

The second improvement was for grading and improving the street, the assessment for which was confirmed and established by the council on August 1, 1939.

You ask our opinion as to the legal status of each of these assessments.

1. With reference to the first assessment, you are advised that real property, the title to which is vested in the state, cannot be charged with a lien for local improvements. Foster v. Duluth, 120 Minn. 484; in re Delinquent Real Estate Taxes, Polk County, 182 Minn. 437. It therefore appears that the assessment made in November, 1938, could not create an effective lien since the property was then owned by the state. Accordingly the property in question is not assessable for the tarvia improvement.

2. It appears that the grading improvement was performed in 1938 when title was vested in the state, but that the assessment was not made until August 1, 1939, at which time the title was vested in "H". In order to determine if the property in question is subject to the assessment, we must determine when the lien of a special assessment attaches. Statutes

or charters generally make provision for this. McQuillin Municipal Corporations, Section 2260. There is no provision in your city charter.

The charter, Article XI, makes provision for local improvements and payment by special assessments. Section 231 provides that the council, "* * * before or after the completion of any improvement * * *," shall, "* * * apportion or assess" the cost thereof. The assessment is then to be filed with the city clerk, and the council is to designate a time, not less than ten days thereafter, and a place, for considering and acting upon such assessment. Public notice of such hearing is to be given. Section 234. At the appointed time and place the council considers the assessment, hears objections thereto, Section 236, and may make such corrections or changes as are necessary to equalize the assessment. Thereafter, the charter provides, the council, "* * * shall confirm and establish the assessment when so corrected and equalized," Section 237. The section further provides that:

> "Said assessment, when so confirmed and established, shall be final, conclusive and binding upon all parties interested therein; and the several amounts charged in such assessment as so confirmed and established against the several lots and parcels of land therein mentioned, shall be enforced and collected as hereinafter provided * * *."

The statute indicates that the hearing therein had, the correction and equalization, followed by the confirmation and establishment of the assessment, is the final and decisive act of the council in completing the assessment procedure. It has been held that a lien for a special assessment cannot exist until the amount of the assessment is determined. Downey v. New York, 51 N. Y. 186. It has been held under Special Laws 1871, Chapter 32, as amended, that the lien did not attach, "* * * until confirmation (by the board of public works) after due notice given as therein prescribed. * * *" Flint v. Webb, 25 Minn. 93. I am led to the conclusion that, in the absence of specific language describing a different time, the lien was meant to attach and does attach upon the final determination and establishment of the amount of the assessment by the city council.

The lien, therefore, attached as of August 1, 1939, at which time the title was vested in "H". Therefore the property in question is properly assessable for the grading improvement.

In appraising land sold pursuant to the above laws, the board of county commissioners should consider the status of special improvements at the time of the appraisal and the status to be at the time of the proposed sale in order to avoid inequities. Reappraisals should especially be made in those instances where the value of improvements was not considered at the time of the first appraisal, (on the assumption that the purchaser thereof would be the owner at the time of the final act of assessment and hence obligated to pay for them after purchase) and where the assessment was completed while the property was still held by the state.

EDWARD J. DEVITT,
Assistant Attorney General.

December 2, 1939. 412a-26

297

Special—Weed liens—General taxes may not be paid separately—M27 § 6161.

Redwood County Attorney.

You inquire whether an owner of real estate against which a lien for expenses of cutting noxious weeds has been assessed under Mason's Minnesota Statutes of 1927, Section 6161, the validity or amount of the lien being questioned by the owner, may pay the general taxes on the land without payment of the amount of the weed lien.

This question is answered in the negative. After the weed lien has been assessed and entered on the tax books, it becomes a part of the taxes. The treasurer has no authority to accept part payment thereof. If the owner wishes to contest the weed lien, he must pursue the remedies that are afforded by law. However, the law does not permit him to pay either the general taxes or the weed lien separately for the purpose of avoiding penalties thereon.

CHESTER S. WILSON,
Deputy Attorney General.

June 3, 1939. 322a-2

298

Assessors—Assessment books—Time in which to complete and deliver to county auditor—M27 §§ 1990, 2037, 2040; L. 35, C. 118.

Richfield Village Attorney.

You inquire as to the time within which the village assessor should have his assessment books completed and whether or not there is any set time when the assessor must return his books to the county auditor. You call our attention to Laws 1935, Chapter 118, the title to which act states:

> "An act determining and fixing the time within which the assessors are required to perform their duties and their compensation in villages, townships and certain cities in counties having a population of more than 450,000 inhabitants and an assessed valuation, * * * of more than $450,000,000.00."

Section 2 of said Chapter 118 provides as follows:

> "The duties of the assessor in towns, villages and cities affected by this Act shall be as now prescribed by law, and shall be performed between the first Monday in April and the last Monday in July of each year."

You are advised that this chapter governs your village.

Section 1990, Mason's Minnesota Statutes of 1927, provides that the assessor shall perform his duties during May and June of each year; and Section 2037, Mason's Minnesota Statutes of 1927, provides the assessor shall on or before the first Monday in July return to the county auditor his assessment books. Section 2034 provides for the board of review to meet on the fourth Monday of June; and Section 2040 provides for the county board of equalization to meet on the first Monday in July to perform their functions.

It is our opinion that under Chapter 118 your assessor has until the last Monday in July to perform his duties. In this case it would be necessary for the board of review to meet on the fourth Monday of June and then adjourn until the assessor gets his books completed.

The statute fixing the time within which the assessor must deliver his books to the county auditor is directory. The only requirement is that no interested party shall be injured in his rights. See State ex rel. Lum v. Archibald, 43 Minn. 428.

If Chapter 118, Laws of 1935, delays the work of the boards heretofore mentioned, the remedy to correct the same must rest with the legislature.

HAYES DANSINGBURG,
Assistant Attorney General.

July 5, 1940. 12b

EXEMPTIONS

299

Property leased—By private owner to U. S.—Cons. Art. 9 § 1; M40 § 1975.

Pine County Attorney.

You inquire whether the county board has the right to allow an application for removal of certain lands from the tax rolls, which lands have been leased to the United States government.

You enclose copy of application and lease. It appears therefrom that the United States government proposes to create and establish a recreational area to be known as the St. Croix Recreational Demonstration Area, which embraces certain lands in Pine County, including the lands covered in the application.

The consideration named in the lease is the sum of $1.00 and other valuable consideration, and the covenants of mutual promises contained in said lease. The term of the lease commences June 24, 1940, and to continue thereafter indefinitely, until the Federal Power Commission Project No. 310 is completed, or when certain proposed dams are constructed and put in operation, when said lease shall automatically terminate.

The lessor reserves the right to use all or any part of the lands in question for and in connection with the construction and maintenance of a dam or dams, or other works and appurtenances, and to operate the same and manipulate the level of the lake or pond thereby created; perpetual and exclusive flowage rights, with full right of ingress and egress at any and all times, even though it may entirely prevent the use by the government or its agents; the perpetual right to construct and operate lines for the transmission of electric energy, including the necessary steel towers, poles and other fixtures over and across the pond on said land; the right to remove minerals, if any, and subject to the rights of parties in possession on certain term leaseholds.

Section 1 of article 9 of the Minnesota Constitution provides in part as follows:

> "Power of Taxation— * * * Taxes shall be uniform upon the same class of subjects, and shall be levied and collected for public purposes, * * * and public property used exclusively for any public purpose, shall be exempt from taxation, * * *."

Section 1975, Mason's 1940 Minnesota Supplement, provides in part:

> "Property exempt from taxation.—All property described in this section to the extent herein limited shall be exempt from taxation, to-wit:
>
> * * *
>
> "(7) All public property exclusively used for any public purpose."

It must be determined whether the property in question comes within the definition of public property, and secondly, whether the use contemplated under the lease may be considered as exclusively for a public purpose. In the case of State ex rel. Realty Co. v. Cooley, 62 Minn. 183, 64 N. W. 379, the court stated that it was not necessary for property to be owned by the public in order to be entitled to tax exemption.

This was reiterated in State v. Browning, 192 Minn. 25, 255 N. W. 254.

The next consideration is a determination of the provision "used exclusively." In Anoka County v. City of St. Paul, 194 Minn. 554, 261 N. W. 588, our court held that the word "exclusively," as used in article 9, section 1, Minnesota Constitution, meant "substantially all" or "for the greater part," and went on to say further "this word must be given a practical construction," and cited the Cooley case, supra, with approval.

The portion of article 9, section 1, Minnesota Constitution, under consideration here, and subsection 7 of section 1975, Mason's 1940 Minnesota Supplement, may be considered as having the same meaning.

Whether the United States government, under the terms of its lease, has exclusive use of the land in question, in accordance with the interpretation placed upon these words by our court, or whether the uses of the land reserved by the lessor are sufficient to take it without the definition of the term, is a question which must be determined by the local authorities

passing upon the matter. If it believes, as a matter of fact, that the federal government, for all practical purposes, has exclusive use of the land, the board may allow the application for exemption, but if it feels that the United States government does not have substantially all or the greater part of the use of said land, and there is a substantial use reserved by the lessor, then the application for exemption should be denied.

JOHN A. WEEKS,
Assistant Attorney General.

October 18, 1940. 414a-2

300

Public property—Airport—Used exclusively for public purposes—Cons. Art. 9, § 1.

Springfield City Attorney.

You state that in 1933 the city of Springfield purchased an 80 acre tract of land adjoining the city limits for the purpose of establishing an airport. That the federal government contributed approximately $8,000.00 to assist the city in grading and levelling the field for airport purposes, all of which amount has been expended. That in 1934 the proposed airline route extending over your city was abandoned and that the local airport was never completed so far as the installation of beacon, markers and other equipment is concerned and that the airport was then designated and is now designated as an auxiliary landing field. As a result of this the City Council determined that 40 or 45 acres of the lands purchased would fully serve the purpose of an auxiliary landing field and so at the suggestion and with the consent of the State Aeronautics Commission the city sowed approximately 45 acres of the land into alfalfa. This 45 acre tract is now used as an auxiliary landing field and the remaining 35 acres sown to small grain. The alfalfa land is rented to a tenant for cash rental upon the condition that the land may be used as an auxiliary landing field, and the remaining 35 acres is each year cropped in small grain on a share basis.

The total income from the rental of the alfalfa and grain land does not exceed $300.00 annually, which amount approximately sets off the expense of the city in maintaining the airport. The 45 acre tract is occasionally used now by local fliers. The fact that alfalfa is planted there, you say, does not interfere with the use of the field as an auxiliary landing field. The city does not intend to abandon the original purpose of the land as an airport but intends in the future to devote the entire 80 acres to that purpose, at such time as a regular airline is established through the city. The city procured an airport license from the State Department of Aeronautics for the years 1937 and 1938 and will apply for a license in 1939.

It further appears that the city voluntarily and without objection paid a real estate tax levied upon the entire 80 acres during the years 1935, 1936, 1937 and the first half of 1938. You then ask:

> "I would like to have your opinion as to whether the entire airport lands are exempt from taxation, and if you consider them to be exempt, what you feel the possibilities of recovering the taxes heretofore paid by the City during the years above stated."

May I first advise that this office rarely passes upon questions relating to tax exemption of property, except upon request of the Commissioner of Taxation, when an actual case arises. Tax exemption cases involve some questions of fact which are not before us, so that it is difficult to arrive at a proper conclusion.

Generally speaking, and in an unofficial way, I am led to the conclusion, upon the facts submitted, that the 80 acre tract in question is not exempt from taxation under the provisions of Article 9, Section 1 of our state constitution, which exempts "public property exclusively used for any public purpose" from taxation. The leading recent case in Minnesota is that of County of Anoka v. City of St. Paul, et al, 194 Minn. 554, 261 N. W. 588, 99 A.L.R. 1137. Also see State v. Bishop Seabury Mission, 90 Minn. 92, 95 N. W. 882; State v. Carleton College, 154 Minn. 280, 191 N. W 400; State v. St. Barnabas Hospital, 95 Minn. 489, 104 N. W. 551. My conclusion is based on the fact that the land in question is not "**exclusively** used for any public purpose."

After reading these cases, if you are of the opinion that this land should be exempt from taxation, I would advise that you permit the question to be officially submitted to this office through the regular channels and an official opinion will be forthcoming. However, I am constrained to believe that the land in question is not exempt under the constitution. In one other instance we considered tax exemption in connection with airports and on March 4, 1931, in an opinion addressed to the Minnesota Tax Commission we held that the St. Paul airport was tax exempt, but in that instance the property was used exclusively for the public purpose in question.

EDWARD J. DEVITT,
Assistant Attorney General.

July 24, 1939. 414a-11

FORFEITED LANDS

301

Reimbursement—Decree or judgment required for by county auditor must be in an action brought to test validity of forfeiture proceedings—L. 39, C. 328.

Morrison County Attorney.

You refer to Laws of 1939, Chapter 328, Section 8, which provides for the reimbursement of a purchaser of tax-forfeited lands under certain conditions. In the particular case which you refer to the applicant, after acquiring his rights pursuant to conveyance from the purchaser from the State of Minnesota under the forfeiture proceedings, brought an action in Justice Court to have the owner of the life estate evicted from said premises. The owner of the life estate denied the title of said purchaser and the case was duly certified to the District Court, where judgment was entered pursuant to the enclosed copy. The court's decision was based on the fact that the sheriff never served a copy of the notice of expiration of time for redemption upon the owner of the life estate who was in actual occupancy of the real property involved.

You ask whether or not the county auditor would be justified in making a refund of the purchase price paid to the present owner of this real estate under the conveyance heretofore made by the State of Minnesota pursuant to Laws of 1935, Chapter 386.

The pertinent part of said Section 8 is as follows:

> "Wherever, prior to the passage of this act, the forfeiture to the state for taxes of any parcel of land heretofore sold pursuant to Laws 1935, Chapter 386 **has been invalidated in a proceeding in court,** the purchaser from the state or his assigns shall be reimhbursed * * *. Application for such reimbursement shall be made to the county auditor * * *, and shall be accompanied by a certified copy of the **judgment or decree invalidating such forfeiture** * * *."
>
> (Boldface ours)

From this language it appears that the county auditor should be able to read the judgment or decree in the proceeding which has been brought and from such examination determine therefrom that the forfeiture to the state has been invalidated. This necessarily requires that an action be brought in such a manner so that the judgment or decree entered therein would adjudge the invalidity of the tax forfeiture proceedings. In the judgment submitted with your request for an opinion there is nothing which would in any way indicate that the court has determined the question of the validity of the tax forfeiture proceedings. It is our conclusion, therefore, that said Section 8 requires a certified copy of a judgment or decree showing that the tax forfeiture in question has been invalidated. If the judgment does not show this on its face, but the invalidation of the forfeiture proceedings appears from the court's findings of fact and conclusions of law, a certified copy thereof should accompany the certified copy of the judgment.

Possibly the effect of the judgment in the instant case was to invalidate the tax forfeiture proceedings, but this does not appear from the copy submitted.

It necessarily follows, therefore, that the answer to your question must be that your county auditor should not make any reimbursement of

the purchase price of the tax-forfeited lands referred to unless a proper showing is made in the manner set forth above.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

September 12, 1939. 424a-16

302

Repurchase—Default in installments—No notice of cancellation necessary—Option automatically terminated by failure to pay installments or taxes— L. 33, C. 407; Ex. S. L. 37, C. 88.

Mahnomen County Attorney.

You refer to Laws of 1933, Chapter 407, which provides for the repurchase of lands forfeited for nonpayment of taxes. You refer also to Extra Session Laws of 1937, Chapter 88, which is a statute providing for the repurchase of lands forfeited for nonpayment of taxes.

You state that there are a number of instances in which repurchases have been made under both statutes and where the purchasers have failed to make their payments.

You ask what notice, if any, is necessary in order to terminate the title and interest of the purchaser under either statute upon default in making the payments of purchase price and current taxes.

This office ruled in an opinion under date of April 29, 1939, that upon a default in payment of installments for current taxes due under a purchase made under Extra Session Laws 1937, Chapter 88, "no procedure is necessary to completely cut off the right, title and interest of the purchaser as the default itself terminates all such interest."

As to purchases made under Chapter 407, supra, the provision dealing with the rights of the owner upon failure to make the payment of any annual installment of the purchase price and interest within 60 days after the anniversary date upon which the same becomes due, or upon failure to pay current taxes for any year prior to the first Monday of January the year following, is Section 5, which is as follows:

> "No person shall be evicted by any public authority from lands forfeited to the state by reason thereof within two years from the time such forfeiture takes place whether the option to repurchase is exercised or not, provided that he was an actual occupant of the premises when so forfeited."

It is to be noted that Chapter 407 does not sell the land which has been forfeited for taxes to the former owner, but merely gives to him an option to repurchase. He continues to have that option to repurchase

so long as he complies with all of the conditions as to payment of installments and current taxes. Upon failure to comply with such provisions, Section 3 above quoted provides that such option shall terminate. This is specifically provided for by statute. It is our conclusion that no affirmative action is required upon the part of the county or the state to terminate the option of the former owner to repurchase, as his failure to comply with the provisions of the repurchase automatically terminates the option.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

July 5, 1940: 425c-6

303

Sales—Default in installments—Contract terminated no further action necessary—No authority to reinstate contract—Land may be sold under— L. 35, C. 386.

Renville County Attorney.

You state:

"We have three or four purchasers of forfeited lands in Renville county, under Chapter 88 of the Extra Session laws of 1937, who have defaulted in payment of the deferred installments under their purchase agreement."

You ask:

(1) "In view of the delinquencies mentioned in paragraph one and the above quoted portion of Chapter 88, I would like to have an opinion from your office as to what procedure, if any, is necessary to completely cut off the right, title and interest of the purchaser in and to such real estate, under Chapter 88?"

(2) "If Section 5 of Chapter 88 automatically causes the purchaser or his heirs to lose their right, title and interest in such real estate upon becoming delinquent on any of the installments, can or may the County Auditor accept such delinquent installments and put the purchaser back in good standing so far as his title to the property is concerned?"

(3) "If there is a delinquency on deferred installments and the purchaser automatically loses his rights and title in the real estate purchased by him under Chapter 88, may the County Auditor and County Board, without any other procedure or notice to the delinquent purchaser, proceed under Chapter 386 of Laws of 1935 to sell said real estate?"

In answer to your first question, it is our opinion that no procedure is necessary to completely cut off the right, title and interest of the purchaser as the default itself terminates all such interest.

In answer to your second question, the county auditor, in our opinion, has no authority to accept delinquent installments nor has he any authority to reinstate the contract after it has been terminated by default.

