REPORT

OF THE

ATTORNEY GENERAL

TO THE

GOVERNOR
STATE OF MINNESOTA

1941 - 1942

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 1941-1942.

Many laws and proposed amendments have been drafted by the Department of Attorney General. Such recommendations as have been made have been submitted to you in the form of bills and also directly to the members of the legislature and its committees.

Respectfully yours,

J. A. A. BURNQUIST,
Attorney General.

December 31, 1942.

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

December 31, 1942

ATTORNEY GENERAL

J. A. A. Burnquist

DEPUTY ATTORNEYS GENERAL

Chester S. Wilson
Arthur Christofferson

ASSISTANT ATTORNEYS GENERAL

Edward J. Devitt*
Victor H. Gran
William C. Green
Charles E. Houston
Philip F. Sherman
George B. Sjoselius
Ralph A. Stone
Kent C. van den Berg*

SPECIAL ASSISTANT ATTORNEYS GENERAL

Sam W. Campbell
Harold L. Dell
Irving Frisch
George Simpson
Charles T. Stone
Mandt Torrison

DEPARTMENT CLERK

Genevieve K. Spangenberg

*Military Leave.

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5527	U. S. v. Cook County	T. H. No. 61	Final Certificate Recorded
5642	U. S. v. Becker, Mahnomen and Clearwater Counties	Indian Land Tax Refundment	Taxes 1912-1921 affirmed, 1922-1925 denied. Affirmed by U. S. Circuit Court. Appealed to U.S. Supreme Court.
5688	U. S. v. Becker County, et al.	Indian Land Sold for Taxes	Dismissed as to State.
5746	U. S. v. Dakota County	Hastings Dam Condemnation	Suspended
5763	Lee Kenneth Turpin	Injunction	Dismissed
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5891	U. S. v. County of Cook, et al.	Condemnation—Lands for National Forest	No Appearance
5893	U. S. v. St. Louis County, et al.	Condemnation—Lands for National Forest	No Appearance

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5342	Lidberg d.b.a. All-American Oil Co.	Gas Tax	Dismissed
5515	Cyrus C. Howe	OAA	1 N. W. 2d 396
5528	Ed Ernst	Habeas Corpus	297 N.W. 24
5530	Northwest Airlines, Inc.	Personal Property Taxes	7 N.W. 2d 691
5580	Adam Miller	OAA	Dismissed
5583	Maley v. Civil Service	Mandamus	2 N.W. 2d 432
5595	Fortinan v. State and City of Minneapolis	Declaratory Judgment	4 N.W. 2d 349
5599	Chicago & N. W. Ry. Co.	Closing Station	297 N.W. 715
5602	Minneapolis & St. Louis Ry.	L. 25, C. 185	297 N.W. 189
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5605	Casualty Mutual Ins. Co.	Gross Premiums Tax	6 N.W. 2d 800 $9,033.00 Collected
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5683	E. Ray Cory v. State Auditor, et al.	Diversion—Trunk Highway Funds	8 N.W. 2d 614
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5716	Quale v. Hubbard County	OAA	7 N.W. 2d 153
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5743	Constans-Duluth Marine v. Board of Pharmacy	Mandamus	Dismissed
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5873	Bright & Boyd v. Employment & Security Division	Experience Rating	7 N.W. 2d 501
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5883	Henry M. Kalschener and D. H. Ankeny, Trustees of The Emporium	Equalization of Real Estate Tax Assessment	8 N.W. 2d 624
5888	E. Thomas O'Brien v. Secretary of State, et al.	Election Ballot — Congressional Candidates—Democratic Party	6 N.W. 2d 47
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5687	A. J. Kleidon v. Austin Mutual Ins. Co., et al.	Damages	Briefs Filed
5689	Eugene Debs Carstater v. Civil Service, et al.	Certiorari	Briefs Filed
5900	Big Stone County District Court, et al.	Prohibition — Whetstone Project	Briefs Filed
5902	Cargill, Incorporated	Certiorari—Income Tax	Briefs Filed
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	Wm. O'Neill Sons' Co.	Arbitration	296 N.W. 7
	Goar v. Hoffmann	Civil Service — Classification	296 N.W. 24
	Nollet v. Hoffmann	Civil Service—Rules	297 N.W. 164
	Glass v. State	Workmen's Compensation	300 N.W. 593
	Gildea v. State	Workmen's Compensation	298 N.W. 453
	Fuchs, et al.	Eminent Domain	4 N.W. 2d 361
	Nelson, et al.	Damages	2 N.W. 2d 572
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765A	Max York	Swindling	3 N.W. 2d 775
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782A	A. Marcus	Selling Produce Without License	299 N.W. 241
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803A	Milford Burton Lytle	Arson	7 N.W. 2d 305
804A	Eleanor Bresky	Assault and Battery	6 N.W. 2d 464
805A	Rudolph Rediker	Manslaughter—First Degree	8 N.W. 2d 527 STATUS
806A	Kelly Postal		Briefs Filed
808A	Michael Swartz, alias Mitch Gordon		Briefs Filed
809A	Arthur F. Clow		Briefs Filed
811A	Frank Stein	Game and Fish Laws—Failure to Keep Record	Briefs Filed

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5290	William R. Thomas v. Commissioner of Highways	Highway Contracts	Dismissed
5304	Seaboard Surety Co. v. McKusick	Timber Permit	Demurrer Filed
5403	Sadie N. S. Shepard	Income Tax	Settled
5416	Div. of Emp. & Sec. v. S. J. Anderson and Standard Accident Ins. Co.	Claim for Contributions	Judgment

DISTRICT COURT CIVIL CASES—Continued

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5464	Whitmore v. Civil Service	Certiorari—Mandamus	Settled
5465	Bard v. Civil Service	Certiorari—Mandamus	Settled
5471	Finke, Guardian. Mabel Thorn v. F. A. Johnson	Claim to Recover Money	Reversed
5474	Plepler v. State Auditor	Mandamus	Claims Paid
5477	Walter W. Magee	Highway Contract	$2,999.64 Collected
5487	O. H. Brandemoen	Land Rental	Dismissed
5488	Oscar Rosemoen	Delinquent Land Rental	Dismissed
5496	Wolff v. Board of Regents	Contract—Damages	Settled
5497	Northern Pacific Railway Co.	Unreported Gross Earnings Taxes	Judgment for Plaintiff — Appealed to Supreme Court
5498	Minnesota & International Ry. Co.	Gross Earnings Taxes	Judgment for Plaintiff
5500	Itasca Oil Co.	Gasoline Tax	$475.00 Collected
5501	Great Northern Railway	Income Tax Refund	Dismissed
5504	George A. Hormel & Company	Income Tax	Dismissed
5507	Archer-Daniels-Midland Co.	Income Tax	Settled
5508	Kalman and Company	Income Tax	Settled
5514	Edward E. Bersing	Maintenance	$100.00 Collected
5518	Peltier v. Heinen, State Deputy Fire Marshal	Damages—Fake Arrest	Dismissed
5521	C. L. Nelson & Co.	Equipment Rental	Settled
5525	Noble Transit Co. v. Sec. of State	Mandamus—License Plates	Dismissed
5526	Great Northern Railway	Income Tax	Dismissed
5532	Delaney Oil Co.	Inspection Fee	Settled
5538	Application of Julia DeMers	ADC	Settled
5539	Collins Coryell Service Station	Oil Inspection Fee	Dismissed
5542	Triplex Corp. of America v. Commissioner of Insurance, et al.	Injunction	Dismissed—See L. 41, C. 299
5546	Chelsen Corp., et al.	Income and Franchise Taxes	Settled
5556	Minnesota Federal Savings & Loan Association	Income Tax	Judgment for State
5566	Eugene Debs Carstater Removal	Certiorari	Settled
5581	Top v. County of Rock & Department of Social Welfare	OAA	Order Declared Void
5585	Nick Thorpe	Maintenance	Judgment
5588	Merry v. Bermewitz, et al.	Partition	Dismissed
5598	Leonard A. Schiff	Mandamus	Dismissed
5606	Virginia Bigelow	Income Tax Refund	Dismissed
5610	Morris Berger	Maintenance	Dismissed
5613	Electrolux, Inc.	Income Tax Refund	Dismissed
5614 5622 5631 5641 5768	Theo. Hamm Brewing Co.	Income Tax Refund	Settled
5616	John H. Shoberg, et al.	Maintenance	$803.10 Collected
5617	Thornton Brothers Co. v. Commissioner of Highways	Claim on Contract	Settlement Approved
5620	Coolerator Co.	Income Tax Refund	Dismissed
5621	Gluek Brewing Co.	Income Tax Refund	Dismissed
5625	Young v. Civil Service	Mandamus	Demurrer Sustained
5628	Malta Mining Co.	Income Tax—Delinquent	Judgment Entered
5629	Corwin Mining Co.	Income Tax—Delinquent	Judgment Entered
5630	Wilma Carmel Rydell, et al.	Maintenance	$525.39 Collected
5632	John Bull, Guardian Josephine Maciejewski Estate	Maintenance	$1,092.48 Collected
5635	Haley v. Civil Service	Mandamus	Dismissed
5636	Wholesale Petroleum Co.	Gasoline Taxes	Receivership Closed
5637	Bankers Farm Mortgage Co. v. Commissioner of Taxation	Income Tax Refund	Dismissed
5639	Standard Oil Company	Injunction	Answer Filed
5643	Hicks v. Roth Hotel Co., et al.	Minimum Wage	Dismissed
5647	Nash v. Commissioner of Taxation	Income Tax Refund	Judgment
5649	Smith v. Div. of Social Welfare	Restoration	Granted
5650	Gus H. Carlson, et al. v. Civil Service	Mandamus	Briefs Filed
5651	Ralph O. Hervey	Sale of Securities Without License	Permanent Injunction Issued
5652	Henton v. Renville County	Bond of Probate Judge	Bond Sufficient
5654	County of Aitkin, et al.	Condemnation Award	Petition Granted
5655	Fay Young v. Game Wardens	Damages	Dismissed

DISTRICT COURT CIVIL CASES—Continued

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5656	Warroad Co-operative Creamery Association v. Game Wardens	Damages	Verdict for Plaintiff Without Damages
5659	Mary Fable	OAA	Affirmed
5662	Freda Hoffman, et al.	Maintenance	Dismissed
5663	John P. Kennedy	Maintenance	Judgment
5664	Davidson Loan Co. v. Liquor Control Commission, et al.	Replevin	Settled
5666	Crummy v. Civil Service	Mandamus	Judgment
5671	Securities Commissioner v. Pederson	Injunction—Sale of Securities	Dismissed
5676	Eva Sears	Income Tax Refund	Answer Filed
5677	Minnesota Agri. Society v. Collins	Unlawful Detainer	Judgment
5679	Wilder Charity	Amendments of Articles	Granted
5682	Nash Investment Co. and The Nash Co. (two cases)	Income Tax	Dismissed
5685	Diers, et al.	Claim	Judgment
5690	Margaret Beyhan	OAA	Judgment
5692	Snyder's Drug Stores v. State Board of Pharmacy, et al.	Injunction (Self-Service Plan)	Dismissed
5693	Pumarlo v. Public Examiner	Damages	Dismissed
5694	Thompson v. Director Public Institutions, et al.	Certificate of Discharge	Dismissed
5696	Nicollet Corporation	Income Tax	Settled
5697	The Chelsea Corporation	Income Tax	Settled
5698	S. S. White Dental Mfg. Co.	Income Tax Refund	Settled
5699	Emma Cathcart Trust	Trust Agreement	Account Allowed
5700	United Biscuit Co.	Injunction	Settled
5701	Tomczak v. Civil Service	Mandamus	Relator Entitled to $600
5702	Securities Commissioner v. Walsh	Injunction—Sale of Securities	Judge Refused to Sign Order
5703	Paul v. Civil Service	Mandamus	Reinstated
5705	Samuel Rom, et al.	Maintenance	Judgment
5706	Minnesota Valley Canning Co.	Collection of Income and Franchise Taxes	Dismissed
5707	Clarence Converse v. Livestock Sanitary Board	Injunction	Dismissed
5708	Paramount Pictures, Inc. v. Ramsey Co., et al., and four other cases	Injunction (L. 41, C. 460)	Law Held Unconstitutional
5712	Warroad Cooperative Creamery Co. v. Arthur Emme, et al.	Damages	Dismissed
5713	Martin L. Nelson, Guardian Trust Company	Maintenance	Dismissed
5714	First National Bank & Trust as Gdn. of Estate of Mary Pontius Smith	Maintenance	Dismissed
5718	Emma Flanagan	Income Tax Refund	Settled
5719	Robert J. Cummings	L. 41, C. 43	Dismissed
5720	Martin Davis	Income Tax Refund	Settled
5721	Waldorf Paper Products	Mandamus — Income Tax Refund	Dismissed
5722	Carolyn McK. Christian	Income Tax Refund	Dismissed
5724	Rice County v. State	Highway Condemnation	Easement Granted
5725	Hester Hoeft	Guardianship	Granted
5728	City of Minneapolis v. Norten Pedersen	Distribution of Award	Closed
5730	New Amsterdam Casualty Co.	Recovery on Bond	Settled
5731	United States Casualty Co.	Recovery on Bond	Settled
5733	Kelly Postal and Carl Skoglund as representatives of the employees of 14 furniture companies and motor transportation	Certiorari	Dismissed
5734	Charles and Agnes Lichy	Maintenance	Settled
5736	Excel Hinck v. State School for Boys	Habeas Corpus	Dismissed
5737	Austin National Company	Income Tax Refund	Answer Filed
5738	First Trust Co. of St. Paul	Income Tax Refund	Answer Filed
5739	McGraw Electric Co.	Income Tax Refund	Answer Filed
5740	Mayo Clinic	Income Tax Refund	Answer Filed
5741	Merchants Bank Building	Income Tax Refund	Answer Filed
5742	Chisholm Water Supply Co.	Income and Franchise Tax	Collected Tax
5743	Constans-Duluth-Marine v. State Board of Pharmacy	Mandamus	Dismissed
5744	Mullen v. City of Minneapolis	Tax Delinquent Lands	Settled
5747	North Star State Hotel Co. v. Labor		