In answer to your third question, the County Board and county auditor may, in our opinion, after default in such contract proceed at once without notice to the former purchaser to sell said land under Chapter 386, Laws 1935, if the land is otherwise properly for sale under said Chapter 386.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

April 29, 1939. 412a-17

P. S. We wish to call your attention to the possibility of the former owners again repurchasing under Chapter 283, Laws 1939.

304

Sales—Notice of sale or lease—Omission of descriptions and appraised values
—M40 §§ 2139-16, 2139-18, L. 39, C. 328.

Kanabec County Attorney.

You inquire as to the necessity for including descriptions and appraised values of the affected parcels of land in the notices of sale or lease of tax-forfeited lands or the sale of hay stumpage or timber thereon under the 1938 Supplement to Mason's Minnesota Statutes of 1927, Sections 2139-16 and 2139-18, as amended by Laws 1939, Chapter 328.

Before the 1939 amendment, Section 2139-16 expressly required the inclusion of the descriptions and the appraised values both in the list of parcels of land to be offered for sale, which was to be prepared by the county board and filed with the county auditor, and in the notice of sale to be published by the auditor. Section 2139-18, providing for the leasing of tax-forfeited land and the sale of hay stumpage and timber thereon, required not less than one week's published notice in an official paper within the county, but contained no requirement for the appraisal of such interests or for the inclusion in the notice of any descriptions or appraised values. Laws 1939, Chapter 328, amended Section 2139-18 so as to require the appraisal before leasing of land or before sale of hay stumpage or timber, and also amended Section 2139-16 by inserting, immediately after the clause requiring the county board to file with the county auditor a list of the parcels of land to be offered for sale, containing a description of the parcels of land and the appraised value thereof, the following language:

* * * "provided that the description and appraised value may be omitted in the discretion of the county board."

We note that this insertion was not in the amendatory bill, H. F. No. 1239, as first drafted and introduced in the 1939 legislature, but was inserted as an amendment somewhere in the course of passage.

The same section goes on to provide:

> * * * "and notice in substantially the following form shall be sufficient:",

followed by a form for notice containing columns for specific descriptions of parcels and appraised values. If the county board has adopted a resolution fixing terms of sale other than for cash only, a copy of the resolution must be published together with the notice.

The insertion where it appears of the above quoted language authorizing the county board to dispense with the descriptions and appraised values creates an apparent conflict and ambiguity in the law. The board is expressly required by other provisions of the law to classify all tax-forfeited land in the county and to appraise each separate parcel before sale or lease of the land or sale of timber or hay stumpage. The appraised values determine the minimum prices in making sales or leases. The auditor could not perform the duties imposed upon him in connection therewith unless the county board provided him with a list of the descriptions and appraised values of the several parcels of land affected. It is obvious that if the inserted language were construed literally, it would permit the county board, by omitting the descriptions and appraised values, to eliminate an essential step in the proceedings for disposing of the forfeited lands, or the products thereof, and thus defeat the main object of the law. As our supreme court said in the case of Vlasak v. Vlasak, 283 N. W. 489, the legislature could not have intended to mar our law with such a blemish of unworkable anomaly.

A law is to be construed as a whole, not piecemeal. Considering the fact that in the same section provision is made both for the filing by the county board of the list of lands and for the publication of notice of sale by the county auditor, it becomes clear that the inserted clause was intended by the legislature to apply to the latter step in the proceedings and not to the former. This is the only construction of the law that makes sense.

We therefore interpret Section 2139-16, as amended by Laws 1939, Chapter 328, as follows:

1. The list of lands to be filed with the county auditor by the county board, after classification and appraisal, must in all cases contain the descriptions and appraised values of the several parcels affected.

2. The descriptions and appraised values of the several parcels should be included in the published notice of sale, provided, that those items may be omitted if the county board so determines. Preferably such determination should be made in the resolution ordering the sale, but it may legally be made in a separate resolution. In either case the record of the proceedings should show clearly the action of the board in the matter.

In our opinion the same rules should apply with respect to leasing lands or sale of timber or hay stumpage under Section 2139-18, as amended.

In case the descriptions and appraised values are omitted, the form of notice prescribed in Section 2139-16, as amended, will have to be modified. The following form is suggested:

> "Notice is hereby given that I shall sell to the highest bidder at my office in the court house in the ..... of ..... in the county of ....., State of Minnesota, the lands forfeited to the state for non-payment of taxes which have been classified and appraised as provided by law, as described in the list of such lands on file in my office. Said sale will be governed, as to terms, by the resolution of the county board authorizing the same, and shall commence at ..... o'clock a. m. on the ..... day of ....., 19.....
>
> "Given under my hand and seal this ..... day of ....., 19.....
>
> .....
>
> County Auditor
>
> .....County,
>
> Minnesota."

A similar form of notice may be used for leasing land or for sale of hay stumpage or timber, with the necessary changes.

Although we are satisfied that the foregoing construction is sound, and that the county board is authorized to omit the descriptions and appraised values, we think that it would be preferable to include the descriptions and appraised values in all notices unless there are urgent reasons to the contrary. The inclusion of the descriptions and appraised values in the published notice will enable prospective bidders to check up on the property offered for sale or lease more readily than if it were necessary to go to the auditor's office. Prospective bidders who would not otherwise attend may thereby be attracted to the sale or leasing. There will be a clear public record of the property to be offered for sale or lease, preventing misunderstanding and eliminating the possibility of charges that the auditor had either included or excluded property improperly.

Moreover, inclusion of the descriptions and appraised values in the published notice would clearly be in compliance with the express provisions of the law, whereas, the omission of those features must be justified by a process of construction which to some extent departs from a literal reading of the law, thereby opening the door for possible court attack on the sale or lease by some interested taxpayer. The probability of such attack may be small and the chance of its succeeding slight. However, it is obviously unwise to leave an opening for litigation unless there is good cause for so doing. In cases where the cost of publishing the descriptions and appraised values in the notices would be practically prohibitive or entirely out of proportion to the value of the property to be offered for sale or

lease, the county board would no doubt be justified in omitting these items. Otherwise it would be advisable to include them.

We suggest that the county officials concerned make it a point to get in touch with their senators and representatives in the next legislature and attempt to secure an amendment which will clarify the law, at the same time ratifying all sales or leases which may have been made in the meantime under notices omitting the descriptions and appraised values.

CHESTER S. WILSON,
Deputy Attorney General.

May 20, 1939. 425c-7

GASOLINE TAXES

305

Bonds of applicants—Exemption—M40 § 2720-88, L. 33, C. 405.

Commissioner of Taxation.

You inquire whether or not the Commissioner of Taxation has discretionary power under the provisions of Section 2720-88, with respect to the exemption of applicants from furnishing bonds for the payment of taxes and fees as provided by that section.

You refer to a previous opinion dated November 22, 1937 to the effect that the Commissioner has discretion to refuse to exempt an applicant under the above section.

Since that opinion, the Supreme Court of Minnesota has decided that case of State v. Oliver Iron Mining Company, 292 N. W. 407, reargument denied, 292 N. W. 411. In that case the court construed Section 32(c), Chapter 405, Laws 1933, which reads as follows:

> "Whenever a corporation which is required to file an income tax return is affiliated with or related to any other corporation through stock ownership by the same interests or as parent or subsidiary corporations, or has its income regulated through contract or other arrangement, the Tax Commission may permit or require such consolidated statements as in its opinion are necessary in order to determine the taxable net income received by any one of the affiliated or related corporations. If 90 per cent of all the voting stock of two or more corporations is owned by or under the legally enforceable control of the same interests the Commission may impose the tax as though the combined entire taxable net income was that of one corporation except that the credit provided by Section 27(e) shall be allowed for each

corporation; but inter-company dividends shall in that event be excluded in computing taxable net income."

The court held that the Tax Commission was given no discretion by the quoted provision, that it was not only empowered but compelled to require and permit consolidated tax statements from affiliated or related corporations, and that the word "may" in the last sentence should be construed as "shall." The court said:

> "By the first sentence of subdivision (c) the tax commission is empowered and we think compelled to require and permit consolidated tax statements from affiliated or related corporations for the purpose of determining the taxable income of any one of such corporations, and we think it makes plain common sense and discloses the obvious intent of the legislature to interpret the word 'may' in the last sentence as 'shall' and thus to require the imposition of one income tax upon a group of affiliated corporations where 90% or more of the voting stock is held by one interest. To adopt the state's contention would be to enable a group of affiliated corporations to avoid a perfectly fair combined tax by scrupulously avoiding the suspicion of evasion when such a course seemed profitable.
>
> (2) 2. "Moreover where a power is conferred to be exercised for the benefit of the state or a private party the word 'may' is to be construed to mean 'must' and the statute is mandatory. Rock Island County Supervisors v. United States, 4 Wall. 435, 18 L. Ed. 419; Bowen v. Minneapolis, 47 Minn. 115, 49 N. W. 683, 28 Am. St. Rep. 333; Babcock v. Collins, 60 Minn. 73, 61 N. W. 1020, 51 Am. St. Rep. 503."

The portion of the statute, Section 2720-88(b), to which you now refer, is as follows:

> "If any licensee desires to be exempt from furnishing such bond as hereinbefore provided he shall furnish an itemized financial statement showing the assets and the liabilities of the applicant and if it shall appear to the chief oil inspector from the financial statement or otherwise that the applicant is financially responsible then the chief oil inspector may exempt such applicant from furnishing such bond until the chief oil inspector otherwise orders."

The legislature must have incorporated this language into the statute for some definite purpose. It must have been the intent to provide for the exemption of such applicants as are able to furnish satisfactory evidence of financial responsibility. It is entirely within the discretion of the Commissioner to determine whether the evidence of financial responsibility is sufficient and satisfactory. A general regulation, however, to the effect that all applicants must furnish bonds entirely irrespective of proof of financial responsibility would be directly contrary to the expressed legislative intent to provide for the exemption of such applicants as were able to furnish satisfactory proof of financial responsibility. The use of the word "may" cannot be construed as authorizing the Commissioner of Taxation to make such an order, where the legislative intent so clearly

appears. The same reasoning as to the use of such a word is applicable here as in the recent Supreme Court decision above referred to.

To the extent that the opinion of November 22, 1937, is in conflict with the foregoing, it is hereby withdrawn.

P. F. SHERMAN,
Assistant Attorney General.

August 12, 1940. 324

GRAIN

306

Bushel tax not applicable to truck operator—M27 §§ 2350-2353, M40 § 5060.

Waseca County Attorney.

You inquire as to the operation of the so-called bushel tax law, Mason's Minnesota Statutes 1927, Sections 2350-2353. There seems to be a good deal of confusion and misunderstanding about the application of this law among the assessors and other local officials concerned in various parts of the state. We are endeavoring to aid the various taxing authorities in working out a consistent and systematic application of the law.

Your question is whether a truck driver who buys grain from producers for resale is subject to the bushel tax in the same manner as the owner of a grain elevator or warehouse.

Your question must be answered in the negative. By the express terms of the law, the bushel tax is imposed on "every person, firm or corporation operating a grain elevator or warehouse in this state * * *" (Mason's Minnesota Statutes 1927, Section 2350). Questions frequently arise as to what constitutes a grain elevator or warehouse within the meaning of this statute, but it is clear that a truck used merely for the purpose of transporting grain from the place of purchase to the place of resale could not be regarded as an elevator or a warehouse.

You call attention to Mason's 1938 Supplement, Section 5060, relating to the licensing and regulation by the railroad and warehouse commission of public local grain warehousemen and purchasers of grain. This section provides:

> "Any person, firm or corporation desiring to purchase grain from producers for the purpose of resale shall procure a license therefor from the Railroad and Warehouse Commission before transacting such business and shall be subject to the same laws, rules and regulations as may govern public local grain warehousemen in so far as they may apply."

The laws, rules and regulations referred to in this provision are those which relate to the manner of conducting business. Laws relating to tax-

ation are not included. Section 5060 of the 1938 Supplement was derived from Laws 1923, Chapter 114, as amended by Laws 1937, Chapter 296. The titles of these chapters made no reference to taxation. Hence the provision above quoted cannot be construed so as to apply to matters of taxation.

CHESTER S. WILSON.
Deputy Attorney General.

June 29, 1939. 215c-10

HOMESTEADS

307

Classification—Ownership by Association does not entitle each member occupant to reduction—Cons. Art. 9 § 1; M40 1993; M27 § 1990.

Minneapolis City Attorney.

You state that a cooperative association owns land in the City of Minneapolis on which there is an apartment building. Each occupant buys one apartment.

You inquire whether each occupant is entitled to a reduction in the assessed valuation applicable to homesteads, the valuation being based on the apartment occupied by such occupant.

The 1938 supplement of Mason's Minnesota Statutes, Section 1993, class 3-C, provides in part as follows:

> "* * * the first four thousand full and true value of each tract of platted real estate used for the purpose of a homstead shall be exempt from taxation for state purposes; * * *".

The classification of real property, for the purpose of taxation, does not violate the uniformity clause of the State Constitution, Article 9, Section 1, and the equal protection clause contained in the Fourteenth Amendment to the Federal Constitution, and the power of classifying subjects for taxation purposes is primarily with the legislature. However, the classification must not be unreasonable, arbitrary or capricious. The classification must rest on some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike. Reed vs. Bjornson, 191 Minn. 254, 253 N. W. 102; and Apartment Operators Ass'n. vs. Minneapolis, 191 Minn. 365, 254 N. W. 443.

> "Placing homesteads in two classes on the basis of valuation was within the scope of the broad power of the legislature to classify property for the purpose of taxation * * * granting the power of classification we must grant government the right to select the differ-

ence upon which the classification shall be based, and they need not be great or conspicuous * * *."

Apartment Owners vs. Minneapolis, supra.

The homestead exemption from debt should not be confused with its classification for the purposes of taxation.

Mason's Minnesota Statutes 1927, Section 1990, provides in part as follows:

"The assessor—shall actually view, when practicable, and determine the true and full value of each tract or lot of real property listed for taxation, and shall enter the value thereof, including the value of all improvements and structures thereon, opposite each description."

In La Paul v. Heywood, 113 Minn. 376, 129 N. W. 763, 32 L. R. A. (N.S.) 368, Ann. Case 1912A, 247, our court said:

"Where a lease is silent as to the payment of taxes, improvements which are removable by the tenant at the end of the term are taxable to him, and not to the landlord. * * * There is no provision of law by which the owner of land can pay the taxes, without at the same time paying the taxes upon all improvements located on the land. **Under the law of Minnesota all buildings and improvements are for the purpose of taxation considered a part of the real estate, and must be assessed as such.**"

The aforequoted case involved a determination of liability for taxes as between landlord and tenant. The first sentence quoted relates to that liability rather than to the duties of the assessor. The remainder of the quoted passage, however, is declaratory of the duty of the assessor. As was said in the note to this case in L. R. A.:

"Although it is stated in the opinion and repeated in the first syllabus by the court, that the improvements are taxable to the tenant, and not to the landlord, the question was not as to the party to whom they should be taxed, but whether the burden of the tax must ultimately rest on the landlord or tenant."

In view of the statutory provision that the assessor shall "determine the true and full value of each tract or lot of real property," we are of the opinion that but one assessment and one liability for the tax on each individual tract or lot exists, and that the assessor cannot be compelled to make more than one assessment of each tract or lot.

Since the assessor is empowered by statute merely to assess "each tract or lot," I am of the opinion that any attempt by the assessor to divide the assessment, which would be necessary in the case you cite, would not be possible under this statute.

You also inquire:

"Is the cooperative association entitled to the benefits of the reduction in the valuation applicable to homesteads?"

It is my opinion that a cooperative association could not properly receive the homestead exemption from taxation, as it could not fulfill the requisites of residence and occupancy.

JOHN A. WEEKS,
Assistant Attorney General.

September 7, 1939. 232d

308

Classification—Part of land leased to tenant—M27 §§ 1990, 1979.

Houston County Attorney.

You state that a landlord owns a contiguous tract of land less than one-third of an acre in extent on part of which she maintains her home. The remainder of the land has been leased for ten years to a tenant who has erected upon it a house in which he resides, a filling station, and a fruit stand, all of which buildings are subject to removal upon termination of the lease.

1. You first inquire whether the tenant's buildings should be assessed with the land. Our answer is in the affirmative. Section 1990, Mason's Minnesota Statutes 1927, provides:

"The assessor * * * shall actually view, when practicable, and determine the true and full value of each tract or lot of real property listed for taxation, and shall enter the value thereof, including the value of all improvements and structures thereon, opposite each description."

The only exceptions to Section 1990 are those mentioned in Section 1979, subdivision 3, which relate to improvements placed by tenants upon lands owned by the United States or a railroad company and are therefore inapplicable here.

2. You further state that it is contended a person may have and claim a homestead in leased land and that all of the land is accordingly entitled to a homestead rate.

A distinction is to be observed here between homesteads for purposes of exemption from debts and homesteads for purposes of taxation. In respect of the former, the tenant's buildings and his interest in the land are clearly exempt from creditors' process, pursuant to Section 8336.

That quality of his homestead right does not, however, affect the nature of the property as a subject of taxation. It is provided by Section 1990, supra, that the assessor shall "determine the true and full value of

each tract or lot of real property." Accordingly, there can be but one assessment and one liability for the tax on any individual tract or lot. The assessor cannot be compelled to make more than one assessment, nor would it be proper for him to attempt to divide the assessment on any individual tract. Opinion of Attorney General, September 7, 1939. There can be but one homestead exemption in a single tract of land, and that exemption is the owner's.

3. You further inquire as to the proper classification for tax purposes of the leased portion of the property.

In our opinion the leased portion of the premises should be placed in Class 4. In Opinion No. 796, 1934, Attorney General's Report, given to the Minnesota Tax Commission, the twelfth question related to a city lot on which was located two houses. The owner lived in one and rented the other. The then Attorney General ruled:

> "That part of the lot on which is located the house in which he lives should be placed in class 3c. The remainder of the lot should be placed in class 4."

Our information is that for the past seven years the State Tax Commission and its successor, the Commissioner of Taxation, as well as local taxing authorities throughout the state, have classified property in accordance with the quoted opinion. The seeming inconsistency of that ruling and supreme court decisions in statutory homestead exemption cases was noted by this office in an opinion dated July 7, 1939 (opinion following this one), in which this office held that, since the earlier ruling had been so widely established in popular usage for a number of years and the consequences of a reversal would be so far-reaching, the practical construction of Section 1993 should not now be disturbed.

We adhere to the previous rulings of the Attorney General and hold that the homestead exemption may be applied only to that portion of the premises upon which the owner resides and which is not leased to the tenant.

FREDERICK O. ARNESON,
Special Assistant Attorney General.

September 9, 1940. 232d

309

Classification—Part of lot on which is located the house in which owner lives should be placed in class 3B—M40 § 1993, L. 33, C. 359.

Mahnomen County Attorney.