DISTRICT COURT CIVIL CASES—Continued

DOCKET	CASE	ACTION	DECISION
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5748	Vanselow v. Elsberg, et al.	Unauthorized Contract	Settled
5749	Motor Transport & Allied Workers Local 544, CIO v. State Labor Conciliator and Local 544, AFL	Certiorari	Dismissed
5750	International Harvester Co.	2% Tax (Fire Marshal)	Demurrer Overruled
5751	Victory Printing Company	Injunction	Pending Settlement
5757	Union Scrap Iron & Metal Co.	Failure to Carry Compensation Insurance	Dismissed
5759	Harry J. Macdonald v. Civil Service	Certiorari	Affirmed
5760	Securities Commissioner v. Alexander J. Bedard	Injunction	Writ Issued
5761	Schultz v. Morrison County	ADC	Settled
5770	City of Tower v. St. Louis County	Tax-forfeited Land	Dismissed
5771	Household Finance Corporation v. Commissioner of Banks	Small Loan License	Dismissed
5773	Matthews Freight Service	Public Convenience Certificate	Dismissed
5774	Herrick v. County of Martin	OAA	Dismissed
5778	Howard L. and Edward Peltomaa and Joe Ahonen	Removing Timber from Tax-forfeited Lands	Default Judgment
5779	Rolph Miles and George H. Benck	Removing Timber from Tax-forfeited Lands	Awaiting Trial
5780	Almstead v. Warden Utecht	Habeas Corpus	Writ Discharged
5781	Armour and Company	Income Tax—1935	Dismissed
5782	St. Paul Serum and Continental Casualty Company	Damages	Pending Settlement
5784	Fairmont Canning Company	Injunction	At Issue
5785	City of Blue Earth	Injunction	At Issue
5786	Minnesota Valley Canning Co.	Injunction	At Issue
5787	Village of Winnebago	Injunction	At Issue
5788	Paper Calmenson & Co.	Claims for Excessive Payments	$11,348.31 Collected
5789	Twin City Accounting Service v. Compensation Insurance Rating Bureau	Certiorari	Awaiting Trial
5794	Paltimore Dairy Lunch, Inc.	Income Tax—1937	Paid
5797	White Flash Parks, Inc.	Income Tax—1937	Dismissed
5799	School District No. 129, Pine County, Minn. v. Walter C. Thayer	Condemnation	$200.00 Collected
5802	Charles R. King	Tax Reduction	Settled
5805	Cretex Companies, Inc.	Income Tax Refund	Answer Filed
5807	Bertha Balkwill v. Mankato Civil Service	Certiorari	Writ Quashed
5808	Northwestern Hide & Fur Co. v. Conservation Commission	Return of Seized Furs	Judgment Entered
5810	Local Union No. 36, et al. v. Labor Conciliator	Certiorari	Settled
5814	Richard F. Spurck v. Walter Finke, et al.	Damages	Dismissed
5817	St. Paul Casualty Company	Dissolution and Liquidation	Receiver Appointed
5819	Goodwill Industries of Minneapolis v. Labor Conciliator	Certiorari	Writ Quashed
5820	Frank Manz v. Eva Manz	Maintenance	Plaintiff to Pay Maintenance
5822	Industrial Credit Company v. St. Paul Casualty Company and Insurance Commissioner, Receiver	Claim	Claim Paid
5823	General Minnesota Utilities v. Labor Conciliator	Certiorari	Settled
5826	Securities Commissioner v. I. S. Steensland	Injunction	Stricken
5833	W. A. Mackenzie, et al. v. Hennepin County Welfare Board, et al.	Injunction	Submitted
5834	Florence J. Allen v. Social Welfare, et al.	Injunction	Awaiting Decision
5836	Stanley Deppa	Restoration	Denied
5837	Mill Pond Trout Fish Club, Inc.	Income Tax	Settled
5838	Herbert W. Southworth v. Civil Service	Mandamus	Dismissed
5839	Bebb v. Clearwater County	OAA	Remanded
5841	W. R. Shaw Lumber Company	Income Tax—1937	Tax Abated
5842	Pennsylvania Casualty Co. v. Insurance Commissioner	Claim	At Issue

DISTRICT COURT CIVIL CASES—Continued

DOCKET	CASE	ACTION	DECISION
5843	Math Schiffer	Maintenance	Judgment
5844	Blanchett Investment Co. v. Dakota County, et al.	Declaration of Taking Lands	Answer Filed
5845	Anne Watkins Wilder Trust	Charitable Trust	Account Allowed
5848	John J. Costello	Injunction	Submitted
5849	Bovey DeLaittre Lumber Co.	Income Tax Refund	Answer Filed
5858	Joseph and Paul Korson, et al.	Maintenance	Dismissed
5861	Charles L. DeReu, administrator of Estate of Lester M. Carver	Title to Land	Awaiting Trial
5863	William E. Stramm v. Blanche K. Stramm, Insane	Divorce	Plaintiff to Pay Maintenance
5864	Application of Christopher Osborne	OAA	Settled
5875	Arthur Gillman Oil Co. v. Division of Employment & Security	Certiorari — Liability	Affirmed
5876	Underwriters at Lloyds of Minnesota	Automobile Insurance—Fleet Rating	Defendant Not Entitled to Declaratory Judgment
5877	American Exploration Company	Declaratory Judgment	Awaiting Decision
5880	First National Bank & Trust Co. of Fergus Falls as guardian Estate of Lorena Billings	Maintenance	Claim Filed
5881	City of Virginia v. Charles Iron Mining Company	Condemnation—State Trust Fund Lands	Petition Granted
5882	Sarah Mattson v. State Teachers Retirement Association	Declaratory Judgment—Teachers Pension	Submitted
5885	Edward Clay Nichols	Psychopathic Personality	Dismissed as to State
5886	Northland Canning Co.	Wholesale Dealers Act	Dismissed
5887	Robert I. Benschoter	Habeas Corpus	Writ Discharged
5892	Anoka County Cooperative Light & Power Association v. Labor Conciliator and Local Union No. B-160 of the International Brotherhood of Electrical Workers (AFL)	Certiorari	Writ Discharged
5894	Martin Bergan	Maintenance—Care of Insane	$147.60 Collected
5896	William Forester v. Elmer K. Carlson, St. Paul Casualty Company in receivership	Damages—Claim	Settled
5897	Virginia Newcomb v. Elliott O. Pederson, St. Paul Casualty Company, Receivership	Damages—Claim	At Issue
5898	Brewery, Malt House & Soft Drink Workers Union Local No. 97 and Union Local No. 205 v. Labor Conciliator (two actions)	Injunction—Certiorari	Injunction Dismissed Certiorari Dismissed
5899	Ervin and Joyce Born	Tax-forfeited Land Certificate—Error in Conveyance	Certificate Cancelled
5903	Chas. J. Kalina, insane	Habeas Corpus	Writ Quashed
5904	Mankato Savings & Loan Assn.	Income Tax—Delinquent	Judgment
5905	Earl Guy	Habeas Corpus	Writ Quashed
5906	Eldon Milender v. Arthur Emme, Game Warden	Damages—Fur Pelts Seized	At Issue
5907	John J. Dwyer Petition	Adoption	Annulled
5909	Winona County v. Lanno Dupont, et al., and four other cases	Abatement	Buildings Padlocked
5910	Conservation Department v. Anoka County, et al.	Condemnation—Game Refuge	Certificate Filed
5911	M. V. Frederickson v. Civil Service Board	Certiorari	Sustained
5932	Century Motor Freight	Public Convenience Certificate	Affirmed
5933	North Shore Fish and Freight Co.	Public Convenience Certificate	Affirmed
5934	Elsholtz Tri City Lines, Inc.	Public Convenience Certificate	Dismissed
5935	Great Northern Ry. Co.	Hinckley Crossing	Reversed
5936	Great Northern Ry. Co.	Rothsay Crossing	Settled
5937	Metropolitan Transportation Co.	Bus Service—New Brighton	Affirmed

DISTRICT COURT CIVIL CASES—Continued

DOCKET	CASE	ACTION	DECISION
5938	McKeown Trucks	Public Convenience Certificate	Dismissed
5939	Northwestern Forwarding Co.	Public Convenience Certificate	Dismissed
5941	Rohweder Truck Lines, Inc.	Public Convenience Certificate	Affirmed
5942	H. E. Mullins Truck Service	Public Convenience Certificate	Affirmed
5943	Reynolds Transportation Company	Public Convenience Certificate	Dismissed
5945	Tri State Telephone Co. v. Inter-County Telephone Co.	Connection of Lines	See 1 N.W. 2d 853
5946	Murphy Motor Freight Lines	Public Convenience Certificate	Affirmed

DISTRICT COURT CRIMINAL CASES

785A	Vernon Selsath	Forgery	Acquitted
786A	Louis Anderson	Murder	No Indictment
787A	Ervin Rustand	Murder—Second Degree	Plead Guilty
788A	Larry W. Roche, et al.	Grand Larceny	Not Guilty
792A	Emma Tyree, et al.	Murder of K. B. Birkeland	Murder Case Dismissed—Kidnapping Action Dropped
793A	Eleanor Jeffrey	Arson	Not Guilty
802A	Maurice Galvin	Gross Misdemeanor	Plead Guilty
810A	Marvin Siebke	Carnal Knowledge	Guilty
812	Winona County Cases	Public Nuisance—Vagrancy	Plead Guilty

PROBATE COURT

5553	Julia Hines, Deceased	Escheat	Heirs Found
5644	Thelma Soderholm	Restoration	Denied
5645	Theodore Copps	Restoration	Dismissed
5661	Andrew Kolsk	Restoration	Granted
5667	Anton Hermandez	Restoration	Granted
5668	Paula Rodrigues	Restoration	Denied
5669	Rose Esparaza	Restoration	Denied
5672	Albert Johnson Estate	Escheat	Administrator Appointed
5674	Fred Schwartz	Guardianship	Denied
5678	Theresa Sapulovics Hutchins	Restoration	Denied
5695	Myrtle Weaver Carner	Restoration	Granted
5723	S. H. Brownlee Estate	Claim—Income Tax	Settled
5725	Hester Hoeft	Guardianship	Terminated
5732	Arlene Evers	Restoration	Denied
5735	Tillie Eng Estate	Blind Aid	Claim Allowed
5753	Gloria Thompson	Restoration	Settled
5762	George Bywater Estate	Escheat	Heirship Denied
5775	Gilbert Juneski, a.k.a. Junczewski	Restoration	Granted
5783	Lusciano Friscone	Restoration	Denied
5793	Chester Warner	Restoration	Dismissed
5798	Estate of Annie Emsley, Deceased (Soldiers' Home Board)	Gift to Board	Accepted
5801	Mae Dixon	Guardian's Account	Settled
5824	Agnes Shikora	Restoration	Granted
5831	Andrew Lewis	Maintenance	Dismissed
5832	William Fournier Estate	Maintenance	$92.00 Collected
5855	Lorraine Krois	Restoration	Denied
5856	Mathilda Dickinson	Restoration	Denied
5857	Pauline Ringwelski	Restoration	Dismissed
5859	Gustav Merclaert Estate	Maintenance	$720.00 Collected
5867	Sylvia Miller	Restoration	Dismissed
5868	Dorothy Helen Piper	Restoration	Granted
5869	Sara Kravetz	Restoration	Denied
5878	Rose Masters	Restoration	Denied

JUVENILE COURT

5765	Richard and Donna Icono, Wards of Owatonna State School	Discharge of Guardianship	Denied

STATE DEPARTMENTS

GOVERNOR

DOCKET	CASE	ACTION	DECISION
5800	Arthur Lieberman, Carlton County Attorney	Removal from Office	Petition Denied

INDUSTRIAL COMMISSION

5670	Mathilda F. Anderson	Claim	Dismissed
5691	George Wright Seeley	Special Compensation Fund	Award Granted
5704	Andrew M. Lyons v. Red Wing Printing Company, et al.	Compensation Fund	Award Granted
5754	Frank O'Leary v. Sandberg Bros. & Employers Mutual Liability Insurance Co.	Special Compensation Fund	Settled
5772	Leonard Maxwell Raines v. Bureau of Criminal Apprehension	Workmen's Compensation Claim	Settled
5791	Fred E. Yokum	Workmen's Compensation	Dismissed
5812	Henry Weuker v. Chain Belt Co.	Special Compensation Fund	Dismissed as to State
5829	M. L. Swanson v. Northern Bread Company	Special Compensation Fund	Award Granted
5830	James J. Dunleavy v. N.W. Mortgage Company, et al.	Special Compensation Fund	Claim Disallowed
5846	Elmer B. Thorson v. Minnesota Mining & Manufacturing Co.	Special Compensation Fund	Pending
5847	Reuben Cheadle	Special Compensation Fund	Award Granted
5851	Samuel Lee	Vacate Award	Denied
5856	Ben E. Eickholt v. Lake City Water & Light Board, et al.	Special Compensation Fund	Award Granted
5879	Charles S. Stillwell v. Atlas Elevator Co., et al.	Special Compensation Fund	Awarded $2,500
5901	Anton D. Carlson v. Archer-Daniels-Midland Co., et al.	Special Compensation Fund	Submitted