You state:

> "One 'M' owns Lots 1 & 2 of Block 5, Aamoth's Addition to the Village of Mahnomen, Minnesota, which run east and west. He has

constructed two dwelling houses upon the two lots, one upon the east half of said two lots and the other upon the west half. 'M' resides in the dwelling house on the east half of said two lots and rents out the dwelling house on the west half thereof. There is a garden between the two houses which 'M' and his tenant use together. The garden mentioned above occupies the center of the two lots so that it is partly on the east half and partly on the west half of said lots."

You ask:

1. "Under the circumstances, is 'M' entitled to homestead classification on the whole of said lots including the two dwelling houses under the provisions of Section 1933, Class 3C, of Mason's Minnesota Statutes, 1938 Supplement? Or should he be granted homestead classification on the east half of said lots, which contains the dwelling house, and denied it on the other half?"

You state:

"One 'R' owns four adjoining lots. On the one farthest south, he has his dwelling house in which he resides with his family. On the next lot he has a restaurant which he rents out. On the next lot he has a gasoline filling station which he operates himself and on the fourth lot he has an implement store, which he operates himself. The whole area is less than a half acre and is his statutory homestead and for that reason he claims he is entitled to homestead classification on all four lots."

You ask:

2. "Under the circumstances stated, is he entitled to homestead classification on all four of said lots or only on the one upon which his dwelling house is situated?"

An earlier case in point was ruled on by a former attorney general in Opinion No. 796, 1934 Report, in which the following question, designated as No. 12, was submitted:

"A person owns a city lot on which is located two houses. He lives in one and rents the other. How should this lot be classified for purposes of taxation?"

This was answered as follows:

"That part of the lot on which is located the house in which he lives should be placed in class 3B. The remainder of the lot should be placed in class 4."

We are informed that ever since this opinion was rendered the state tax commission and the taxing authorities throughout the state have proceeded in accordance therewith, thereby placing in effect a practical construction of Laws 1933, Chapter 359, Section 1 (1938 Supplement to Mason's Minnesota Statutes of 1927, Section 1993), so far as this particular question is concerned. We appreciate that this previous opinion seems inconsistent with the decisions of our supreme court in statutory homestead exemption

cases, and perhaps if the question were now presented for the first time we might reach a different conclusion. However, it must be admitted that there are differences between the homestead exemption laws and the tax assessment laws which lend some support to the opinion of the former attorney general. At any rate, following the settled practice of the courts, we feel that it has become so widely established in practical usage and that the consequences of reversal would be so far-reaching that we cannot now disturb it.

Adhering, for that reason, to the former opinion, we hold that the owners in both your cases are entitled to homestead classification only for the premises on which their dwelling houses are situated, that is, for the property actually occupied and used by the owners for residence purposes.

Any question which may arise as to the dividing line between such property and adjacent property of the same owner is a practical matter for determination by the assessor.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

July 7, 1939. 232d

310

Exemption—Actual occupancy required—Filing notice ineffectual—M27 § 8342; M40 § 1992-1, 3b, and 3c.

Redwood Falls City Attorney.

You state:

> One A owns a building in the City of Redwood Falls, Minnesota, with a mercantile establishment on the first floor and living quarters on the second floor. About 15 months prior to May 1, 1940, the owner moved from said premises and left the city. At the time of making the move out of the city he filed a statutory notice with the register of deeds of Redwood County, setting forth his intention to claim and hold said property as his homestead.

You inquire:

> "Would the assessor be complying with the law in listing said property as a homestead for tax purposes? The owner of the said premises has not resided on said premises since moving away."

"Homestead" means the premises occupied by a person as his home or place of abode. This involves questions of fact, to be determined for taxation purposes, in the first instance, by the assessor. If the owner ceases to occupy the premises as his home, he loses his homestead rights therein for purposes of taxation.

Filing notice of homestead claim under Mason's Minnesota Statutes of 1927, Section 8342, has no effect upon homestead rights for taxation purposes. That section applies only to exemption from execution.

Mere temporary absence of the owner will not terminate his homestead rights, provided he maintains his living quarters upon the premises in condition for continued occupancy by himself or his family, showing his intention to return presently, and provided he does not establish another home elsewhere or otherwise manifest an intention to abandon the actual occupancy of the premises as his place of abode. However, if the owner moves and actually establishes his regular home elsewhere, he thereby terminates his homestead rights in his former home, for taxation purposes, even though he may intend to return there at some future time. See Dunnell's Digest and Supplements, Sections 4200, 4215.

HAYES DANSINGBURG,
Assistant Attorney General.

May 13, 1940. 232d

311

Homestead—Method of apportionment between counties—M40 §§ 1933 and 1993 (3b); L. 33, C. 359.

Mahnomen County Attorney.

You state:

"Mrs. S. is the owner of SE¼ Sec. 1-143-43 in Norman County, Minnesota, and has suitable farm buildings and improvements upon said land and lives thereon and farms the same with her husband and son, Phillip. She was allowed the 'homestead rate' prescribed by Chapter 359 of the Laws of Minnesota for 1933. The assessed value of said real estate was $1066 and the true and full value $5,330. Mrs. S. and her son Phillip also own Lot 8, Sec. 6, and Lot 1, Sec. 7-143-42 in Mahnomen County, Minnesota, as tenants in common. Said Lot 8, Sec. 6-143-42 is directly east of and contiguous to and adjoining SE¼ SE¼ Sec. 1-143-43 owned by Mrs. S. in Norman County and said lot 1 Sec. 7-143-42 is directly south of and adjoining said Lot 8 Sec. 6-143-42. There is no highway on the county line between said lands and the said Mahnomen County lands are farmed with and as a part of the Norman County land. As stated Mrs. S. and her husband and son Phillip live on the Norman County land and farm and operate all the land above described as one farm. The homestead rate has not been allowed upon said Mahnomen County land. It is assessed as of the true and full value of $1000. Mrs. S. and her son Phillip now propose to apply for the homestead rate upon their said lands in Mahnomen County."

You ask:

"Should their application be allowed? Is the son entitled to an exemption on his undivided half interest in the Mahnomen County land?"

You inquire as to the application of Chapter 359, Laws 1933 which is now Section 1993, 1938 Supplement to Mason's Minnesota Statutes and particularly as to paragraph 3(b) thereof. Under said paragraph 3(b) real estate used for the purposes of a homestead up to a valuation of $4000.00 shall be valued and assessed at twenty per cent of the true and full value thereof. If Mrs. S. is receiving the full benefit allowable upon property of the true and full value of $4000.00 in Norman County, she is not entitled to any additional benefit under said act in Mahnomen County. Her son Phillip does not reside on the land in Mahnomen County of which he is part owner, neither does he own the land upon which he resides which is contiguous to the land in Mahnomen County. Under the circumstances stated, in our opinion the son Phillip is not entitled to the benefit of the provisions of said Chapter 359. In order to obtain such benefit, the owner must actually occupy a contiguous piece of land as a homestead. Here the land on which he lives is occupied by his mother as her homestead.

You ask:

"If exemption should be granted on said Mahnomen County land how should the $4000.00 prescribed by the statute be divided or apportioned between the two counties and what method or procedure should be used by the two counties to determine the proper division or proportion?"

If Mrs. S. should be granted the benefit of said Chapter 359 in Mahnomen County, it is our opinion that the $4000.00 should be apportioned between the two counties on the same ratio as the true and full value of the tracts in the respective counties bears to the total amount of the true and full value of all the tracts involved. In other words, if the true and full value of the tract in Norman County is $4000.00 and that of the tract in Mahnomen County is $1000.00, then the total true and full value is $5000.00. The ratio of the Norman County tract is $\frac{4000}{5000}$ or 4/5, and 4/5 of the $4000.00 prescribed by the statute should be allocated to Norman County and 1/5 to Mahnomen. It is our opinion that Mrs. S. may elect to have the $4000.00 applied first to the tract on which she is actually living, if she chooses so to do, and the remainder, if any there be, applied on the Mahnomen tract. In no event, however, may the lower rate be applied to more than $4000.00 of the true and full value of said land.

You state:

"A. owns 40 acres of land in Norman County, Minnesota, the east line of which coincides with the Mahnomen County line. A. also owns a quarter section of land in Mahnomen County adjoining and contiguous

to his Norman County forty. A. has his farm buildings and improvements on his Norman County forty and lives thereon with his family but farms and operates both tracts as one farm. The true and full value of his Norman County forty is $2000 and he has been allowed his homestead exemption thereon by Norman County. The true and full value of A.'s Mahnomen County Quarter is $2000. He has not been granted a homestead exemption thereon and proposes to apply for such exemption."

You ask:

"Should such application be granted?"

Upon the facts stated, it is our opinion that the application should be granted subject to the limitations imposed by said Chapter 359.

You also ask:

"If so, how should the $4000 prescribed be divided or apportioned between the two counties and what method or procedure should the two counties use in order to determine the proper division or proportion?"

The rules laid down above in answer to your question 1(b), are equally applicable here and answer your question.

We regret that owing to the large volume of work for the legislature in addition to the great volume of regular business, there has been a delay in answering your request.

GEORGE B. SJOSELIUS,
Special Assistant Attorney General.

April 27, 1939. 232d

312

Income Tax—Salaries of district court judges—Constitutional law—Cons. Art. VI § 6.

Commissioner of Taxation.

You have inquired whether the salaries of Judges of the District Court in this state are subject to the income tax.

A former opinion of the Attorney General, No. 804, 1934 report, dated April 7, 1934, is on file in your office. That opinion holds that state district court judges are subject to the state income tax, whether appointed or elected before or after the enactment of Chapter 405, Laws 1933, the Income Tax Law. You state that a reconsideration of the question has been requested by two district court judges.

Section 11, Chapter 405, Laws 1933, Mason's Minn. Statutes, 2394-11, provides that "gross income" shall include "every kind of compensation for labor or personal services of every kind from any private or public employment, office, position, or services whatsoever." If the salaries of judges are to be excluded from gross income, it must be by virtue of Article VI, Section 6, of the Constitution of Minnesota, which provides that the judges of the Supreme and District Courts shall receive such compensation as may be prescribed by the Legislature, "which compensation shall not be diminished during their continuance in office."

The United States Supreme Court recently considered a similar question arising under Article III, Section 1, of the Constitution of the United States. So far as material here, that section is exactly the same as the provision above quoted from our own Constitution. In O'Malley v. Woodrough, 307 U. S. 277, 59 S. Ct. 838, it was held that the compensation of federal judges taking office after June 6, 1932, the date of the enactment of an Act of Congress expressly taxing the income of judges thereafter taking office, is subject to the Federal Income Tax.

O'Malley v. Woodrough in effect overrules Evans v. Gore, 253 U. S. 245, 40 S. Ct., 550. It expressly overrules Miles v. Graham, 268 U. S. 501, 45 S. Ct. 601, to the extent that the former decision is inconsistent with it. The court said:

> "Having regard to these circumstances, the question immediately before us is whether Congress exceeded its constitutional power in providing that United States judges appointed after the Revenue Act of 1932 shall not enjoy immunity from the incidences of taxation to which everyone else within the defined classes of income is subjected. Thereby, of course, Congress has committed itself to the position that a non-discriminatory tax laid generally on net income is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition of Article III, Section 1, of the Constitution. To suggest that it makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, Sec. 1. To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering."

Two decisions of the federal courts since O'Malley v. Woodrough have held that federal judges are subject to taxation upon their salaries, whether appointed before or after June 6, 1932. See Bland v. Commissioner, 102 Fed. (2nd) 157; Magruder v. Brown, 106 Fed. (2nd) 428.

Prior to the O'Malley case, the opinions of state courts construing similar provisions of state constitutions were in conflict. A majority of

these decisions held that a non-discriminatory income tax did not violate constitutional provisions against diminution of salaries. Among these are:

Taylor v. Gehner, 45 S. W. (2nd) 59 (Mo. 1932).
Poorman v. State Board, 45 Pac. (2nd) 307 (Mont. 1935).
Martin v. Wolfford, 107 S. W. (2nd) 267 (Ky. 1937).
State v. Nygaard, 150 N. W. 513 (Wis. 1915).
Cases reaching the opposite result are:
Long v. Watts, 110 S. E. 765 (N. C. 1922).
Gordy v. Dennis, 5 Atl. (2nd) 69 (Md. 1939).

The two decisions last cited rely in large measure on Evans v. Gore which, as pointed out, has since been overruled. The Maryland case was decided only two months before the decision in O'Malley v. Woodrough.

There is no case, except Miles v. Graham, 268 U. S. 501, expressly overruled in the O'Malley case, which holds that a judge taking office after the enactment of an income tax law may claim constitutional immunity from taxation. In Evans v. Gore, Gordy v. Dennis and Long v. Watts, supra, the judge who questioned the imposition of the tax upon his salary had been appointed or elected prior to the enactment of the Income Tax Law for a term which had not expired when the tax was imposed. Even before the O'Malley case, Miles v. Graham had been materially weakened, as pointed out in Dupont v. Green, 195 Atl. 273 (Del. 1937).

The term of office of district court judges in this state is six years Article VI, Section 4, Minnesota State Constitution. With respect to all judges whose terms of office began subsequent to April 21, 1933, it is clear that the constitutional provision, Article VI, Section 6, cannot be held to authorize the exclusion of their salaries from gross income under the provisions of Chapter 405, Laws 1933.

With respect to the compensation of judges for the remainder of a term beginning prior to April 21, 1933, I am of the opinion that the former opinion of the Attorney General, dated April 7, 1934, is correct, and that the constitutional provision does not exclude such salaries from gross income. The United States Supreme Court indicates clearly that when that question is squarely presented to it under the corresponding section of the Federal Constitution, it will so hold. See O'Malley v. Woodrough, supra. Three state courts have so held under similar constitutional provisions: Poorman v. State Board, supra, Martin v. Wolfford, supra; State v. Nygaard, supra.

I am of the opinion that the reasoning of the United States Supreme Court in the O'Malley case as summarized in the quotation included in this opinion, and that of the state courts in the cases reaching the same result under similar constitutional provisions, are persuasive, and will be followed by the courts of Minnesota.

Your question is answered in the affirmative.

P. F. SHERMAN,
Assistant Attorney General.

June 21, 1940. 531h

LEVIES

313

Agricultural societies—M40 § 738-16.

Mower County Attorney.

You state that you have an agricultural society which is a member of the State Agricultural Society in conformity with the law. You call our attention to Section 738-16, Mason's 1940 Minnesota Supplement, which is Laws 1929, Chapter 48. This section is an amendment of Laws 1927, Chapter 128, which was passed April 8, 1927. In Chapter 128 the authority to levy the tax was given by a unanimous vote of the board. Section 738-16 amended Chapter 128, Laws 1927, in that it permitted a tax to be levied upon a four-fifths vote of the board. Both laws state, "to assist such society in paying its financial obligations heretofore incurred."

You inquire if the words "heretofore incurred" apply simply to the past or if this statute may be construed prospectively so that whenever there is indebtedness prior to the time of the levy, that the board may make the one-quarter mill levy.

It is our opinion that the board, by a four-fifths vote, may grant authority to levy a tax of not exceeding one-quarter mill to assist such society in paying its financial obligations incurred prior to April 8, 1927. We can see nothing to justify an opinion that the legislature intended to change the date of April 8, 1927 to the time of the passage of Chapter 48, Laws 1929, which was March 9, 1929.

Under this law there is no time limit as to when such tax can be levied if the obligations were incurred prior to April 8, 1927, and are still valid and existing obligations. However, this section does not in our opinion give the various county boards authority to levy such tax to pay any obligations incurred after April 8, 1927.

HAYES DANSINGBURG,
Assistant Attorney General.

July 16, 1940. 519a

314

Relief—County board to levy in counties having the town system—M27 § 3187, 3177; M40 § 3195-1, 2, 3; 974-11 to 974-20.

Swift County Attorney.

You submit the following questions:

1. Whether the county may levy taxes for poor relief purposes and have such poor relief administered by the county welfare board.

2. If it does so, is it necessary that each township, village or city in your county adopt a resolution agreeing with the county welfare board that the latter shall supervise and administer the poor relief funds in such township, village or city?

3. Is it necessary that the board of county commissioners pass a resolution to the effect that poor relief be administered through the county welfare board?

There are two distinct systems of poor relief—the county system and the town system. The electors of the county determine the system which is to be operative in their county. Your county, Swift County, is one in which the electors have chosen the town system. It should be thoroughly understood that this opinion is limited to those counties in which the town system is operative. We will not limit each reference to a county hereafter by a statement that it is a county in which the town system of relief obtains, but it must be understood that such limitation is in fact to be applied as though stated in each reference.

We shall now proceed to a discussion of the various obligations for relief to the poor for which said counties must provide. Section 3187, Mason's Minnesota Statutes of 1927, provides that the county board of any county having the town system may establish, maintain and govern a county poorhouse in the same manner as in other counties. It provides further that "the cost thereof shall be paid by the county; but at its July meeting in each year the county board shall fix a weekly rate for each inmate, to be paid to the county by the town, city, or village from which he comes." This does not necessarily mean that the towns, cities or villages will be charged with the full cost of the operation of such poorhouse.

The liability of counties for the care of the poor in counties where the township system prevails is fixed by Section 3195-1, Mason's Minnesota Statutes, 1938 Supplement, which provides that in such counties a town, village or city, however organized, shall be entitled to be reimbursed by the county for seventy-five per cent of the amount expended for poor relief in any calendar year in excess of one mill of the taxable value of property in such town, village or city for that year. Sections 3195-2 and 3195-3 provide the procedure for carrying out the provisions of Section 3195-1. Section 3195-4 exempts any county in which a city of the first class is located when said city has ninety per cent or more in value of the taxable property of the county located within it. This exemption, of course, does not apply to Swift County.

In 1937 the legislature created a new branch of county administration in the form of a county welfare board. The provisions for the county welfare board are found in Sections 974-11 to 974-21, both inclusive, Mason's Minnesota Statutes, 1938 Supplement. The county must pay the salaries, office, traveling and other necessary expenses of the county welfare board regardless of which poor relief system is in effect, subject to such reimbursement out of state and federal funds as may be provided by law.

The specific authority for this is contained in Section 974-16, Mason's Minnesota Statutes, 1938 Supplement.

The general authority for county boards to levy a tax sufficient to defray the estimated expenses of supporting and relieving the poor is found in Section 3177, Mason's Minnesota Statutes of 1927. Under authority given by this section, the county board may levy whatever taxes are necessary to meet the obligations enumerated above and such other obligations for relief of the poor as are expressly imposed by law on counties having the town system.