LIVE STOCK SANITARY BOARD

5766	Board v. Denver Hog Serum Co.	Permits	Permits Revoked
5767	Board v. Dr. J. Pogoriler d.b.a. Farmers Veterinary Supply Co.	Permit	Permit Revoked

RAILROAD AND WAREHOUSE COMMISSION

5804	Minneapolis Street Railway Co. and St. Paul Street Railway Company.	Laws 1921, C. 278—Fares, Increase in rate	Rates Increased—6 Tokens for 50c

CIVIL SERVICE

5825	Richard F. Spurck	Discharge	Dismissed

TAX COMMISSION

5854	Labor Lyceum College, Inc.	Tax Reduction	Submitted

HIGHWAY PROCEEDINGS IN EMINENT DOMAIN

DOCKET	CASE	ACTION	DECISION	
Condemnation Proceedings instituted				242
Commissioners' Reports of Awards filed				264
Final Certificates filed				116
Appeals to District Court from awards:				
	Jury trial		150	
	Settled		383	
	Dismissed		244	
	Pending		152	
				929
Drivers' License cases:				
	Tried		3	
	Pending		5	
				8
Workmen's Compensation cases:				
	Tried		5	
	Dismissed		1	
	Pending		3	
				9
Legislative Claim suits:				
	Tried		3	
	Settled		2	
	Pending		6	
				11
Civil Service Commission suits:				
	Tried		1	
	Settled		1	
				2
Railroad and Warehouse Commission, case pending				1

TABLE NO. 1

PROSECUTIONS REPORTED BY COUNTY ATTORNEYS FOR 1941 AND 1942

COUNTY AND COUNTY ATTORNEY	IN DISTRICT COURT							
	Pleaded Guilty		Found Guilty		Acquittals		Dismissals	
	1941	1942	1941	1942	1941	1942	1941	1942
Aitkin—John T. Galarneault	22	16	3	.....	1	1	14	3
Anoka—Edw. J. Walsh—Allen S. Chambers, Ass't.—Charles P. LeRicheux	11	2	1	4	3	.....	1	5
Becker—Carl G. Buck—Lowell W. Benshoff, Ass't.	13	39	1	.....	.....	1	5	1
Beltrami—Clarence R. Smith	29	9	3	.....	1	.....	5	6
Benton—J. Arthur Bensen	14	*	.....	.....	1	.....	.....	.....
Big Stone—C. J. Benson	10	8	.....	.....	1	.....	.....	.....
Blue Earth—Milton D. Mason	19	17	.....	.....	1	1	3	.....
Brown—T. O. Streissguth—S. P. Gislason	34	11	1	1	.....	.....	.....	.....
Carlton—Arthur R. Lieberman	28	11	.....	.....	1	.....	2	.....
Carver—A. E. Haering	17	*	2	.....	.....	.....	.....	.....
Cass—Edward L. Rogers	21	18	.....	3	4	2	11	13
Chippewa—C. A. Rolloff	5	10	2	.....	.....	.....	3	.....
Chisago—Carl W. Gustafson	13	5	.....	.....	.....	2	2	2
Clay—James A. Garrity	23	27	3	1	1	.....	.....	.....
Clearwater—O. E. Lewis	12	9	.....	.....	.....	.....	.....	.....
Cook—E. P. J. Chapman	*	*	.....	.....	.....	.....	.....	.....
Cottonwood—M. F. Juhnke	3	4	.....	.....	.....	.....	.....	.....
Crow Wing—Franklin E. Ebner	19	38	1	2	.....	1	1	3
Dakota—David L. Grannis, Jr	17	20	.....	2	1	1	.....	8
Dodge—Kenneth A. Myster	7	4	1	1	.....	.....	2	3
Douglas—C. Fred Hanson	10	12	.....	.....	.....	.....	.....	2
Faribault—Harold C. Lindgren	12	9	1	1	1	.....	3	14
Fillmore—Clarence T. Perkins	*	*	.....	.....	.....	.....	.....	.....
Freeborn—Joseph R. Gunderson	34	32	.....	3	1	.....	.....	6
Goodhue—Milton I. Holst	15	25	2	.....	.....	.....	5	4
Grant—R. J. Stromme	.....	2	.....	.....	.....	.....	.....	.....
Hennepin—Ed. J. Goff—Frank J. Williams	361	327	35	44	20	15	80	72
Houston—L. L. Roerkohl	10	8	.....	1	.....	.....	1	2
Hubbard—Chas. L. Clark	15	3	.....	.....	1	.....	4	1
Isanti—Harold L. Westin	16	9	.....	.....	.....	.....	.....	2
Itasca—Ben Grussendorf	10	22	2	.....	1	.....	23	11
Jackson—L. A. Paulsrude	9	22	4	2	.....	.....	3	1
Kanabec—Geo. L. Angstman	4	1	.....	.....	.....	.....	.....	1
Kandiyohi—Roy A. Hendrickson	3	2	.....	.....	.....	1	.....	6
Kittson—Lyman A. Brink	20	4	1	.....	1	.....	2	.....
Koochiching—J. J. Hadler	14	30	1	1	.....	1	3	3
Lac qui Parle—H. W. Swenson	4	2	2	.....	1	.....	.....	.....
Lake—Emmett Jones—Elaine M. Oversvee, Act. Incumbent	4	33	.....	1	.....	.....	2	.....

Lake of the Woods—Wheelock B. Sherwood	3	9	3	2			8	1
Le Sueur—George T. Havel	11	9					2	1
Lincoln—B. M. Heinzen	14	9					1	
Lyon—C. J. Donnelly	25			1			3	3
McLeod—Wm. O. McNelly	11	4				1		3
Mahnomen—L. A. Wilson	13	8					3	1
Marshall—A. A. Trost	11	8	1			1	4	1
Martin—C. L. Erickson	30	15	2		1		3	2
Meeker—Sam G. Gandrud	16	3	1	1				
Mille Lacs—John S. Nyquist	9	6	2					
Morrison—Austin L. Grimes	38	28	2	3	1	1	4	6
Mower—A. C. Richardson	34	32	6	3	1	1	1	3
Murray—J. T. Schueller	10	5		1			1	
Nicollet—Emerson Hopp—Geo. T. Olson, Ass't	27	7		1	2			
Nobles—Arnold W. Brecht	23	19		1			2	4
Norman—Lloyd J. Hetland	8	7					1	
Olmsted—Thomas J. Scanlon	38	41	3	1		1	2	5
Otter Tail—Wm. P. Berghuis	55	43	1	3	2	1	19	12
Pennington—Paul A. Lundgren	21	14	3	2	1		5	4
Pine—Albert Johnson	6	4					1	
Pipestone—J. H. Manion	11	1	1		1	1	2	1
Polk—F. H. Stadsvold	29	61		6	3		4	2
Pope—Wm. Merrill		7	11					
Ramsey—James F. Lynch	199	141	16	10	4	3	6	12
Red Lake—Ralph H. Lee	19	*						
Redwood—Thos. F. Reed, Jr	21	17		12			6	12
Renville—Russell L. Frazee	18	8	1				3	
Rice—John E. Coughlin	12	17	1	2	2	2	3	
Rock—Mort. B. Skewes	11	3						
Roseau—Bert Hanson	16	5		2			10	1
St. Louis—Thomas J. Naylor	174	140	18	15	3	7	16	35
Scott—Julius A. Coller II	10	6	1				4	
Sherburne—Geo. H. Tyler		4	2	1			1	7
Sibley—Everett L. Young	3	8	1				3	
Stearns—Harry E. Burns	50	28		8	2	2	10	53
Steele—John P. Walbran	16	20	2	1		1		
Stevens—Clayton A. Gay	1	4				2		
Swift—Frank A. Barnard	10	6					10	6
Todd—Henry F. Prinz	26	6	1				5	3
Traverse—Earl E. Huber	10	3	1					
Wabasha—**Wm. G. Lindmeier—John R. Foley	13							
Wadena—Hugh G. Parker	10	8					3	4
Waseca—John H. McLoone	14	5	1					
Washington—Milton Lindbloom	12	7	2		1	1	3	1
Watonwan—E. M. Perrier	18	8				1	2	3
Wilkin—M. O. Ettesvold	8	7	2					
Winona—W. Kenneth Nissen	19	20	3	1	1	3	24	2
Wright—W. S. Johnson	13	11	1		1		1	3
Yellow Medicine—Paul D. Stratton	7	2	1					3
Totals	2,011	1,615	156	144	67	55	351	363

*Report not received. **1942 Report of Wm. G. Lindmeier January 1 to August 7, inclusive. Report for balance not received.

TABLE NO. I—Continued

PROSECUTIONS REPORTED BY COUNTY ATTORNEYS FOR 1941 AND 1942

COUNTY AND COUNTY ATTORNEY	IN MUNICIPAL COURT							
	Pleaded Guilty		Found Guilty		Acquittals		Dismissals	
	1941	1942	1941	1942	1941	1942	1941	1942
Aitkin—John T. Galarneault	101	158	.....	.....	.....	1	.....	.....
Anoka—Edw. J. Walsh—Allen S. Chambers, Ass't.—Charles P. LeRicheux	349	566	4	31	.....	1	15	13
Becker—Carl G. Buck—Lowell W. Benshoff, Ass't	336	231	18	.....	1	1	9	7
Beltrami—Clarence R. Smith	72	54	4	1	1	1	8	5
Benton—J. Arthur Bensen	38	.....	1	.....	1	.....	7	.....
Big Stone—C. J. Benson	20	41	4	3	.....	.....	13	5
Blue Earth—Milton D. Mason	1,142	956	54	23	6	.....	12	11
Brown—T. O. Streissguth—S. P. Gislason	148	123	10	7	2	.....	4	3
Carlton—Arthur R. Lieberman	509	315	21	11	.....	.....	5	11
Carver—A. E. Haering	107	.....	17	.....	.....	.....	22	.....
Cass—Edward L. Rogers	28	58	11	51	14	6	12	17
Chippewa—C. A. Rolloff	162	128	3	3	6	.....	1	1
Chisago—Carl W. Gustafson	135	127	9	8	2	.....	8	9
Clay—James A. Garrity	391	280	.....	.....	.....	.....	1	4
Clearwater—O. E. Lewis	114	74	4	5	.....	.....	4	.....
Cook—E. P. J. Chapman	.....	.....	.....	.....	.....	.....	.....	.....
Cottonwood—M. F. Juhnke	60	35	2	11	.....	1	.....	.....
Crow Wing—Franklin E. Ebner	1,018	729	18	19	7	8	25	28
Dakota—David L. Grannis, Jr	1,307	1,443	899	680	19	10	70	57
Dodge—Kenneth A. Myster	113	64	2	.....	.....	.....	2	2
Douglas—C. Fred Hanson	129	99	8	2	7	5	11	7
Faribault—Harold C. Lindgren	116	70	.....	1	.....	1	9	67
Fillmore—Clarence T. Perkins	.....	.....	.....	.....	.....	.....	.....	.....
Freeborn—Joseph R. Gunderson	212	124	34	73	.....	.....	2	8
Goodhue—Milton I. Holst	367	137	15	.....	1	.....	4	6
Grant—R. J. Stromme	12	8	.....	.....	.....	.....	.....	.....
Hennepin—Ed. J. Goff—Frank J. Williams	.....	.....	.....	.....	.....	.....	.....	.....
Houston—L. L. Roerkohl	124	81	2	8	.....	1	.....	1
Hubbard—Chas. L. Clark	117	78	5	3	.....	.....	7	5
Isanti—Harold L. Westin	62	37	3	.....	.....	.....	5	5
Itasca—Ben Grussendorf	672	432	5	14	4	5	27	10
Jackson—L. A. Paulsrude	129	35	1	6	1	2	4	4
Kanabec—Geo. L. Angstman	54	68	.....	.....	.....	.....	2	2
Kandiyohi—Roy A. Hendrickson	922	627	.....	2	.....	3	31	19
Kittson—Lyman A. Brink	24	23	1	.....	.....	1	1	.....
Koochiching—J. J. Hadler	182	112	6	17	2	.....	3	9
Lac qui Parle—H. W. Swenson	195	116	4	.....	.....	.....	11	21
Lake—Emmett Jones—Elaine M. Oversvee, Act. Incumbent	146	100	3	2	.....	.....	8	10