In commenting upon the town system of poor relief, the Supreme Court of Minnesota in the case of Village of Robbinsdale v. County of Hennepin, 199 Minn. 203, said:

> "The matter of relief under the town system is not a matter of county concern. It is not the obligation of the county but of its political subdivisions. The duty of providing relief and levying taxes therefor is on each individual city, village, or town. Each is obliged to look after its own residents. Only after that is done does the statute give the village or town a right of reimbursement from the county. The error into which the plaintiff has fallen is the failure to note that the legislature in providing for the town system did not make relief an obligation of the county, but rather of its particular political subdivisions."

Section 3177, above referred to, therefore does not confer the power to make levies to defray the cost of general poor relief distributed by such counties.

In counties operating under the town system of poor relief there may be money available for such poor relief from two sources: first, from taxation; second, from allocations by the State Relief Agency of funds provided under Chapter 89, Extra Session Laws of 1937, Section 11. We have already discussed the money which is received from taxation. Discussing now the funds received from the State Relief Agency, all such funds granted to the counties and municipalities on a basis determined by the (Executive) Council shall be disbursed by the said county welfare board in each county, including those which operate on a town system, "except in counties containing a city of the first class and operating under the town system, where such funds may be disbursed by the agent of such county board with respect to the portions of the county outside of such city, and except in municipalities where a public welfare agency is provided by charter or by legislative act, then by such public welfare agency in accordance with the provisions of such charter or act." The agency for such distribution is also limited by said Section 11, wherein it states:

> "In counties having poor commissions established by law, such poor commission shall administer such duties and expend such funds herein made available for such counties."

We wish to point out the desirability of town boards and village and city councils cooperating, so far as practicable, with the board of county commissioners and the county welfare board, even though there is no statutory authority for the delegation of power by either agency to the other.

The opinion of the Attorney General dated October 4, 1938, may appear to be in conflict with this opinion. Where such conflict appears, this opinion must be construed as limiting the broad interpretation made by the opinion of the previous Attorney General.

To sum up, it is our opinion that the board of county commissioners of a county in which the town system of poor relief is in operation has the authority to levy the taxes necessary to provide for the obligations enumerated above and for such other obligations as are specifically provided for by law in counties operating under the town system of poor relief, but such county board does not have authority to make levies to defray the cost of general poor relief.

J. A. A. BURNQUIST,
Attorney General.

March 8, 1939. 519j

Note: See Laws 1941, C C. 261, 284.

315

Relief—County welfare fund—Certificates of indebtedness—Issuance of in anticipation of deficiency levy (St. Louis County)—M40 §§ 813, 3199; L. 39, C. 161.

St. Louis County Attorney.

You request an opinion as to the power of the county board of St. Louis County to issue certificates of indebtedness in anticipation of the proceeds of a deficiency tax levy for poor relief under Mason's Supplement 1938, Section 3199, as amended by Laws 1939, Chapter 161 (applicable only to St. Louis County). From the information submitted by you and by members of your county board at a recent conference at this office, it appears that the proceeds of the tax levy made in 1938 under that section by the county welfare board (successor to the authority of the board of poor commissioners under Mason's 1938 Supplement, Section 974-11 (e)), will be inadequate to meet the needs of poor relief for the remainder of the year 1939. The tax levied in 1938, of course, was payable in the year 1939. In accordance with the amended provisions of Section 3199 (limited to the years 1939 and 1940) the welfare board, having determined that the amount so levied will be inadequate to meet the minimum requirements of poor relief for the balance of the current year, will so notify the board of county commissioners. Thereupon the latter board will authorize the expenditure of the necessary additional sums, within the limitations of

the statute, and in order to finance the same will make transfers to the county welfare fund from other funds, so far as available. However, it is expected that such transfers will not be sufficient to meet the deficit, so the county board will proceed to levy a tax to finance the remaining deficiency, not exceeding two mills, in addition to the regular 1939 levy. Assuming that the deficiency levy is made in time, it will be spread on the tax books for 1939, along with the regular levy, and will be payable in 1940.

You wish to know whether, upon making this additional deficiency levy before the end of the year 1939, the county board, in order to take care of the current requirements of poor relief until the proceeds of the new taxes come in, may anticipate the same by the issuance and sale of certificates of indebtedness under Mason's 1938 Supplement, Section 813. Such certificates, it is stated, can be carried at a much lower rate of interest than ordinary tax anticipation warrants, which bear six per cent, so the proposed issue of certificates would be desirable from the standpoint of economy.

Section 813, after authorizing the issuance of anticipation certificates for any fund up to fifty per cent of the amount of taxes previously levied therefor and remaining uncollected, provides as follows:

> "No such certificates shall be issued prior to the beginning of the fiscal year for which the taxes so anticipated were intended, except that when taxes shall have been levied for the purpose of paying a deficit in any such fund carried over from any previous year or years certificates of indebtedness in anticipation of collection of the taxes levied for such deficit may be issued at any time after such levy shall have been finally made and certified to the county auditor."

Such certificates, under another provision of Section 813, must be made payable not later than December 31 of the year succeeding the year in which the levy is made.

The question comes down to this: May a deficit occurring in the county welfare fund in 1939 as a result of inadequacy of the 1938 tax levy and the authorization of additional expenditures by the county board under Section 3199, as amended, be regarded as a deficit carried over from a previous year within the meaning of the above quoted provision of Section 813?

The usual application of this provision would be to the case of a deficit which existed in a certain fund at the close of the calendar year, and which was to be covered by a tax levy made in the usual course in the following year. In the present case the deficit is now prospective, but it will become actual and the amount thereof will be determined as soon as the county board has authorized the additional expenditures for poor relief for the remainder of the year 1939, made transfers from other available funds to finance the same, and found the amount so transferred insufficient to cover the authorized expenditures. Thus, under Section 3199, as amended, the procedure both for determining a deficit and the levying of taxes to meet

the same is accelerated for poor relief purposes as compared with other purposes. However, the tax levy to meet the resulting deficit will not be payable until 1940, which is the fiscal year for which the taxes would be intended, under the language of Section 813. With respect to that year, the deficit would be carried over from a previous year. If the tax levy were deferred until after January 1, 1940 (in which event the taxes would not be payable until 1941), the immediate issuance of anticipation certificates would clearly be permissible under Section 813.

Under the circumstances here presented, where the determination of the deficit and the levying of taxes to meet it have been advanced with respect to the calendar year, it seems reasonable to hold that the issuance of certificates of indebtedness in anticipation of the proceeds of the tax levy may be advanced accordingly. This conclusion gives effect to the apparent intent of the legislature, which was to authorize the county board to take immediate steps to finance urgent needs of poor relief. A contrary construction of the law would seriously curtail the effectiveness of the emergency measures which are provided for, and might leave the county board without means to care for people in actual want.

You are therefore advised that in our opinion the county board may lawfully proceed to issue certificates of indebtedness as proposed.

CHESTER S. WILSON,
Deputy Attorney General.

September 30, 1939. 107a-1

316

Relief—Township system where part of town located in county operating under county system—M27 § 3164.

Lake of the Woods County Attorney.

You state:

> "Some time prior to May 1, 1939, the Village of Roosevelt, Roseau County, annexed some territory in Lake of the Woods County. The County Auditor of Roseau County, which County operates under the Town system of caring for the poor, certified to our County Auditor a levy from the Village of Roosevelt for poor purposes. Lake of the Woods County operates under the county system for caring for the poor."

You inquire whether the county auditor of Lake of the Woods County should spread the levy certified to him from Roseau County and omit the Lake of the Woods County levy for poor purposes in the portion of the Village of Roosevelt in Lake of the Woods County.

Your question is answered in the negative.

Section 3164, Mason's Minnesota Statutes of 1927, provides that the question of whether the county shall operate under the county system of poor relief or the township system of poor relief shall be determined by the voters of that county, which action governs the entire county. We do not believe it is possible for the actions of one county to determine or control what system of poor relief shall exist in part in an adjoining county. Consequently it is our opinion that that part of the Village of Roosevelt situated within Roseau County which has a township system of relief is governed by the laws pertaining thereto and that that portion of the Village of Roosevelt situated within the County of Lake of the Woods which operates under a county system is governed, as far as poor relief purposes are concerned, by the laws applicable to the county system of poor relief. It follows that your county auditor should return the levy certified to him from Roseau County and make his own levy for that portion of the village within Lake of the Woods County in accordance with the system under which you are now operating.

HAYES DANSINGBURG,
Assistant Attorney General.

December 16, 1939. 519j

317

Schools—Limitations—Determination of proper homestead values to be used —M27 §§ 3011, 3012; M40 § 1933.

Commissioner of Education.

You ask whether for the purpose of determining the basis for the one mill county school tax provided by Mason's Minnesota Statutes of 1927, section 3012, and for the 1.23 mills state school tax provided by Id. section 3011, unplatted real estate used as a homestead should be valued at 33⅓% of its true and full value and platted real estate used for the same purpose should be valued at 40% of its true and full value.

You state that the Minneapolis Board of Education was given authority in 1937 to go beyond the 22 mill limitation to compensate for the reduction in valuation due to the preferred treatment of homesteads on the basis of a statement in section 1993, Mason's Minnesota Statutes, 1940 Supplement (Chapter 359, Laws 1933):

> "For the purpose * * * of determining tax limitations * * * now established by statute * * *, class 3b and 3c shall be figured at 33⅓% and 40% of the full and true value thereof respectively."

We assume that by this reference you base your statement on the supreme court decision in the case of 510 Groveland Avenue, Inc. v. Erickson, 201 Minn. 381. The provision there under discussion was a mandate of the Minneapolis charter, limiting the annual levy by the board of education

to 22 mills "on each dollar of the assessed valuation * * * as determined by the last assessment." The question before the court was whether this provision is one of the "tax limitations" referred to in the statute quoted above. We call particular attention to the discussion by the court of "tax limitations" and of how assessed valuations shall be "figured" in relation thereto. The court concludes that the charter provision relating to 22 mills is a tax limitation. In reaching this conclusion the court said on page 384:

> " 'Tax limitations' have been fixed by statute at a maximum per capita, by a 'millage rate' (a common method) and possibly by other standards."

The question therefore which now confronts us is whether the 1 mill county school tax and the 1.23 mills state school tax are tax limitations. There is a real difference between provisions such as the Minneapolis charter provision and the statutes relating to the county and state school taxes. The charter provision contemplates that the board of education shall first determine the amount necessary for the operation of the schools for the year in question. This amount may be any given amount provided the tax rate necessary to produce it does not exceed 22 mills. The determination of the amount to be raised involves the exercise by the school board of discretion within the limits imposed by the Minneapolis charter. The levy of the school taxes under sections 3012 and 3011, supra, permits no exercise of discretion by any person. These provisions are mandatory. They provide no limit within which the state and county school tax may be levied. They provide a flat mill rate which the state and county auditors respectively must levy. They do not limit the tax rates which may be levied for state and county school taxes, they prescribe the respective rates. The 1 mill and the 1.23 mills levies are not tax limitations, but fixed tax levies. Having reached the conclusion that the 1 mill county school levy and the 1.23 mills state school levy are not tax limitations, it necessarily follows that the proper valuations to use in determining the amount of the county and state school taxes are respectively for unplatted real estate used as a homestead 20% of the true and full value thereof and for platted real estate used as a homestead 25% of the true and full value thereof.

We are supported in the conclusion which we have reached by the construction placed upon these and similar statutes since the passage of the 1933 amendment to Mason's Minnesota Statutes of 1927, section 1993 (Laws 1933, Chapter 359). As examples of similar laws we have the 1 mill levy for the town road dragging fund (Id. 2574), the 1 mill levy for the state road and bridge fund (Id. 2559), and the tenth of a mill levy for soldiers' relief (Id. 4354). Many city charters also contain mandatory provisions for specific levies. The state auditor and the county auditors generally have since the passage of the 1933 amendment to section 1993 applied these levies on the basis of 20 and 25% assessed valuation of homesteads. This interpretation of the laws here involved by the officers charged with applying them amount to a practical construction of them. Such construction by these officers is entitled to great weight. Dunnell's Digest, section 8952. Certainly such a construction is not so greatly out

of reason as to justify an interpretation which would reverse it and cause great confusion in the real estate tax structure of the entire state.

We are mindful of the case of Sutton v. Board of Education, 197 Minn. 125, in which the court said:

> "By L. 1921, c. 332, the maximum annual tax levy defendant can make is 20 mills on each dollar of taxable valuation of the property within the district; under 1 Mason Minn. St. 1927, § 3012, a county school tax of an additional mill is extended; and by L. 1933, c. 359, 3 Mason Minn. St. 1934 Supp. §§ 1993, 1993-1, to help out the schools, the reduction in homestead valuation is disregarded."

This, however, was clearly obiter dictum. It was not material to the court's conclusions. There is no reason to believe that the court had in mind specific tax levies in making the quoted statement. Hence it is of no persuasive effect in determining the question now before us.

J. A. A. BURNQUIST,
Attorney General.

December 12, 1940. 519

318

School Districts—Limitations—M27 § 3013 repealed by L. 39, C. 229.

Aitkin County Attorney.

Section 3013, Mason's Minnesota Statutes, 1927, is repealed by Laws 1939, Ch. 229. "An amendment of a statute, 'so as to read as follows' takes the place of the original, and operates to repeal all of it not embraced in the amendment." Dunnell's Digest, 2nd Ed., section 8928. State v. Jones, 98 Minn. 6, 106 N. W. 963. Shadewald v. Phillips, 72 Minn. 520, 75 N. W. 717.

An exception is made to this rule in construing omitted portions which were passed at the same term of the legislature. Under this chapter the limit for tax levy for school maintenance purposes is removed; and the tax rate for purchase of school sites, and erection or equipment of school houses can not exceed ten mills. Except in districts in which such ten mill tax will not produce six hundred dollars, a greater tax may be levied for school sites and buildings, not to exceed thirty mills on the dollar or six hundred dollars in amount.

Said Chapter 229, Laws of 1939, further provides,

> "In independent districts no tax in excess of 8 mills on the dollar shall be levied for the purposes of school sites and erection of school houses."

There is therefore no limitation on the levy for maintenance in common school districts. Heretofore there has been no such limit in the levy in independent districts and apparently the legislature intended to place common schools on equal terms in this respect with independent districts.

M. TEDD EVANS,
Assistant Attorney General.

July 14, 1939. 519m

MONEY AND CREDITS

319

Personal property—Statute of limitations with respect to collection of—Payment of interest and costs—M27 § 2206; M40 § 2199-1.

Ramsey County Attorney.

With respect to the statute of limitations upon moneys and credits and personal property tax assessments, as well as with respect to interest thereon and costs incurred in connection therewith, has been referred to the undersigned for attention. You state that there are in your county assessments of personal property and moneys and credits taxes which have not gone to judgment because of the inability of the sheriff to serve the person assessed. You ask whether the statute of limitations runs against these assessments. You further state that these assessments are sometimes paid prior to the entry of judgment and you ask whether the taxpayer is required to pay interest upon the tax as well as the costs of the clerk in connection with the issuance of the citation and of the sheriff for the return of not found.

Section 2206 of Mason's Minnesota Statutes of 1927, referred to in your letter, is as follows:

> "The right to assess property omitted in any year, or to reassess taxes upon property prevented from being collected in any year, either as authorized and directed by this chapter or otherwise, shall not be defeated by reason of any limitation contained in any statute of this state; but, except as otherwise provided in this chapter, there shall be no limitation of time upon the right of the state to provide for and enforce the assessment and collection of taxes upon all property subject to taxation."

Concerning the provision above quoted, there is the following general statement in Section 9525 of Dunnell's 1927 Minnesota Digest:

> "Under the present law there is no limitation on the right of the state to enforce the liability for taxes. Formerly there was a limitation of six years."

State v. Foster (1908), 104 Minn. 408, 116 N. W. 826 construed the statutory provision as eliminating any statute of limitations with respect to real estate taxes. State v. United States Express Company (1911), 114 Minn. 346, 131 N. W. 489, construed the same statutory provision to be applicable to gross earnings taxes upon express companies with the result that no limitation period is applicable with respect to such taxes. However, Chapter 423 of the 1939 Session Laws amended Section 2206 above quoted by adding before it the phrase "Except as hereinafter provided" and after it six subdivisions concerning moneys and credits taxes including the following:

> "Actions to enforce the collection of the taxes imposed by Mason's Minnesota Statutes of 1927, Sections 2337 to 2349, both inclusive, shall be commenced within six years after said taxes become delinquent, provided, however, that such actions shall not be commenced until and unless a valid assessment of such taxes has been made."

Assuming then that all assessments have been timely and properly made, there is, in our opinion, a six year period of limitation with respect to actions to enforce collection of moneys and credits taxes and no limitation with respect to personal property taxes.

With respect to your other inquiries Section 2199-1 of Mason's 1940 Minnesota Supplement should be quoted and is in part as follows:

> "The taxes assessed upon personal property, with lawful penalties, interest and costs, shall be a first and perpetual lien, superior and paramount to all other liens or encumbrances thereon, except the vendor's interest in conditional sale contracts, whether prior or subsequent in point of time, upon all of the personal property then owned by the person assessed from and including May 1 in the year in which they are levied, until they are paid; provided such lien shall not continue on items of personal property sold at wholesale or retail in the ordinary course of business."

Under the above quoted provision all lawful penalties, interest and costs are made a first and perpetual lien against certain specified property. By virtue of Section 2200 interest accrues after a period of thirty days and may be "collected with and in like manner as the principal sum." Whether costs are lawful within the meaning of the statute quoted depends upon the circumstances under which they were incurred. Consequently this is a question of fact in each case. Under the above statutes, it is our opinion that the taxpayer is required to pay interest and lawful costs subject, of course, to the statute of limitations with respect to moneys and credits taxes.

WILLIAM W. WATSON,
Special Assistant Attorney General.

October 18, 1940. 421a-8

MORTGAGE REGISTRATION

320

Recording—In county where no land situated—M27 §§ 2322 to 2330.

Cottonwood County Attorney.

You state that a mortgage given by a telephone company to a trust company, covering the mortgagor's interest in lands, was asked to be recorded in the register of deed's office and that the telephone company owns no real estate in the county, but that their telephone lines extend into Minnesota and Cottonwood County.

You inquire:

"Are they subject to the usual Mortgage Registration Tax?"

Your inquiry is answered in the negative.

The subject of taxation is the security and not the debt secured thereby. Mutual Benefit Life Insurance Company vs. Martin County, 104 Minn. 179, 116 N. W. 572.

The county would be entitled to no tax for the mortgage registration unless it covers real estate in the county in which they seek to register their mortgage. Mason's Minnesota Statutes for 1927, Sections 2322 to 2330, cover mortgage registration taxation. The tax is paid to the first county in which the mortgage is registered and divided among the various counties in which the land is located in proportion to the assessment district's valuation of the land. If the mortgage also covers land outside of the state, only the proportion within the state is taxed in accordance with its relationship to the data.