Lake of the Woods—Wheelock B. Sherwood	82	74		2				7
Le Sueur—George T. Havel	84	62		1			1	1
Lincoln—B. M. Heinzen	70	68	1	1			3	3
Lyon—C. J. Donnelly	156	278				1		
McLeod—Wm. O. McNelly	259	149		5		5	19	24
Mahnomen—L. A. Wilson	49	34		1			1	2
Marshall—A. A. Trost	39	29	1	5			8	2
Martin—C. L. Erickson	153	106		2			5	
Meeker—Sam G. Gandrud	139	59		1				
Mille Lacs—John S. Nyquist	258	252	18	26	8	10	12	7
Morrison—Austin L. Grimes	277	317	21	15	7	3	30	32
Mower—A. C. Richardson	256	126	16	15	8	1	16	15
Murray—J. T. Schueller	125	45	9	2	2		6	1
Nicollet—Emerson Hopp—Geo. T. Olson, Ass't	126	40	1		5		13	2
Nobles—Arnold W. Brecht	258	160	4	9		3	2	1
Norman—Lloyd J. Hetland	52	51					3	
Olmsted—Thomas J. Scanlon	482	282	22	4	2	1	10	5
Otter Tail—Wm. P. Berghuis	284	168	14	8	2	3	34	46
Pennington—Paul A. Lundgren	37	23	20	11	2		11	11
Pine—Albert Johnson	285	348	6	21	1	1	7	1
Pipestone—J. H. Manion	298	225	20				25	61
Polk—F. H. Stadsvold	77	29	1	2	1		5	3
Pope—Wm. Merrill	120	70	9	4		3	2	
Ramsey—James F. Lynch	1,050	1,318	23	46	2	3	6	5
Red Lake—Ralph H. Lee	62							
Redwood—Thos. F. Reed, Jr	172	143	2	1	3	5	12	10
Renville—Russell L. Frazee	55	46	18				8	9
Rice—John E. Coughlin	420	267	8	7	4	6	9	18
Rock—Mort. B. Skewes	293	120	4	1				1
Roseau—Bert Hanson	59	48		4				4
St. Louis—Thomas J. Naylor	618	568	5	1	2	1	17	25
Scott—Julius A. Coller II	73	15	4	72	1	3	5	12
Sherburne—Geo. H. Tyler	111	111	2	6				1
Sibley—Everett L. Young	75	62	15	11	1	1	12	5
Stearns—Harry E. Burns	151	126			4	5	124	113
Steele—John P. Walbran	291	240	1		1	1	1	5
Stevens—Clayton A. Gay	226	105	4	7			1	1
Swift—Frank A. Barnard	213	134					213	134
Todd—Henry F. Prinz	137	131	1	1	1	1	28	26
Traverse—Earl E. Huber	118	85					2	4
Wabasha—**Wm. G. Lindmeier—John R. Foley	158	16				1	2	
Wadena—Hugh G. Parker	170	111	2	4			2	1
Waseca—John H. McLoone	123	40		2				
Washington—Milton Lindbloom	191	72	8	7		2	5	4
Watonwan—E. M. Perrier	222	172	2	3	2		5	6
Wilkin—M. O. Ettesvold	91	152	2		3	1	3	8
Winona—W. Kenneth Nissen	1,426	1,374	22	30	9	4	26	44
Wright—W. S. Johnson	69	93	1	1			1	
Yellow Medicine—Paul D. Stratton	89	85		1	1		6	5
Totals	20,242	16,158	1,455	1,321	146	112	1,044	1,012

**1942 Report of Wm. G. Lindmeier January 1 to August 7, inclusive. Report for balance not received.

TABLE NO. 2

TABULATED STATEMENT OF CRIMINAL CASES AS REPORTED BY COUNTY ATTORNEYS FOR 1941 AND 1942

NATURE OF ACCUSATION	IN JUSTICE, MUNICIPAL AND DISTRICT COURTS							
	Pleaded Guilty		Found Guilty		Acquittals		Dismissals	
	1941	1942	1941	1942	1941	1942	1941	1942
I. Crimes Against the Person:								
Murder in first degree	4	4	3	6			1	3
Murder in second degree	4	2		1	1		3	
Murder in third degree	3						3	
Manslaughter in first degree	3	1	2	1	1	1	1	
Manslaughter in second degree	3	1	1		3		1	3
Criminal negligence	13	2	8	1	4	2		
Assault in first degree	3	4	1	4	5	1	4	
Assault in second degree	35	44	10	5	6	8	16	15
Assault in third degree	436	400	98	76	24	19	113	68
Robbery in first degree	22	33	3	4	4		2	9
Robbery in second degree	20	15			3		1	4
Robbery in third degree	13	6		5				1
Kidnapping	3						1	
Slander		3					4	4
Miscellaneous		1		1				
II. Crimes Against Morality, Etc.:								
Rape	6	9	8	4	3	2	6	6
Carnal knowledge	5	23		1		1		7
Female under 10 years	1	1		1			1	2
Female 10 to 13 years	6	4	1			1	2	2
Female 14 to 17 years	68	26	8	4	2	2	15	16
Incest	7	4	1	2			1	1
Indecent assault	32	32	6	4	3	3	11	6
Sodomy	13	4		1			2	2
Psychopathic personality			2	4				
Indecent exposure	7	8	2	3			1	
Abortion	6	1	2	2				
Abduction	2	1					3	4
Seduction		1						1
Adultery	11	12	1	1			4	11
Fornication	12	5	1					1
Keeping house of ill fame	3	3		3			1	4
Bigamy	5	7					1	1
Disorderly conduct	205	206	10	27	2	2	18	15
Crimes against children, etc.—								
Paternity—Illegitimate child	234	181	28	19	3	4	35	37
Absconding to evade paternity proceedings	1						2	3

Abandonment—wife or child	102	76	9	3	1	.....	32	64
Non-support—wife or child	190	153	29	26	10	6	41	64
Contributing delinquency of minor	22	19	.....	1	2	.....	2	.....
Miscellaneous—								
Public dance laws	10	10	.....	.....	.....	.....	2	.....
Gambling—Lottery laws	81	44	.....	3	.....	.....	4	8
III. Crimes Against Property:								
Arson in first degree	.....	.....	3	1	.....	.....	.....	3
Arson in second degree	4	1	.....	.....	.....	1	.....	1
Arson in third degree	15	3	2	1	.....	.....	3	1
Burglary in first degree	3	3	.....	.....	.....	.....	.....	.....
Burglary in second degree	7	2	1	1	.....	.....	1	2
Burglary in third degree	139	80	6	2	4	2	9	18
Unlawful entry	20	15	.....	.....	.....	.....	6	2
Forgery in first degree	15	10	.....	.....	.....	.....	3	6
Forgery in second degree	118	66	2	5	1	.....	12	15
Forgery in third degree	23	13	.....	.....	.....	.....	5	11
Grand Larceny in first degree	68	49	6	2	2	.....	13	18
Grand Larceny in second degree	402	313	10	23	6	9	67	89
Grand Larceny in third degree (Petit larceny)	567	395	31	28	19	7	82	94
Extortion	1	.....	1	.....	.....	.....	1	.....
Checking without funds	296	186	12	4	4	1	169	146
Receiving stolen property	20	26	2	2	1	1	6	9
Mortgaged Chattels	25	17	1	2	1	1	17	15
Malicious mischief	28	33	3	8	1	2	11	15
Trespass	60	22	2	.....	1	1	2	3
Miscellaneous	32	45	2	6	3	4	8	21
IV. Crimes Against Sovereignty, Public Justice, Safety, Peace, Etc.:								
Bribery	1	1	.....	.....	2	.....	2	4
Perjury	3	2	4	1	1	.....	4	3
Resisting or interfering with officer	57	45	3	4	3	.....	2	6
Concealed weapons	15	20	.....	5	1	1	3	3
Language provocative of assault	40	51	2	8	.....	3	6	8
Habitual offender	1	.....	.....	.....	.....	.....	.....	.....
Escape—jail or officer	8	8	.....	.....	.....	.....	.....	1
Riot	7	.....	.....	.....	.....	.....	1	.....
Public nuisance	31	21	.....	2	.....	.....	6	1
Organizing strike	4	.....	.....	.....	.....	.....	1	.....
Swindling	1	1	.....	1	.....	.....	.....	1
Breach of peace	1	.....	.....	.....	.....	1	1	3
Contempt of court	3	.....	.....	.....	.....	.....	.....	.....
Miscellaneous	.....	32	.....	2	.....	1	1	6
V. Miscellaneous Crimes:								
Cruelty to animals	15	5	.....	1	.....	1	5	3
Vagrancy	233	164	8	5	.....	.....	7	.....