JOHN A. WEEKS,
Assistant Attorney General.

May 25, 1939. 418b-21

321

Tri-State Power Co-operative—Trust deed.

Fillmore County Attorney.

You enclose an instrument called an indenture, dated as of December 20, 1938, executed by the Tri-State Power Cooperative, a Wisconsin corporation, and the American Exchange Bank, a Wisconsin corporation, trustee, which has been submitted to the register of deeds of your county for recording. You inquire whether this instrument is exempt from payment of the mortgage registration tax.

This indenture is a trust deed, in effect a mortgage, given by the cooperative corporation to the trustee to secure a present loan of $500,000

made to the corporation by the United States Government under the Rural Electrification Act of 1936, as amended, also to secure additional future loans which may be made under the same act up to a total of three million dollars. According to the terms of the indenture the note evidencing the original loan of $500,000 is made payable to the order of the government, and notes which may be issued to cover subsequent loans are also to be made payable to the government. It is also provided that further notes may be issued upon the security of the indenture to the holder or holders of outstanding notes to refund the same or in renewal thereof or in substitution therefor. Evidently it is contemplated that the notes secured by the mortgage shall be transferable, and so may come into the hands of holders other than the government.

The property covered by the indenture is pledged to the trustee for the benefit and security of all those who shall from time to time be holders of the notes, without priority as between them.

The mortgage registration tax is imposed upon the security rather than upon the debt.

Mutual Benefit Life Insurance Co. v. County of Martin, 104 Minn. 179, 116 N. W. 572.

If the security is held by the United States Government or by the trustee for the benefit of the government, the mortgage is exempt from the tax. It is clear that so far as the initial principal note of $500,000 and any further principal notes are concerned, the government being the payee, the security is held by the trustee for the benefit of the government. Hence, in our opinion, the indenture as it now stands is exempt, and may be recorded without payment of the registration tax.

The question may arise later whether any registration tax will be payable in case of a future extension of all or any part of the notes, in connection with which new notes are issued to some holder other than the government. However, determination of that question will depend on the circumstances of the case so must await the event.

J. A. A. BURNQUIST,
Attorney General.

May 29, 1939. 418b-19

MOTOR VEHICLES

322

Dealers—Exemptions—Time when taxes are payable—M27 § 2687, 2674, M40 § 2673.

Secretary of State.

You ask:

"* * * whether the following interpretation of the motor vehicle registration law is correct:

"A motor vehicle operated under his dealer's plates by a licensed dealer is not always exempt from the registration tax even tho the dealers license law provides that motor vehicles, new or used, bearing dealers license plates may be operated by the dealer or his employe for any purpose whatsoever."

The basic provision of law making motor vehicles subject to taxation is found in Mason's Minnesota Statutes of 1927, Section 2687, which reads as follows:

"Every motor vehicle (except those exempted in Section 2 of this act) shall be deemed to be one using the public streets and highways and hence as such subject to taxation under this act if such motor vehicle has since April 23, 1921, used such public streets or highways, or shall actually use them, or if it shall come into the possession of an owner other than as a manufacturer, dealer, warehouseman, mortgagee or pledgee. But, new and unused motor vehicles in the possession of a dealer solely for the purpose of sale, and used or second-hand motor vehicles which have not theretofore used the public streets or highways of this state which are in the possession of a dealer solely for the purpose of sale and which are duly listed as herein provided, shall not be deemed to be vehicles using the public streets or highways. The driving or operating of a motor vehicle upon the public streets or highways solely for the purpose of demonstrating it, in good faith, to prospective purchasers or solely for the purpose of moving it from points outside or within the state to the place of business or storage of a licensed dealer within the state or solely for the purpose of moving it from the place of business of a manufacturer, or licensed dealer within the state to the place of business or residence of a purchaser outside the state, shall not be deemed to be using the public streets or highways in the state within the meaning of this act or of Article 16 of the Constitution and shall not be held to make the motor vehicle subject to taxation under this act as one using the public streets or highways, if during such driving or moving the dealer's plates herein provided for shall be duly displayed upon such vehicle."

The Section 2 referred to is Section 2673 of Mason's 1938 Supplement as amended by Laws of 1939, Chapter 349. The only part of said Section 2673 which is applicable to the question under consideration is the following:

"Motor vehicles which during any calendar year have not been operated on a public highway shall be exempt from the provisions of this Act requiring registration payment of tax and penalties for non-payment thereof, provided that the owner of any such vehicle shall first file his verified written application with the Registrar of Motor Vehicles, correctly describing such vehicle."

From a study of these sections we find that the following are not to be deemed motor vehicles using the public streets or highways and hence are not subject to taxation:

(1) New and unused motor vehicles in the possession of a dealer solely for the purpose of sale;

(2) Used or second-hand motor vehicles which have not theretofore used the public streets or highways of this state which are in the possession of a dealer solely for the purpose of sale and which are duly listed as provided by law unless they come within the provisions of Laws of 1939, Chapter 284;

(3) Motor vehicles driven or operated upon the public streets or highways solely for the purpose of demonstrating them, in good faith, to prospective purchasers;

(4) Motor vehicles which are driven or operated upon the public streets or highways solely for the purpose of moving them from points outside or within the state to the place of business or storage of a licensed dealer within the state;

(5) Motor vehicles driven or operated upon the public streets or highways solely for the purpose of moving them from the place of business of the manufacturer, or licensed dealer within the state to the place of business or residence of a purchaser outside the state;

(6) Motor vehicles which during any calendar year have not been operated on the public highway provided the owner shall have applied for exemption as required by said Section 2673 as amended.

The manner and method of registration and of payment of the tax is provided for in Mason's Minnesota Statutes of 1927, Section 2674, paragraph (c). This section is as follows:

> "The owner of every motor vehicle, not exempted by section 2, or 14, shall, so long as it is subject to taxation within the state, list and register the same and pay the tax herein provided annually, provided, however, that any dealer in motor vehicles to whom dealer's plates shall have been issued as herein provided, shall, upon due application on the date set for the annual renewal of registration and payment of tax, be entitled to withhold the tax upon any motor vehicle held by him solely for the purpose of sale or demonstrating or both and upon which the tax as a user of the public highways, shall become due, until the motor vehicle shall be sold or let for hire to a person not such a dealer, or until used upon the public highways, but no longer than until October 1st, following, when the whole tax shall become immediately payable with all arrears."

From an examination of this language we note that while it defers payment until October 1 under certain conditions, the only exemptions from its provisions are those given by Section 2, or 14, of the Laws of 1931, Chapter 461, which are now respectively Section 2673 hereinbefore referred to and Section 2685 of Mason's Minnesota Statutes of 1927. The latter section is as follows:

"Manufacturers within the state, of motor vehicles which shall not use the public highways, and manufacturers or dealers distributing motor vehicles which shall not have used the public highways in the state and are not for sale in this state from points in this state to other states, shall be exempt from the provisions of this act requiring the listing and registration thereof."

All general provisions with regard to the registration of foreign state used cars brought into this state are subject to the provisions of Laws of 1939, Chapter 284, which deals with such cars when they have been brought in for the purpose of sale.

We pass now to consideration of Mason's 1938 Supplement, Section 2686 as amended by Laws of 1939, Chapter 209, which relates to the licensing of dealers and manufacturers of motor vehicles. The provisions for the use of dealer's plates therein made is merely incident to the licensing of the motor vehicle business. Paragraph (e) of said section as so amended reads in part as follows:

"Motor vehicles, new and used, bearing such number plates owned by such motor vehicle dealer, may be driven upon the streets and highways of this state by such motor vehicle dealer, or any employee of such motor vehicle dealer, for demonstration purposes, or for any purpose whatsoever, including the personal use of such motor vehicle dealer or his employee."

The troublesome question is the effect to be given to the words "or for any purpose whatsoever, including the personal use of such motor vehicle dealer or his employee."

The language last above quoted, if construed literally so as to give the full effect, would remove all restrictions upon the use of motor vehicles by motor vehicle dealers and their employees. If such a construction were given, the special privileges thereby conferred upon motor vehicle dealers would immediately raise the question of discrimination and unequal taxation by the general provisions for the taxation of motor vehicles owned by persons other than dealers. It is true that a law must be so construed as to uphold its validity if that is possible, but, on the other hand, as the court said in State vs. Polk County, 87 Minn. 327:

"The statute must be construed in the light of all its provisions, and in harmony with preexisting legislation on the subject."

Tracing the history of the language of the statute under consideration we find that it was first written into the motor vehicle law by Laws of 1935, Chapter 271. There was no conflict between the provisions of Section 2686 and those of Section 2687 before that amendment. The failure of the legislature, perhaps advisedly, to insert the same amendment in Section 2687 leaves all use of a motor vehicle by a dealer or his employee on the public streets or highways other than as exempted in Section 2687 a use of public streets and highways within the meaning of Article 16 of the Constitution and necessarily subjects the motor vehicle so used to taxation.

The only possible effect that can be given to the language under discussion is that a car used as therein provided may be driven while bearing dealer's plates, but immediately upon use for any purpose not exempt under Section 2687 becomes subject to taxation in the same manner as a car not owned and driven by a motor vehicle dealer.

To summarize our conclusions from our study of the various sections hereinbefore referred to, it seems clear that all motor vehicles owned by motor vehicle dealers are subject to taxation in the same manner as motor vehicles owned by persons other than dealers, unless they are in one of the following classifications:

(1) New and unused motor vehicles in the possession of a dealer solely for the purpose of sale;

(2) Used or second-hand motor vehicles which have not theretofore used the public streets or highways of this state which are in the possession of a dealer solely for the purpose of sale and which are duly listed as provided by law, subject to the provisions of Laws of 1939, Chapter 284;

(3) Motor vehicles displaying dealer's plates, driven or operated upon the public streets or highways solely for the purpose of demonstrating them, in good faith, to prospective purchasers;

(4) Motor vehicles displaying dealer's plates, which are driven or operated upon the public streets or highways solely for the purpose of moving them from points outside or within the state to the place of business or storage of a licensed dealer within the state;

(5) Motor vehicles displaying dealer's plates, driven or operated upon the public streets or highways solely for the purpose of moving them from the place of business of the manufacturer, or licensed dealer within the state to the place of business or residence of a purchaser outside the state;

(6) Motor vehicles which during any calendar year have not been operated on the public highway, provided the owner shall have applied for exemption as required by said Section 2673 as amended.

The tax upon motor vehicles which do not come within the foregoing classifications and which are owned by motor vehicle dealers must be paid;

(a) On foreign used cars subject to the provisions of Laws of 1939, Chapter 284, within 10 days after date of entry into the state;

(b) On all vehicles which during the year have been operated under a dealer's plates for any purpose, provided, however, that such payment may be deferred until October 1, upon compliance with the provisions of Section 2674, paragraph (c);

(c) Upon any motor vehicle operated under dealer's plates for any purpose not exempted in Section 2687 immediately upon such use.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

October 26, 1939. 632e-5

PENALTY AND INTEREST

323

Abatement must be ordered by Tax Commissioner—M27 § 1983.

Steele County Attorney.

You ask:

1. "In a situation where an application for either a reduction or an abatement of personal property taxes is filed with the County Auditor prior to March 1st of the year in which the tax falls due, and if the tax is not paid by March 1st, and the application is pending at that time, and the County Board of Commissioners and the Tax Commission subsequently grant the petition in whole or in part, is the penalty and interest automatically abated?"

2. "If the penalty and interest in the situation above given are not automatically abated, is it the duty of the Tax Commission to make a specific order as to the penalty and interest?"

3. "Where the order of the County Commissioners and the Tax Commission is silent on the penalty and interest, and simply fixes the assessed valuation, is it the duty of the Treasurer and Auditor to collect the penalty and interest on the amount so fixed by the Board and Tax Commission?"

The answer to your first question is in the negative.

The answer to your second question is in the affirmative.

The answer to your third question is in the affirmative.

An application to the Commissioner of Taxation for a reduction or abatement of taxes is not like a defense to a proceeding in court to enforce payment in the ordinary course. Abatement by the Commissioner of Taxation is not an adjudication that the amount which it was asked to abate is not a legal tax or assessment, nor an adjudication that the state could not have enforced the payment of the full amount of the tax or assessment. The power vested in the Tax Commission to abate taxes is intended primarily to reach those cases where a taxpayer has no defense in the proceeding at law to enforce the collection, but where the circumstances are such that it would be unjust and inequitable to require him to pay the full amount. In other words it provides a method of relief for those cases where the courts could not afford it under rules of law. See State ex rel. Kasper v. Minnesota Tax Commission, 137 Minn. 37. Since the reduction is not a matter of right, but one dependent upon the discretion of the Commissioner of Taxation, the principle which relieves the taxpayer from the payment of penalty and interest in cases where he was never given an opportunity to pay the correct amount of the tax is not applicable here. The taxpayer may make application under Mason's Minnesota Statutes of 1927, Section 1983, for the abatement, not only of

the tax, but for any penalty or interest which he may have paid or which may have accrued. The Commissioner of Taxation has the power under said Section 1983 to so frame his order that it will carry with it an abatement of any penalty or interest, or both, that may have accrued. If an order has been made by the Commissioner of Taxation which does not provide for the abatement of the penalty and interest, the taxpayer may ask the Commissioner of Taxation to amend his order so as to make such abatement. In the absence of an order of the Tax Commissioner specifically granting an abatement of penalty and interest, they must be imposed.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

March 9, 1940. 505j

PERSONAL PROPERTY

324

Airplanes—Situs—M 1927, Sec. 2009.

Commissioner of Taxation.

You submit the following facts concerning the assessment of an airplane owned by A. This airplane is housed in a hangar on the Minneapolis side of the Wold Chamberlain Field, but the sale of tickets, loading and unloading of passengers is all transacted in Richfield, where the office is located. The plane when housed in this hangar at the airport, is located in Minneapolis, and is serviced, and all tools and parts or repairs have their permanent location at this hangar, value of the plane, approximately $12,000.

You ask that we advise you as to the situs of the airplane for assessment for personal property taxes.

The question of the situs of airplanes for purposes of assessing the taxes thereon is a new one which affords considerable difficulty in determining the proper answer as there is a divergence of opinion among the authorities to whom the question has been presented. There is as yet no determination by the court of this question.

The proper situs for purposes of taxation of airplanes which are kept for sale or which are in possession of the person engaged in their manufacture and of airplanes which are owned by a private owner who uses them for private purposes have all been determined by an opinion of the attorney general, opinion 256, 1932 report.

The question now before us arises where the owner of the property is a foreign corporation, which is engaged in interstate commerce.

Mason's Minnesota Statutes of 1927, section 2009, provides:

"The personal property of express, stage, and transportation companies, except as otherwise provided by law, shall be listed and assessed in the county, town, or district where the same is usually kept."

"That statute must be construed as applying to transportation companies engaged as common carriers of freight or passengers for hire, and not to concerns created and existing and being operated in furtherance of private interests, * * *."

State ex rel. St. Louis County v. Iverson, 97 Minn. 286, 288.

It is understood, of course, that the company here involved is engaged in the transportation of freight and passengers for hire as a common carrier. It necessarily follows that the appropriate statute for the determination of the situs of the property of the airlines corporation here involved is section 2009.

It is our opinion that an airlines company which is not a Minnesota corporation and which is engaged as a common carrier in carrying passengers and freight for hire is a "transportation company" for hire within the meaning of section 2009, and that its airplanes and other personal property should be assessed in the taxing district where it is usually kept, regardless of the principal place of business of the corporation.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

December 14, 1940. 421a-17

325

Bees—Listing and assessment—Located in county other than owner's residence—M27 § 2003.

Red Lake County Attorney.

You state that a resident of Carver county is engaged in the business of marketing and producing honey in Carver county; that the past four years he has placed approximately 1,000 hives of bees in Red Lake county; and that they have not been removed therefrom since they were first placed there. You also state there is no question but what his place of residence and principal place of business are in Carver county.

You inquire: Should the bees which have been placed in Red Lake county be listed and assessed for tax purposes in Red Lake county, or should they be listed and assessed in Carver county where the owner resides?

Mason's Minnesota Statutes of 1927, section 2003, provides as follows:

"Except as otherwise in this chapter provided, personal property shall be listed and assessed in the county, town, or district where the owner, agent, or trustee resides."

Under the circumstances above mentioned, the property you describe should be listed and assessed in the taxing district in which the owner resides, which, in this case, would be Carver county.

JOHN A. WEEKS,
Assistant Attorney General.

November 14, 1940. 421a-17

326

Exemptions—Beauty and hairdressing schools—M27 § 1975.

Stearns County Attorney.

You inquire as to whether or not personal property of a beauty and hairdressing school is exempt from taxation.

For a number of years it has been the policy of this office to refrain from giving official opinions relative to the exemption of property from taxation until such time as the question arises either upon an application to the tax commissioner for an abatement of the taxes, or on account of an assertion of a defense in a tax proceeding. The reason for this policy is that sometimes when application for a rebate is made to the tax commissioner, or a defense is imposed in a proceeding to collect taxes, other additional facts and circumstances which were not mentioned in the request for an opinion are brought out, which additional facts and circumstances, of course, should be taken into consideration in the rendition of an opinion.

Section 1975, Mason's Minnesota Statutes of 1927, states:

> "All property described in this section to the extent herein limited shall be exempt from taxation, to-wit:
>
> * * *
>
> "(4) All academies, colleges, and universities, and all seminaries of learning."

Article IX, Section 1, of the Constitution of Minnesota states:

> "* * * Taxes shall be uniform upon the same class of subjects, and shall be levied and collected for public purposes, but public burying grounds, public school houses, public hospitals, academies, colleges, universities, and all seminaries of learning * * * shall be exempt from taxation. * * *"

While you do not so state, we presume the question arises because of the sections of the Constitution and the statute above cited.

We have no facts in connection with the manner in which this institution is operated or how it was organized nor other matters concerning the same. We assume it does not come within the classification of an academy,

college, or university, thus leaving only the question as to whether this constitutes a "seminary of learning."

You will find the term "seminary of learning" discussed in the following cases:

Hennepin County v. Grace, 27 Minn. 503.

Hennepin County v. Bell, 43 Minn. 344.

Ramsey County v. Stryker, 52 Minn. 144.

State v. Bishop-Seabury Mission, 90 Minn. 92.

State v. Browning, 192 Minn. 25.

State v. Northwestern College of Speech Arts, Inc., 193 Minn. 123.

State v. H. Longstreet Taylor Foundation, 198 Minn. 263.

We call your attention to the dictum in the case of State v. Northwestern College of Speech Arts, Inc., supra, at page 128, where our Supreme Court stated:

> "We have barber colleges, dancing academies, riding schools, and the like, which no one will claim to be exempt from taxation."

HAYES DANSINGBURG,
Assistant Attorney General.

May 7, 1940. 414b-3

327

Exemptions—Household—M40 § 1975.

Hennepin County Attorney.

You ask:

> "Is the personal property exemption provided for in subdivision 8, Section 1975, Mason's Minnesota Statutes of 1927, 1940 Supplement, applicable only to the items set out in class 2, Section 1993, Mason's Minnesota Statutes of 1927, or is it applicable to any personal property which the taxpayer may own, regardless of classification?"

Section 1993, Mason's Minn. Statutes 1927, Clause 2, has remained unchanged since the classification law was enacted in 1913. See Laws 1913, Chapter 483, Section 1.

Mason's Minn. Statutes, 1940 Suppl., Section 1975, Clause 8, has a longer legislative history. Laws 1878, Chapter 1, Section 5, Clause 10, provided for an exemption in the amount of $100 of "the personal property of each individual." There was a provision to the effect that each person must list all of his personal property, the county auditor being required

to deduct the amount of the exemption from the total amount of the assessment. This clause remained the same until the enactment of Laws of 1913, Chapter 259, which amended it by providing that personal property "of every head of a family" was exempt to the value of $100. That act provided "The County Auditor shall deduct such exemption from the total valuation of such property as equalized by the Tax Commission assessed to such person and extend his levy of taxes upon the remainder only."

This section remained the same until the enactment of Laws of 1925, Chapter 171, which amended the section so as to read as it now appears in Mason's Minn. Statutes, 1940 Suppl., Section 1975, Clause 8. For a period of a few months, however, an amendment to this section was in force. Laws 1935, Chapter 385, approved April 29, 1935, amended the section so as to exempt "all household goods of every household" and also "other personal property for every household of the value of $25.00." Extra Session Laws of 1935, Chapter 66, approved January 24, 1936, amended this section so as to read the same as enacted in 1925 and as it now appears in the statutes.

The Constitution of Minnesota, Article IX, Section 1, "permits" the exemption of personal property for each household, individual, or head of a family. There is no restriction on the **kind** of personal property to be exempted. See Reed v. Bjornson, 191 Minn. 254, discussing the exemptions in the Income Tax Law of 1933.

An opinion of the Attorney General dated March 12, 1914, a copy of which is attached, construing the 1913 Law, states the reason for the change from an exemption for an individual to an exemption only for the head of a family. An opinion of the Attorney General, dated February 1, 1927, copy of which is attached, construing the law as it now reads, holds that the exemption is deductible from the total of all classes of personal property assessed to the household. We are informed that this has been the construction of this section throughout the state with the exception of Hennepin County.

We are therefore of the opinion that the personal property exemption provided in Mason's Minnesota Statutes, 1940 Supplement, Section 1975, Clause 8, is applicable to any personal property which the taxpayer may own and is not limited to the household goods described in Mason's Minnesota Statutes, 1927, Section 1993, Class 2.

P. F. SHERMAN,
Assistant Attorney General.

December 6, 1940. 421b-5

328

Exemptions—Reconstruction Finance Corporation—Title 15, U. S. C. A. Sec. 610.

Big Stone County Attorney.

You state that an elevator in the Village of Clinton is now owned by the Reconstruction Finance Corporation. You further state that this elevator is personal property. You ask whether it is exempt from local taxation.

Section 610 of Title 15 of the United States Code Annotated contains the following provision with respect to the local taxation of property owned by the Reconstruction Finance Corporation:

> "Any and all notes, debentures, bonds or other such obligations issued by the corporation shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, County, municipal, or local taxation to the same extent according to its value as other real property is taxed."

Mr. Justice Cardozo stated, in Baltimore National Bank v. Tax Commission, 297 U. S. 209, at page 211, with respect to the Reconstruction Finance Corporation:

> "We assume, though without deciding even by indirection, that within McCulloch v. Maryland, 4 Wheat. 316, a corporation so conceived and operated is an instrumentality of government without distinction in that regard between one activity and another. Even on that assumption taxation by state or municipality may overpass the usual limits if the consent of the United States has removed the barriers or lowered them."

Inasmuch as the federal government has expressly consented to local taxation only with respect to real property, it is our opinion that personal property of the Reconstruction Finance Corporation would be exempt. This conclusion is confirmed by the case of First National Bank of Albuquerque v. State Tax Commission, 92 Pac. (2d) 987, in which the court indicated that shares of stock held by the Reconstruction Finance Corporation would be exempt from local taxation.

If the elevator to which you refer might in any way be considered real property, the result might be otherwise.

WILLIAM W. WATSON,
Special Assistant Attorney General.

June 4, 1940. 421a-11

329

Pipelines—Place of assessment—M27 §§ 2003, 2004, 2009.

Brown County Attorney.

You inquire whether or not pipelines constructed by natural gas companies are to be assessed in the taxing districts where actually located regardless of the principal place of business of the corporation.

This office has ruled, in an opinion dated May 26, 1931, that pipelines for the transportation of gasoline are personal property; that a company operating a pipeline for the transmission of gasoline as a common carrier is a "transportation company" as that term is used in Section 2009, Mason's Minn. Statutes 1927; and that pipelines owned by companies transporting gasoline as common carriers should be assessed in the taxing district where actually located, regardless of the principal place of business of the corporation.

In State ex rel. St. Louis County v. Iverson, 97 Minn. 286, the court construed Sec. 1517, Gen. Statutes of 1894 which contained the same language as Sec. 2009, Mason's Minn. Statutes 1927. The court there held that logging railroad companies were not "transportation companies" as used in that section. The court said:

> "The facts disclose that they are purely private affairs, and were organized solely for the purpose of furthering the business and interests of the lumber companies, and we are clear that they do not come within the purview of Section 1517. That statute must be construed as applying to transportation companies engaged as common carriers of freight or passengers for hire, and not to concerns created and existing and being operated in furtherance of private interests, as in the case at bar."

Under Sections 2003 and 2004, Mason's Minn. Statutes 1927, the personal property of corporations is taxed in the district of the principal place of business of the corporation when located in this state, otherwise, at the place in this state where the corporation transacts business. These sections govern the taxation of pipelines unless the pipeline company is included within the meaning of the term "transportation companies" as used in Sec. 2009. Under the decision in State ex rel. v. Iverson, quoted above, only common carriers are included within this term. If, therefore, the companies about which you inquire are engaged in transporting gas for their own private purposes, they cannot be considered "transportation companies" and therefore are not within Sec. 2009, and should be taxed as provided in Section 2004.

P. F. SHERMAN,
Assistant Attorney General.

July 31, 1940. 421c-28

REAL ESTATE

330

Assessment—Building owned by different parties—Division thereof—M27 § 1990.

Hawley Village Attorney.

You state that a two story brick building is owned by two different persons, and that one owns the second story, while the other owns the basement and first story. That the lot upon which the building is located is owned by a railway company, but leased to the owners of the building; that the village assessor has assessed the entire building as one building and has failed to assess the second story separately and distinctly from the first story and basement.

You inquire: "May the assessor, or should the assessor assess the second story of the building which belongs to A separately from the first story and basement which belongs to B?"

Section 1990, Mason's Minnesota Statutes 1927, provides in part as follows:

> "The assessor—shall actually view, when practicable, and determine the true and full value of each tract or lot of real property listed for taxation, and shall enter the value thereof, including the value of all improvements and structures thereon, opposite each description."

In La Paul v. Heywood, 113 Minn. 376, 129 N. W. 763, 32 L. R. A. (N.S.) 368, Ann. Case 1912A, 247, our court said:

> "Where a lease is silent as to the payment of taxes, improvements which are removable by the tenant at the end of the term are taxable to him, and not to the landlord. * * * There is no provision of law by which the owner of land can pay the taxes, without at the same time paying the taxes upon all improvements located on the land. **Under the law of Minnesota all buildings and improvements are for the purpose of taxation considered a part of the real estate, and must be assessed as such."**

The aforequoted case involved a determination of liability for taxes as between landlord and tenant. The first sentence quoted relates to that liability rather than to the duties of the assessor. The remainder of the quoted passage, however, is declaratory of the duty of the assessor. As was said in the note to this case in L. R. A.:

> "Although it is stated in the opinion and repeated in the first syllabus by the court, that the improvements are taxable to the tenant, and not to the landlord, the question was not as to the party to whom they should be taxed, but whether the burden of the tax must ultimately rest on the landlord or tenant."

In view of the statutory provision that the assessor shall "determine the true and full value of each tract or lot of real property," we are of

the opinion that but one assessment and one liability for the tax on each individual tract or lot exists, and that the assessor cannot be compelled to make more than one assessment of each tract or lot.

We are uninformed as to the content of the lease agreement or agreements by which this land was demised, but we assume that, irrespective of the primary liability for the tax, the tenants at least, and perhaps the railroad company as well, heretofore have each paid a proportionate share of the tax. This may have been accepted by the parties concerned as a substantial determination of their respective liabilities.

However, since the assessor is empowered by the statute merely to assess "each tract or lot", we are of the opinion that any attempt by the assessor to divide the assessment as in the case you have proposed would be legally ineffective.

JOHN A. WEEKS,
Assistant Attorney General.

September 1, 1939. 408

331

Assessment—Property used partially by gross earnings taxpayer—May not be divided for tax purposes.

Stearns County Attorney.

You state that in the city of St. Cloud an express company has leased a portion of a large building for a period of years.

You inquire whether in assessing the real estate the assessor should take into consideration that part of the building which is used by the express company, and if he should divide the property and figure out what part of the building is used by the express company and then assess a real estate tax on the balance of the building, leaving out that part used by the express company.

Your inquiry is answered in the negative.

In the case of State v. Pequot Rural Telephone Co., 188 Minn. 523, 247 N. W. 695, our Supreme Court said:

> "It will not do to attempt to apportion the amount of the use of property by the company in its business and the amount of the use by it for other purposes. Property is either devoted to the telephone business, to the extent and of the character indicated, or it is not. The whole is taxable on an ad valorem basis, or no part thereof is to be so taxed. There is no room for neutrality or division. The whole must follow the principal use. There is no machinery in the law for appor-

tioning the use and having a definite and satisfactory conclusion in case some uncertain fractional portion of the property should be sold for the nonpayment of an ad valorem tax."

JOHN A. WEEKS,
Assistant Attorney General.

July 24, 1940. 474d-1

332

Confession of Judgment—Notice of expiration of redemption annulled by confession of judgment under—Default in payments under confessed judgment restores tax judgment—New notice of expiration of redemption necessary when there has been a confessed judgment under said chapter—Ex. S. L. 35, C. 72.

Kanabec County Attorney.

You state:

"Certain properties in Kanabec County were delinquent in taxes in the years 1929 to 1934 when, pursuant to Chapter 278, Laws of 1935, notice was properly served of the forfeiture pursuant to said statute; but that within the time allowed for redemption, the owner took advantage of Section 2176-11 of Mason's 1938 Minnesota Statutes and filed a confession of judgment on said taxes. After several payments under this confession of judgment, default has been made and still exists." You inquire:

"Are these lands now properly forfeited to the state without further notice or proceedings pursuant to Chapter 278, Laws of 1935, or is any notice to the owner necessary for the state to acquire title under the forfeiture act and, if so, what is required?"

Section 2 of Chapter 72, Extra Session Laws of 1935, expressly states "further proceedings shall be suspended on any judgment for taxes embraced in said confessed judgment as long as no default exists."

It is the legislative intent, when default has occurred in payments due under the confessed judgment, to restore the judgment for taxes to the same status it would have had if there had been no confession of judgment.

Section 5 of said Chapter 72 provides as follows:

"Laws 1935, Chapter 278, shall remain in full force and effect save and except wherein an applicant takes advantage of the provisions of this act. In the event of default occurring in the payments to be made under any confessed judgment entered pursuant hereto, the penalties and interest waived under the terms of section 2 hereof shall be reinstated and the lands described in such confessed judgment shall

thereupon be subject to forfeiture according to Laws 1935, Chapter 278."

The first sentence of said Section 5 provides that "Laws 1935, Chapter 278, shall remain in full force and effect save and except wherein an applicant takes advantage of the provisions of this act." This indicates, by implication at least, that a notice of expiration of redemption given according to said Chapter 278 would be ineffectual after an applicant has taken advantage of said Chapter 72. The next sentence of said Section 5 provides that the penalties and interest waived under the terms of Section 2 of said Chapter 72 shall be reinstated upon default in payments. The same sentence then goes on to provide that the lands described in such confessed judgment shall upon such default be subject to forfeiture according to laws of 1935, Chapter 278. It is significant that in this sentence the legislature saw fit only to reinstate the penalties and interest waived under the terms of said Section 2 and did not deem it advisable to reinstate the notice of expiration of redemption which had already been given at the time that the owner availed himself of the provisions of said Chapter 72. The legislature might have provided that the confession of judgment under said Chapter 72 would merely suspend the operation of the notice of expiration of redemption. It did not do so. It did provide that said Chapter 278 should not remain in force and effect where "an applicant takes advantage of the provisions of this act." It also provided that after default lands should "thereupon be subject to forfeiture according to Laws 1935, Chapter 278."

It is our opinion (1) that under the language above stated, the confession of judgment annuls the notice of expiration of redemption; (2) that it is the legislative intent, when default has occurred in payments due under the confessed judgment, to restore the judgment for taxes to the same status it would have had if there had been no confession of judgment; and (3) that it is necessary to give a new notice of the expiration of redemption and to take all necessary proceedings under Chapter 278, Laws 1935, as though starting proceedings thereunder for the first time.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

February 28, 1939. 423f

333

Confession of Judgment—Notice of expiration upon original tax judgments—Order of credit—No reference to confessed judgments—Ex. L. 35, C. 72; L. 35, C. 278.

Lake of the Woods County Attorney.

Your first question is:

"In cases of defaulted confession of judgment settlements, is the County Auditor to give Notices of Expiration of Redemption under Chapter 278 Laws 1935."

A notice of expiration of redemption should be given under Laws 1935, Chapter 278, except in those instances where the taxes of 1931 and 1932 are involved. For the determination of the correct law which is applicable we refer you to the sale and redemption table which has been prepared by this office. A copy of that table is enclosed herewith. We are now referring to taxes for the year 1926 and subsequent years.

Your second question is:

> "If so, is the notice based on original real estate tax judgment and not the judgment confessed?"

The answer to this question is in the affirmative. Extra Session Laws of 1935, Chapter 72, Section 5, specifically provides for the reinstatement of penalties and interest waived upon default in the payments under the confessed judgment and that the land shall be subject to forfeiture for the unpaid taxes, penalties and interest.

Your third question is:

> "If credit should be given for amounts paid under the confession, in what order should they be applied to the payment of the delinquent taxes?"

Under the provisions of Chapter 72, supra, it was the duty of the county auditor, when the payments were made under the confession of judgment, to credit the taxes so collected upon the confessed judgment and to apply the same in the inverse order as provided therein. By inverse order it is meant that the amounts paid shall be first applied to the payment of taxes which have last been levied. In other words, if the delinquent taxes last levied were those for the year 1933 the amount received under the confession of judgment should be applied to the payment of those taxes first, and if there is any over plus it should be applied to the next delinquent year going backward from 1933 to 1932, then to 1931, then to 1930 and so on until full credit had been given for all amounts paid.

Your fourth question is:

> "Should the notice make any reference to the Confession of Judgment settlement?"

The answer to this question is in the negative.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

July 5, 1940. 412a-10

334

Confession of Judgment—Partial release—No authority for—Ex. S. L. 35, C. 72; L. 37, C. 486; L. 39, C. 91.

Chippewa County Attorney.

You state:

> "We have the following situation in Chippewa County: A party in Montevideo owns a business building on which there were delinquent taxes of about $1600.00. He also owned some adjoining vacant lots which were assessed separately and on which the taxes delinquent amounted to about $75.00. The owner confessed judgment and both parcels were included in one judgment. At the time that judgment was entered the vacant lots were subject to a contract for deed given by the owner to third parties. Now the vendees are paying up their contract and demand clear title. The owner has tendered the $75.00 to the County Auditor and demands a partial release of the tax judgment as to the vacant lots."

You ask whether a partial release of the tax judgment as to the vacant lots may be made.

In our opinion there is no statutory authority for the partial release of a judgment entered under any of the confession of judgment acts, E. S. Laws of 1935, Chapter 72, Laws of 1937, Chapter 486, and Laws of 1939, Chapter 91, except for the payment of installments as therein provided. It necessarily follows that the county auditor in the case submitted has no authority to release the vacant lots.

GEORGE B. SJOSELIUS,
Special Assistant Attorney General.

May 24, 1939. 412a-10

335

Confession of Judgment—Right of mortgagee to make—M27 § 2209; L. 39, C. 91.

Commissioner of Taxation.

You have inquired whether, under Chapter 91, Laws 1939, a mortgagee may confess judgment, notwithstanding the fact that previously the owner has confessed judgment and defaulted.

Section 6 of Chapter 91, Laws 1939, reads as follows:

> "Not more than one confession of judgment and agreement to pay in installments under this or any prior law affecting the same

taxes or any portion thereof may be made by or on behalf of any owner of any particular right, title, interest in, or lien upon, any given parcel of land, his heirs, representatives or assigns."

Section 2209, Mason's Minnesota Statutes, authorizes the payment of taxes by mortgagee or other lien holder.

In my opinion, the legislature has limited the rights conferred by Chapter 91, Laws of 1939 in such a way that only one confession of judgment may be made by the owner of a particular interest; it has not prohibited the confession of judgment by a mortgagee or the owner of any other separate right, title, interest or lien upon the same land, notwithstanding the fact that the owner of a separate interest in the land has previously confessed judgment and defaulted. If the legislature had wished to provide that only one confession of judgment could be made as to the same tract of land, it would have ended Section 6 at the word "made"; by continuing with the words "by or on behalf of any owner of any particular right," etc., the legislature clearly indicated the intention to allow more than one confession of judgment, provided, that no more than one confession be made by the owner of the same interest in the land.

P. F. SHERMAN,
Assistant Attorney General.

June 18, 1940. 412a-10

336

Confession of Judgment—Taxes may not be included in and must be paid before such judgment may be entered—Laws 1939, Chapter 91. M40 § 2176-16a.

Benton County Attorney.

You state:

"In some counties the auditors have included in the confession of judgment the taxes for the year 1938, whereas other auditors have not included the taxes for 1938 but have insisted that the 1938 taxes be paid in full with accrued interest, penalties and costs. The auditors who have included the 1938 tax in the confession of judgment base their authority to do so upon the title to Section I of Chapter 91, Laws 1939—'Confession of judgment for delinquent taxes,' and also upon the third (3) paragraph of Section I of that act which is found on page 145 of the Session Laws as paragraph two (2) on that page.

"'At the time of such offer he shall pay any delinquent taxes which have not attached to a judgment for prior years, with accrued interest, penalties and costs.'

* * * * *

"There appears, however, to be some merit to the claim of the auditors who have interpreted this act to include the 1938 tax in the

confession of judgment authorized. Again referring to the paragraph quoted above, the one confessing judgment 'shall pay any delinquent taxes which have **not** attached to a judgment for prior years, with accrued interest, penalties and costs.'

"Under the law, the 1938 tax became delinquent on January 1, 1940, if not paid, and that tax attached immediately to the judgment entered for taxes for the year 1936. The 1938 tax, therefore, would attach to a judgment for prior years and consequently under this paragraph the one confessing judgment would not have to pay this delinquent tax with accrued interest, penalties and costs. Such auditor also interprets the confession of judgment law to mean under its title, all delinquent taxes and the 1938 tax being delinquent is includible in the confession."

You ask whether the 1938 tax if delinquent may be included in the confession of judgment.

We assume that there has been no prior judgment for taxes which has been declared void by a court of competent jurisdiction.

The delinquent taxes which the auditor is authorized to compose into one item or amount by confession of judgment are stated by Mason's 1940 Minnesota Supplement, Section 2176-16a (Laws 1939, Chapter 91, Section 1) to be "delinquent taxes upon any parcel of real estate for 1936 and prior years, which shall have been bid in for and are held by the state and not assigned by it, together with taxes for the year 1937, which shall have become attached to a prior judgment * * *."

This is the grant of authority to the county auditor. It does not provide that delinquent taxes for the year 1938 may be included in the confession of judgment. There is no authority vested in the county auditor to permit the inclusion in the confession of judgment of taxes for the year 1938.

Said Section 16a, supra, also provides in part as follows:

"At the time of such offer he shall pay any delinquent taxes which have not attached to a judgment for prior years, with accrued interest, penalties and costs."

This language must be construed in the light of the preceding provisions. It was clearly the intention of the law, read as a whole, to require that all delinquent taxes not included in the composite judgment should be paid at the time of entry of the judgment. As above stated, the law does not authorize inclusion of the 1938 taxes in the composite judgment. It follows that the 1938 taxes must be paid in full in addition to the amount payable under the composite judgment. This conclusion is supported by the fact that another clause of the same section requires payment of current taxes before they become delinquent.

So far as the phrase, "which have not attached to a judgment for prior years" may seem to conflict with this conclusion, it may be disregarded or modified in order to conform with the main intent of the law. Dunnell's Digest, Sections 8951, 8983.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

November 4, 1940. 412a-10

337

Delinquent—Attachment of rents—Procedure under new lease—M40 § 2150.

Polk County Attorney.

You ask:

> "In cases of the attachment of rents to be paid under an existing lease of tax delinquent lands, is the levy effective as to rents accruing under a new lease, to a different tenant, for a subsequent year or period, or is it necessary that original attachment proceedings be had because of the changed status?"

Mason's 1938 Minnesota Supplement, Section 2150, provides in part as follows:

> "Provided further, that if at any time while the sheriff is collecting such rent the lease upon said property shall expire, or, if the sheriff has once commenced to collect such rent and said property becomes vacant, the county auditor may lease said property upon five days' notice to the owner, subject to the approval of the district court.
>
> "Provided further, that at any time while the sheriff is collecting the rent under any lease, no modification of the lease between the owner and the tenant shall be valid unless approved by the district court upon five days' notice to the county auditor."

Under these provisions, if the sheriff has once commenced to collect the rent, the property assumes a new status in so far as new leases and modifications of existing leases are concerned. The court has acquired jurisdiction over the property and any change in the leasing is subject to its approval.

If the new lease to which you refer was made in accordance with the above quoted provisions, the existing attachment is effective as to the rents accruing thereunder. In such case the requirement for approval of the rent would be sufficient to charge the new lessee with notice that the lease was made under the jurisdiction of the court and that it was subject to the existing attachment. Hence, in our opinion no new attachment

proceedings would be necessary in any case where a new lease was made in compliance with the statute.

However, if a new lease was made in disregard of the statute to a lessee who entered into the lease in good faith and without knowledge of the attachment, we do not think that the attachment would be binding upon him until he was given notice thereof. We think that this conclusion is compelled by a reading of Section 2150 as a whole, and particularly by the express provision that the sheriff serve a copy of the writ of attachment "on each tenant or person in possession of such land paying rent therefor, or for any part thereof, and such service shall operate as an attachment of all rents accruing from the person served." Nowhere in the statute is there any provision which makes the commencement of the attachment proceedings or the issuance of the writ of attachment by the court constructive notice of the attachment to tenants or persons in possession of the land. It follows that in order to subject a tenant to liability for payment of the rent to the sheriff, he must be brought personally within the jurisdiction of the court, either by personal service upon him of a copy of the writ or by his voluntary submission through acceptance of a lease approved by the court.

We do not think that it would be necessary to commence a new attachment proceeding against a new tenant whose lease had not been approved by the court. All that would be necessary would be to serve on him a copy of the writ of attachment already issued.

Of course the validity of the lease in any such case would be questionable until it was approved by the court. Whether such a lease would be absolutely void or merely voidable is a judicial question, which we need not attempt to determine. However that may be, we think that upon discovering that the owner of the premises had made a new lease without the approval of the court, it would be the duty of the auditor to decide whether it should be approved or contested. If he is satisfied that the terms of the lease are reasonable and that the premises cannot be rented on terms that will produce more tax revenue under the attachment, he should seek to have the lease approved by the court. Otherwise he should seek to have it cancelled and proceed to negotiate a new lease as provided by the statute. In either case he should consult the county attorney promptly as to the proper procedure, and should notify the sheriff to serve a copy of the existing writ of attachment forthwith upon the tenant, so as to bind any unpaid rent that may have accrued or that may accrue pending the determination of the matters at issue.

CHESTER S. WILSON,
Deputy Attorney General.

November 8, 1939. 412a-25

338

Delinquent—Redemption—Amount necessary—Interest rate and time of commencement—M27 § 2152; L. 33, C. 121.

County Attorneys.

With reference to delinquent taxes for 1932 and subsequent years, the question has been submitted to this office:

> "Where land is bid in for the State at the annual May sale and subsequently assigned, is interest figured on the amount of the assignment from the date of the assignment to the date of redemption or on the amount of the original tax from the 1st day of March following the year in which the tax was current to the date of redemption?"

Mason's Minnesota Statutes of 1927, Section 2152, provides in part as follows:

> "Any person redeeming any parcel of land shall pay into the treasury of the county, for the use of the funds or persons thereto entitled: * * *
>
> "2. If the right of the state has been assigned pursuant to section (R. L.) 935, the amount paid by the assignee with interest at twelve per cent per annum from the day when so paid, and all unpaid delinquent taxes, interest, costs, and penalties accruing subsequently to such assignment; and if the assignee has paid any delinquent taxes, penalties, costs, or interest accruing subsequently to the assignment, the amount so paid by him, with interest at twelve per cent per annum from the day of such payment."

The last paragraph of Laws of 1933, Chapter 121, Section 3, reads as follows:

> "Provided, that such interest shall be calculated from the first day of March following the year in which the taxes become due and no interest shall be charged on penalties accrued and only on the amount of taxes and costs authorized by law."

In the case of Bratrud v. Security State Bank of Bemidji, et al., 281 N. W. 809, the Supreme Court of the State of Minnesota passed upon the rates of interest applicable to the taxes of 1932 and subsequent years in connection with Section 2188, Mason's Minnesota Statutes of 1927. The court said:

> "Laws 1933, c. 121, s. 3, amended Laws 1931, c. 313, so that the rate of interest provided for is reduced to eight per cent for 1932 and subsequent years instead of ten per cent.
>
> "We think these two statutes manifest an intention and use language sufficiently broad to constitute an amendment of s. 2188 insofar as the rate of interest is concerned. Apparently the legislature employed comprehensive language to avoid the necessity of enacting

specific amendments to the many sections in our statutes dealing with the rate of interest in connection with delinquent tax proceedings."

While it is true that the case under discussion passes upon the effect of these statutes on Section 2188, above referred to, it is our opinion that under the language of the court quoted above said Laws 1933, Chapter 121, paragraph 3, also amended Section 2152 above referred to.

In addition to reducing the interest rates from twelve per cent to eight per cent, Laws 1933, Chapter 121, Section 3 has the further provisions which are stated in the paragraph quoted above.

Applying the language above quoted to said paragraph 3, Section 2152, we find that said section is amended not only so as to reduce the rate of interest from twelve per cent to eight per cent, but also to change the date from which interest shall be calculated to the first day of March following the year in which the taxes became due. It further amends said paragraph 3 of Section 2152 so as to provide that interest shall not be charged on penalties accrued and only on the amount of taxes and costs authorized by law.

It is our opinion that where land is bid in for the state at the annual May sale for delinquent taxes for 1932 and subsequent years and is subsequently assigned, the interest is figured at eight per cent instead of twelve per cent and is figured on the amount of the original tax from the first day of March following the year in which the taxes became due and also upon the costs authorized by law. Care should be taken that no interest is charged on the penalties which have accrued and that the face amount of the penalties only is included in the amount required to be paid for redemption.

GEORGE B. SJOSELIUS,
Special Assistant Attorney General.

March 6, 1939. 412a-9

339

Delinquent—Redemption—By owners of undivided interests—M27 § 2156.

Kanabec County Attorney.

You state:

"A tract of land in Kanabec County is owned by twelve heirs, each one having an undivided one-twelfth interest therein. In May, 1932, two of the heirs owning together an undivided two-twelfths interest paid two-twelfths of the 1931 tax, thereby paying the current tax on their respective interests, the other ten-twelfths of the 1931 tax being unpaid.

"Thereafter, and on all subsequent years from 1932 to the present, the tax on the whole twelve-twelfths of this property has been bid in for the State and judgment obtained. It is now the intention of the County to serve notice and perfect the tax forfeiture for the 1931 tax on the undivided ten-twelfths interest in and to this property and thereafter offer the undivided ten-twelfths interest for sale."

You ask:

"* * * whether or not the two heirs who paid the 1931 tax on their respective undivided one-twelfth interest each could then come in and redeem their undivided two-twelfths interest by paying to the County a sum equal to two-twelfths of the tax judgments for the year of 1932 and subsequent years and, if so, could they then acquire title to this undivided two-twelfths interest sufficient to give a deed of the same to this prospective purchaser of that ten-twelfths interest which is forfeited and will be offered for sale?"

From your statement of facts we assume that the undivided ten-twelfths interest whereon the 1931 taxes were unpaid was bid in for the state for those taxes, and is now subject to forfeiture on account thereof. We also assume that the other two-twelfths interest, whereon 1931 taxes were paid, was bid in for the state for 1932 taxes, from which the owners of that interest propose to redeem.

The two heirs who paid the 1931 taxes on their respective undivided one-twelfth interests are entitled to redeem the same in their own respective names on paying such proportion of the amounts due for taxes, penalties, interest, and costs for 1932 and subsequent years as their respective undivided interests bear to the whole, under Mason's Minnesota Statutes of 1927, Section 2156. These heirs might redeem the other interests also, but not in their own names. Redemption of the other shares would be subject to the beneficial interests of the other cotenants, as the same might appear.

GEORGE B. SJOSELIUS,
Special Assistant Attorney General.

May 10, 1940. 423h

340

Delinquent—Redemption—Determination of last day of stated period—M27 § 10933; M40 § 2164-6(c).

Lac qui Parle County Attorney.

You state:

"On September 28, 1937, the attorney general's office rendered an opinion, No. 413 of the biennial report for 1938, defining the term 'stated period of redemption'."

You ask:

Whether there has been a subsequent opinion issued on the same point, and if not, whether the attorney general adheres to the above mentioned opinion.

There has been no opinion upon this matter since that of September 28, 1937, to which you refer.

The next to the last paragraph of said opinion No. 413 reads as follows:

> "The exact time of the expiration of the stated period of redemption for a particular parcel of land sold for taxes for either 1931 or 1932 is the end of the last day of a five year period **which commences to run on the date when such parcel was sold for taxes or bid in for the state for taxes.**"

Mason's 1940 Minnesota Supplement, Section 2164-6 (c) (Laws 1935, Chapter 278, Section 2) provides:

> "The stated period of redemption of all lands sold to actual purchasers or bid in for the state at any tax judgment sale hereafter held shall be five years from the date of sale."

Mason's Minnesota Statutes of 1927, Section 10933, paragraph 21, provides:

> "In computing the time within which an act is required or permitted to be done, the first day shall be excluded and the last included, unless the last shall fall on Sunday or on a holiday, in which case the prescribed time shall be extended so as to include the first business day thereafter."

The question then arises whether or not the day on which the sale took place should be excluded. The rule as laid down in Dunnell's Digest, Section 9627, is:

> "Whether the word 'from' shall be construed as inclusive or exclusive of the terminus a quo depends upon the subject matter and context. When it refers to the time within which an act is required or permitted to be done, the statute provides that, with certain exceptions, the first day shall be excluded."

The reference to time in Section 2164-6, supra, is a reference to the time within which an act is required to be done. Following the rules laid down, the day on which the sale took place should be excluded.

The exact time of the expiration of the stated period of redemption for a particular parcel of land sold for taxes for either 1931 or 1932 is the end of the last day of a five year period which commences to run on the date following the day on which such parcel of land was sold for taxes and bid in for the state.

Opinion No. 413 above referred to is hereby modified to the extent necessary to conform with this opinion.

CHESTER S. WILSON.
Deputy Attorney General.

August 12, 1940. 412a-23

341

Delinquent—Redemption—Expiration—Serving notice—M27 § 2163; L. 39, C. 310.

Mahnomen County Attorney.

You inquire as to the law and procedure in connection with serving notice of expiration of the time for redemption of real property which is subject to forfeiture for delinquent taxes for the year 1932.

You call attention to the opinion rendered by the former attorney general, dated April 27, 1938, holding that it was necessary to serve individual notices, substantially in the form prescribed by Mason's Minnesota Statutes of 1927, Section 2163, in cases based on the 1932 taxes. We have adhered to that opinion. You suggest that the conclusion therein expressed may have been, in effect, overruled by the decision of the Supreme Court, rendered February 17, 1939, in the case of State of Minnesota v. Aitkin County Farm Land Company. The same idea occurred to us when the decision was rendered, but, after careful consideration, we decided that since the Court did not pass on the specific point, it would not be safe to proceed upon such an assumption.

We gave a good deal of thought to the question as to whether the problem could be solved by having the legislature pass an act providing for the service of notice on the 1932 taxes in the general form prescribed by Laws 1935, Chapter 278, in order to save the expense entailed by publication of individual notices under Section 2163. We decided that even with an express enabling act, the matter would still be open to question and litigation, owing to the possibility that the Court would hold that vested rights were involved.

Accordingly we decided that it was best not to attempt to secure any new legislation with reference to notices on the 1932 taxes. Hence, in all cases where it is deemed necessary to serve notice on taxes for 1932, we advise procedure under Section 2163, in accordance with the opinions above mentioned. This procedure is already being followed in Ramsey and some other counties where the amount and value of the real estate subject to delinquent taxes for 1932 was sufficient to justify the expense.

However, in order to take care of the situation in counties such as yours, where the expense of procedure under Section 2163 would be prohibitive, the legislature, at our suggestion, enacted Laws 1939, Chapter 310, authorizing the taking of a new tax judgment for taxes for 1938 upon lands subject to prior delinquent taxes under the conditions in question. Necessarily this will postpone the absolute forfeiture of such lands to the state for some years. However, there seemed to be no other way to accomplish such forfeiture effectively and economically.

We think that with the acts passed by the recent legislature, the laws are now in such shape that within the next few years we can work our way out of the confusion which was created by the various extension

and discount sale acts passed by the legislature during past years. This, of course, will depend on getting future legislatures to refrain from passing well-meant but hastily devised acts which upset the orderly procedure.

In this connection, it may be noted that the recent legislature passed some remedial acts which should be adequate to afford relief in most, if not all, cases where former owners have been subjected to hardships through tax forfeitures. However, as far as we know, all these remedial acts have been devised in such manner as not to interfere with the regular procedure.

CHESTER S. WILSON.
Deputy Attorney General.

April 26, 1939. 423c

342

Delinquent—Redemption—Expiration—Two or more descriptions may not be combined in one notice—M27 § 2163.

Sherburne County Attorney.

You state:

> "In order to effect forfeiture of lands bid in by the State at the May, 1934, tax sale for delinquent taxes for the year 1932, it is required that the Notice of Expiration of Time of Redemption must be substantially as provided by Mason's 1927 Minnesota Statutes, Section 2163."

You ask:

> 1. "Where several parcels are assessed separately to the same person and where said parcels were bid in separately by the State at the May, 1934 tax sale, is it possible to combine said parcels in one Notice of Expiration of Time of Redemption in order to reduce the expense?"
>
> 2. "In case this is possible would redemption of any one or several of the parcels contained in the notice invalidate the notice so far as the unredeemed parcels are concerned and what form of notice should be used?"

Under the language of Mason's Minnesota Statutes of 1927, section 2163, there may be some cause for argument on the question of permitting the inclusion of more than one piece of property assessed in the name of one person in the same notice. We understand that some of the printing houses have issued forms for such combined notices. However, this has been without official sanction, as far as we can discover. We are unable to find any opinion on the subject in our files. However, inquiry discloses

that this office has informally disapproved the practice, and that the authorities of the two largest counties, Hennepin and Ramsey, have refused to adopt it.

We wish to point out that to insert more than one description would in effect simply result in combining together two or more notices, since a complete statement of particulars would have to be made as to each parcel separately. There could be little, if any, saving of expense, as the detailed information required for each individual piece of property would be of approximately the same length as would be required in the case of individual notices.

There would be a substantial doubt as to the validity of such a combined notice. We do not believe that the saving would justify the hazard of having a defective tax forfeiture proceeding. While it is true that in the case of State v. Aitkin County Farm Land Company, 284 N. W. 63, the court upheld a consolidation of descriptions, in that case the combined description was in the judgment. The court indicated that the consolidation of descriptions was objectionable, but that the owner, having failed to answer, waived his objections. An altogether different situation is presented here.

After a full consideration of the matter this office cannot approve of the proposed combination of descriptions in one notice of expiration of time for redemption. Even if we did approve it, a court might well hold otherwise, so our opinion to that effect would not afford any protection to persons relying on it, and might be misleading.

GEORGE B. SJOSELIUS,
Special Assistant Attorney General.

October 6, 1939. 423c

343

Delinquent—1932 taxes—Time for redemption—Notice—Inclusion of 1931 taxes—M27 § 2163; M40 §§ 2139-2, 2164-1, 2164-2, 2164-6, 2164-9.

Lincoln County Attorney.

You are advised:

1. Where a parcel of land was bid in by the state for taxes for 1932 at the regular tax judgment sale held in May, 1934, and was thereafter sold to an individual purchaser by assignment certificate covering 1932, 1933, and 1934 taxes, notice of expiration of the time for redemption may now be served in behalf of such purchaser at any time. The time for redemption will expire twelve months after service of notice and filing of proof thereof in the office of the county auditor. The form of notice is that prescribed by Mason's Minnesota Statutes of 1927, Section 2163, except that the specified period of sixty days should be changed to twelve months.

2. This case, involving lands bid in at a tax judgment sale between the passage of Laws 1933, Chapter 366, and Laws 1935, Chapter 278, is governed by Laws 1935, Chapter 278, sections 2(b), and 5 (Mason's Supplement 1938, Sections 2164-6, 2164-9), Mason's Supplement 1938, Section 2139-2, Laws 1933, Chapter 366 (Mason's Supplement 1938, Sections 2164-1, 2164-2), and Mason's Minnesota Statutes of 1927, Section 2163. Under Section 2139-2 (part of the so-called Thwing act) the land would have become absolutely forfeited to the state five years from the date of the tax sale, that is, in May, 1939, without right of redemption, but for Laws 1933, Chapter 366, which was passed before absolute forfeiture occurred, and which required twelve months notice of expiration of the time for redemption. That act did not prescribe the form of notice, but it has been construed as requiring notice in the old form required by Section 2163.

3. For method of computing interest in such cases, see circular letter to county attorneys, dated March 6, 1939, a copy of which is enclosed. See also opinion number 415, report of attorney general for 1938.

4. Note that the sale for 1931 taxes was postponed by Laws 1933, Chapter 337 (Mason's Supplement 1938, Section 2139-6), to 1935, thus falling at the same time as the regular sale for 1933 taxes. If the 1931 taxes are unpaid, they must also be included in the amount required to redeem. See opinion number 415, 1938 report, above referred to, for form of statement concerning such taxes in the notice.

5. In referring to opinion number 415, 1938 report, above mentioned, bear in mind that the form of notice therein given was drawn for cases where the land is still held by the state. Hence it alleges that the land "was duly bid in for the state," instead of saying merely that the land "was sold," as in cases where the land has been sold to an actual purchaser.

CHESTER S. WILSON,
Deputy Attorney General.

August 4, 1939. 419f

344

Gross Earnings—Exemption or commutation of ad valorem tax in lieu of—Determined by use of property—M27 § 2246.

Commissioner of Taxation.

You state that certain land was privately owned and purchased by a railroad company only because of the gravel value and that there are no spur tracks on this land nor is it used or ever has been used for any railroad requirement whatsoever. That this tract is wild, unimproved, and has never been cultivated or occupied.

You inquire whether or not land having a gravel deposit and owned by a railroad company is exempt from taxation under the Minnesota tax laws in the aforementioned circumstance.

Mason's Minnesota Statutes of 1927, Section 2246, provides in part as follows:

> "Every railroad company owning or operating any line of railroad situated within or partly within this state, shall, during the year 1913 and annually thereafter, pay into the treasury of the state, in lieu of all taxes, upon all property within this state **owned or operated for railway purposes,** by such company, including equipment, appurtenances, appendages, and franchises thereof, a sum of money equal to five per cent of the gross earnings derived from the operation of such line of railway within this state."

The exemption, or more properly speaking, the commutation of railroad property from ordinary taxation (Stearns v. Minnesota, 179 U. S. 231; City v. Baltimore Ry. Co. 296 Fed. 89; Jaggard on Taxation, 84) is based on the assumption that it will be held and used for the purposes for which the corporation was created and through such use yield to the corporation an income and to the state a percentage of the same in lieu of direct taxation. Property held by railroad companies not used for railroad purposes is taxable in the ordinary way where the railroad companies' charter does not expressly provide for an exemption of all property. This rule has been applied to lands which have ceased to be used for railroad purposes and are either returned to individuals or allowed to remain vacant. Ramsey County v. Chicago, etc., R. R. Co. 33 Minn. 537, 24 N. W. 313. Whitcomb v. Ramsey, 91 Minn. 238, 91 N. W. 879. County of Todd v. St. Paul, etc., 38 Minn. 163, 36 N. W. 109, 142 U. S. 282. Also to lands held for railroad purposes in the indefinite future. City of St. Paul v. St. Paul, etc., 39 Minn. 112, 38 N. W. 925. As to personal property see State v. Northern Pacific Ry. Co. 167 N. W. 294, 297, 139 Minn. 469, 473.

However, where substantially all of a tract is used for railroad purposes small fragments of the tract not in such use are nevertheless exempt. State v. District Court, 68 Minn. 242, 71 N. W. 27.

Land of a railroad company held not used for railroad purposes and therefore subject to an ad valorem tax and to an assessment for local improvements. State v. Chicago, etc., R. R. Co., 140 Minn. 440, 168 N. W. 180. Judge Dibell, in the foregoing case, stated as follows:

> "The statute should have a reasonable construction and one rather liberal to the company. If the property were held for prospective use at a reasonable time in the future or if it were used as a convenience for railway operation or maintenance, or if it were left vacant for purposes of safety, or to give better access to the depot or tracks it should not be taxed, for by a fair construction it would then bear its share of the public burden by the payment of a gross earnings tax."

See Dunnell's Digest, Section 9552, for a digest of law relative to taxation of property not devoted to railroad uses.

In Minnesota prior to 1920 real estate owned or used by a railroad company for railroad purposes was exempt from assessments for local improvements under General Statutes of 1913, Section 2226, providing for a gross earnings tax on railroads in lieu of all taxes and assessments whatever levied by the state, county or municipal authorities. This statute, however, was amended in 1919, Laws 1919, Chapter 533, to eliminate the words "and assessments," and since that date such property has been subject to assessment for any local improvements which confer a special benefit. And now by the further interpretations of the effect of this amendment, Minnesota has placed itself among those states which believe that a railroad company should pay its proportionate share of the cost of local improvements without regard to the receipt of any practical benefits. Minnesota Transfer Railroad v. City of St. Paul, 165 Minn. 8, 205 N. W. 609, 207 N. W. 320. In re Superior Street, 172 Minn. 561, 216 N. W. 318, 12 Minn. Law Rev. 524. See Anno. 37 A. L. R. 219 for compilation of cases on assessments of railroad right-of-way for local improvements.

While the language used in Railway Express Agency v. Holm, 180 Minn. 271, 230 N. W. 815, is rather broad, this case must be limited to the particular issue involved. Our Supreme Court has applied the same principle to the telephone gross earnings tax, State v. Pequot Rural Telephone Co. 188 Minn. 520, 245 N. W. 695.

The weight of authority is that "* * * only such property as is used for the relevant purposes of the exempt institution is exempt." 18 Minn. Law Rev. 421.

For a general compilation of authorities on whether a gross earnings taxpayer must pay an ad valorem tax on real estate which it owns, depending upon its main or principal use, see Anno. 80 A. L. R. 255.

Your inquiry is answered in the negative.

JOHN A. WEEKS,
Assistant Attorney General.

October 23, 1939. 216i

345

Gross earnings—Property not principally used for telephone purposes subject to ad valorem tax.

Commissioner of Administration.

You state:

"It is deemed necessary that more suitable office space be obtained for the use of the Minnesota Division of Employment and Security. Consequently, specifications and public notice for bids have been published, pursuant to which published notice bids have been received from various owners or managers of building properties in the City

of Saint Paul, including that of a public utility concern which offers to lease its building for a period of two years free of rent on condition, however, that the Division of Employment and Security pay the taxes on such property accruing during the term of the lease, maintenance costs, insurance premiums on the building, cost of heating the building, elevator service and maintenance of elevators, janitor service, water, light, power, supplies, necessary repairs, and any alterations.

"The public utility company formerly occupied this building as an office building and later built a new building and moved its offices into it; * * *."

You ask:

"Will the said utility company building property become subject to real estate tax in the event it is leased to the State of Minnesota, Division of Employment and Security without rental charge but subject to costs as above set forth?"

In the case of State v. Pequot Rural Telephone Co., 188 Minn. 520, it was held that:

"Property is either devoted to the telephone business, to the extent and of the character indicated, or it is not. The whole is taxable on an ad valorem basis, or no part thereof is to be so taxed. There is no room for neutrality or division. The whole must follow the principal use."

The building referred to in your question will not be used in any part for telephone purposes if it is rented or leased to the state for office purposes. It necessarily follows that the building will become subject to ad valorem taxes in the event it is leased to the state or any person for office purposes. We are unable to find any authorities which hold that any different situation arises because the property is leased to the state for state purposes and not to a private person or corporation for private use. Your question is answered in the affirmative.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

August 17, 1939. 216g

346

Lien—Bankruptcy—Notice of expiration of redemption to be filed with clerk of court—L. 35, C. 278.

Red Lake County Attorney.

You state that a number of parcels of real estate situated within Red Lake County were assessed in the name of The Chicago, Rock Island and

Pacific Railway Company, and taxes for the years 1931, 1932, and 1933 were not paid. The company was adjudicated a bankrupt on June 8, 1933, in the District Court of the United States for the Northern District of Illinois, Eastern Division. The lands were sold for the 1933 taxes on May 13, 1935, and were bid in for the State of Minnesota. The county auditor was advised of the company's bankruptcy a short time ago and a portion of the court's order, enjoining and restraining all persons, firms and corporations from interfering with and enforcing liens upon any portion of the assets of the company belonging to or in the possession of the debtor or from taking possession of the same, was sent to him.

The period of redemption has expired, and you inquire if the county auditor may serve notice of the expiration of the period of redemption.

The sale and redemption of taxes for the year 1933 sold in the year 1935 are governed by Chapter 278, Section 8, Laws of 1935, and those entitled to redeem have 60 days after the giving of notice and filing of proof thereof, as provided therein.

Mason's Minnesota Statutes of 1927, Section 2191, provides that the state shall have a lien for unpaid taxes, which attaches May 1 in the year in which they are levied until they are paid.

A statutory tax lien generally is not affected by the subsequent bankruptcy of the taxpayer, although it is created within four months of the bankruptcy petition. 8 C. J. S. section 243, page 897. See—

Remington on Bankruptcy, 4th ed., vol. 5, section 2364;

11 U.S.C.A. section 103, subsection 100;

11 U.S.C.A. section 104, subsection 13;

11 U.S.C.A. section 107, subsection 356;

American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co., 98 Fed. (2d) 72;

Bright v. Arkansas, 249 Fed. 953;

In re Clark Realty Company, 253 Fed. 938;

In re Jacobs, 7 Fed. Supp. 749.

Prior to the bankruptcy law of 1938, it was necessary to obtain the court's sanction in order to convert a pre-existing tax lien into full title by procurement of a tax deed or certificate.

In re Eppstein, 156 Fed. 42, 84 C.C.A. 208, 17 L.R.A. (n.s.) 465;

Dayton, Trustee, etc. v. Stanard, 241 U. S. 588.

Bankruptcy Laws of 1938, section 67b, provides in part as follows:

"* * * statutory liens for taxes and debts owing to the United States or any State or subdivision thereof, created or recognized by

the laws of the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy or of the original petition under chapter X, XI, XII, or XIII of this Act, by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof with the court."

The county auditor should proceed in the usual manner and in addition to the posting and publishing of notice and service upon occupants, if any, a notice should be filed with the clerk of court in which the bankruptcy proceeding is pending. The notice sent to the clerk of court should contain the description of the property and the name of the owner to which the property is assessed.

JOHN A. WEEKS,
Assistant Attorney General.

July 11, 1940. 520b

347

Rural Credit Land—County auditor no authority to spread tax after land passes to State.

State Department of Rural Credit.

You state that the Department of Rural Credit acquired title to certain real estate in Scott County on July 10, 1938 by foreclosure proceedings and that on October 25, 1938, and prior to the time taxes were spread thereon, the Department sold said real estate by contract for deed; that during the period from July 10, 1938 to October 25, 1938 the former owner and mortgagor occupied the farm as tenant of the Department of Rural Credit. The purchaser under contract obtained possession thereof on November 1, 1938.

You inquire:

"Is this property subject to the payment of taxes for the year 1938 under the circumstances above stated?"

Your inquiry is answered in the negative. Immunity from taxation of public lands attaches when the fee title vests in the state. The auditor has no authority to spread taxes against lands after title passes to the state and until taxes are spread, which is evidenced by his certificate, there can be no tax. McCormick v. Fitch, 14 Minn. 252 (Gil. 185). In Re Delinquent

Real Estate Tax Proceedings, 182 Minn. 437, 13 M.L.R. 745; Foster v. City of Duluth, 120 Minn. 484, 140 N. W. 129, 48 L.R.A. 707; Johnson v. Revere (Mass.), 177 N. E. 577, 79 A.L.R. 116, 26 R.C.L. 229.

JOHN A. WEEKS,
Assistant Attorney General.

July 24, 1939. 770g

348

Rural Credit Lands—Immunity from taxation upon acquisition of title by State—Land sold under contract—M27 § 2072.

Redwood County Attorney.

You state that certain property was on September 27, 1937, deeded to the Department of Rural Credit, State of Minnesota, in lieu of mortgage foreclosure and a lease for one year was given to the former owner; that the county auditor spread the taxes during the month of December 1937 and had the same in the hands of the treasurer prior to January 12, 1938, on which date he was first notified of the transfer of the property to the Department of Rural Credit.

You inquire whether the 1937 taxes are a valid levy against the Department of Rural Credit. This question is answered in the negative.

Immunity from taxation of public lands attaches when the fee title vests in the state either by the expiration of the time for redemption from the foreclosure sale or by the owner's voluntary conveyance to the state in lieu of foreclosure. The auditor has no authority to spread taxes against lands after title passes to the state and until taxes are spread, which is evidenced by his certificate as provided in Mason's Minnesota Statutes of 1927, Section 2072, there is no tax in existence. McCormick v. Fitch, 14 Minn. 252 (Gil. 185). In Re Delinquent Real Estate Tax Proceedings, 182 Minn. 437, 13 M.L.Rev. 745; Foster v. City of Duluth, 120 Minn. 484, 140 N.W. 129, 48 L.R.A. 707; Johnson v. Revere, etc. (Mass.), 177 N.E. 577, 79 A.L.R. 116. 26 R.C.L. 299.

The renting of land by the season is merely incidental to the holding of land for sale and it does not affect the public purpose for which it is primarily held. Attorney General's Opinion to Minnesota Tax Commission November 20, 1926.

You further state that this same property was on December 6, 1938, sold by the Department of Rural Credit to a private individual under a contract for deed.

You inquire whether the 1938 taxes are a valid levy against the Department of Rural Credit or its vendee under the contract for deed of December 6, 1938.

Your second inquiry is answered as follows: Land sold under contract for deed by the Department of Rural Credit should be placed back on the tax rolls. Land may be assessed and taxed to a person who is in possession thereof under an executory contract of sale. State v. Rand, 39 Minn. 502, 40 N. W. 835, 61 Corp. Jur. 211, Sec. 187. The same rule prevails here as when the state acquires title. If taxes had been spread as evidenced by the certificate of the auditor when the state divested itself of fee title either by deed or contract, then the land would not be subject to taxes for that year and your question would be answered in the negative.

JOHN A. WEEKS,
Assistant Attorney General.

April 21, 1939. 770g

349

Rural Credit Lands—Lands sold by state—Taxes for current year.

Kittson County Attorney.

You state that the Rural Credit Department owned a piece of property on May 1, 1938, and on July 7, 1938, the land was sold to a private party. You inquire:

> "Is the purchaser, buying on July 7, 1938, entitled to cancellation of the 1938 taxes?"

Your inquiry is answered as follows: Immunity from taxation of public lands attaches when the fee title vests in the state. The auditor has no authority to spread taxes against lands after title passes to the state and until taxes are spread, which is evidenced by his certificate as provided in Mason's Minnesota Statutes 1927, Section 2072, there is no tax in existence. McCormick v. Fitch, 14 Minn. 252 (Gil. 185). In Re Delinquent Real Estate Tax Proceedings, 182 Minn. 437, 13 M.L.Rev. 745; Foster v. City of Duluth, 120 Minn. 484, 140 N.W. 129, 48 L.R.A. 707; Johnson v. Revere, etc. (Mass.), 177 N.E. 577, 79 A.L.R. 116, 26 R.C.L. 299.

Land sold by the Department of Rural Credit should be placed back on the tax rolls. Land may be assessed and taxed to a person who is in possession thereof under a contract of sale. State v. Rand, 39 Minn. 502, 40 N. W. 835, 61 Corp. Jur. 211, Section 187. If the taxes have been spread as evidenced by the certificate of the auditor when the state divests itself of fee title, then the land would not be subject to taxes for that year.

I do not believe that any agreement between the purchaser and the vendor would have any effect as to the liability for taxes in the instance you cite.

JOHN A. WEEKS,
Assistant Attorney General.

April 25, 1939. 770g

350

Rural Credit Lands—Lands sold subsequent to May 1.

State Department of Rural Credit.

You state that the Department of Rural Credit became the owner of certain land on April 17, 1938, by reason of the expiration of the year of redemption in foreclosure proceedings, and was the owner of said land on May 1, 1938. Thereafter by deed dated June 1, 1938, the Department of Rural Credit conveyed said land to one "X." Said deed was subsequently recorded in July of 1938. You inquire:

(1) Is the purchaser who acquired title as stated above entitled to cancellation of the 1938 taxes?

(2) If so, can said land be legally assessed for taxes before May 1, 1939?

Your first inquiry is answered in the affirmative and the second inquiry is answered in the negative.

Immunity from taxation of public lands attaches when the fee title vests in the state. Land owned by the state should not be assessed and if any such assessment is made it is void. The property you inquire about was owned by the state prior to and on May 1, and should not have been assessed. McCormick v. Fitch, 14 Minn. 252 (Gil. 185). In Re Delinquent Real Estate Tax Proceedings, 182 Minn. 437, 13 M.L.Rev. 745; Foster v. City of Duluth, 120 Minn. 484, 140 N. W. 129, 48 L.R.A. 707; Johnson v. Revere, etc. (Mass.), 177 N.E. 577, 79 A.L.R. 116, 26 R.C.L. 299.

If the state owns the property on May 1 of 1938, it would remain immune from taxation until it sells or disposes of said land, and in the event the state sells said land it remains immune from taxation until the following May 1, when it would then be subject to assessment and taxation.

JOHN A. WEEKS,
Assistant Attorney General.

May 9, 1939. 770g

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