TABLE NO. 2—Continued

TABULATED STATEMENT OF CRIMINAL CASES AS REPORTED BY COUNTY ATTORNEYS FOR 1941 AND 1942

NATURE OF ACCUSATION	IN JUSTICE, MUNICIPAL AND DISTRICT COURTS							
	Pleaded Guilty		Found Guilty		Acquittals		Dismissals	
	1941	1942	1941	1942	1941	1942	1941	1942
II. Crimes Against Morality, Etc.—Cont.								
Violations of laws re:								
Compulsory education	18	25	7	7	.....	.....	5	7
Forestry	77	57	2	2	.....	1	8	6
Game and fish (wild animals)	1,529	1,756	48	75	15	21	75	93
Health	15	20	1	2	.....	3	1	5
Food and dairy	46	49	2	7	2	.....	1	6
Motor vehicle traffic	11,199	8,353	1,033	828	35	23	234	143
Motor vehicle intoxicated driver	1,297	1,004	53	57	8	3	22	23
Motor vehicle unauthorized driving	294	105	17	3	3	2	13	11
Motor vehicle careless driving	65	.....	10	.....	.....	.....	1	.....
Criminal negligence causing death	1	32	.....	5	.....	6	.....	5
Drunkenness	2,361	2,062	60	79	3	3	50	52
Intoxicating liquor laws	139	216	5	8	.....	5	23	44
Non-intoxicating liquor laws	18	10	.....	2	.....	5	.....	2
Confiscations	1	5	.....	.....	.....	.....	10	.....
Prohibition	221	10	4	.....	6	.....	26	.....
City ordinances	773	562	.....	7	.....	2	19	18
Miscellaneous	345	532	34	56	14	5	119	86
Total	22,253	17,773	1,611	1,465	213	167	1,395	1,375

SELECTED OPINIONS

CONSERVATION

FISH

1

Licenses—Application—Both husband and wife must complete application for combination resident license—M27 §§ 5536-4, 5536-5; L 41, C 467; (MS41 §§ 97.251, 98.05, 98.07, 98.09).

Olmsted County Attorney.

Question

When a combination fishing license is purchased, is it necessary for both husband and wife to appear before the County Auditor or agent issuing the license?

Answer

Mason's Minnesota Statutes of 1927, Section 5536-5 (Art. 100 of the Laws Relating to Game and Fish 1939-1940), provides as follows:

> "Applications for licenses shall be made **on oath in writing,** stating the name, age, postoffice address, and legal residence of the applicant. * * * Any person who shall make a false statement under oath in such application shall be guilty of a perjury."

Mason's Minnesota Statutes of 1927, Section 5536-4 (Art. 99 of the Laws Relating to Game and Fish 1939-1940), provides in part as follows:

> "The form of all licenses and applications therefor shall be determined and blanks therefor shall be prepared by the commissioner (director of game and fish) * * *"

Laws 1941, Chapter 467, provides as follows:

> "The fee for a resident fishing license to take fish by angling, subject to all other provisions of law relating thereto, shall be one dollar, provided a combination license for husband and wife shall be issued for $1.50."

Under the latter law, the wife becomes a licensee as well as the husband. The license provided is not a license for the head of a family, entitling members thereof to fish upon an identification card, or without fee.

Under the statute specifying the method of application, namely, on oath and in writing, giving certain information about the applicant, it is clear that the legislature intended that each applicant for a license verify the same.

In addition, the statutory provision authorizing the form of applications to be determined by the Director of Game and Fish has been complied with by him, and the applications furnished provide for the signature of both the husband and wife, each separately and under oath.

It is therefore our opinion that both the husband and wife must appear before the county auditor or the agent, issuing the license, and their sworn statement obtained upon the application in order to validate the license granted.

However, there appears no strict necessity for their appearing together, desirable though that may be. If, therefore, it is not convenient or possible for their both appearing at the same time, no reason appears why they cannot come in separately before the agent and complete the application.

MANDT TORRISON,
Special Assistant Attorney General.

May 19, 1941. 209

2

Licenses—Residence discussed—(MS41 § 97.01, subd. 16; § 201.32, subds. 6 and 7).

Division of Game and Fish.

Question

Whether the County Auditor of Jackson County may issue a resident license in November of this year to a man whose residence is to be determined upon the following circumstances:

A man and his wife resided in the state of Texas until some time ago when the man entered the employ of the United States Government and was sent to the Hawaiian Islands. The wife left Texas and established a residence in Jackson County, Minnesota, where she will have been living for more than six months by November. At that time her husband expects to come home to Minnesota on a two-months leave of absence and is desirous of obtaining a resident license referred to.

Answer

Minnesota Statutes 1941, Sec. 97.01, Subdivision 16, defines, for the purposes of game and fish laws, the term "resident" as meaning "any person who has resided in this state for at least six months."

Assuming that the facts stated in your request remain unchanged, the question to be determined will be whether constructive residence complies with the six-month residential requirement contained in the game and fish laws.

Ordinarily the rules applicable in determining the residence of voters are used in determining questions of residence, unless a different meaning to the word "residence" is indicated by the legislation using the word.

Minnesota Statutes 1941, Sec. 201.32, Subdivisions 6 and 7 (contained in the 1942 edition of "Minnesota Election Laws," page 53), would appear somewhat in point.

Subdivision 6 provides:

"The place where a man's family resides shall be considered his residence, but if it be a temporary establishment for his family, or for transient purposes, it shall not be so considered;"

Subdivision 7 provides:

"If a man has his family living in one place and he does business in another, the former shall be considered his residence, but when a man has taken up his abode at any place with the intention of remaining there, and his family refuses to reside with him, then such place shall be considered his residence;"

We further call your attention to the case of

Bangs vs. Brewster, 111 Mass. 382, cited in 19 C. J. 425.

This case holds squarely that personal presence is not essential for the establishment of a domicile through the medium of removal of family and personal effects to a new residence. Upon the authority of that case and the rules for determining residence in Minnesota for voting purposes, we conclude that facts might be presented which would justify the issuance of a resident license to a man who had not been personally present in the state during the six-month period preceding his application for the license.

We wish to suggest, however, that the manifest purpose of the legislature in requiring a six-month period of residence is to prevent the issuance of such license to persons whose sojourn in the state is of a temporary or transient nature. In considering facts surrounding a claim to a right to a resident license, based upon constructive residence without actual physical presence in the state, great care should be taken to avoid a finding which would violate such legislative intention.

MANDT TORRISON,
Special Assistant Attorney General.

August 11, 1942. 209-H

4

Species of fish included in Director's closing order for reduction of fire hazard discussed—Brook trout defined—M40 §§ 4031-35½j, 5565, 5567; (MS41 §§ 88.27, 101.04, 101.06).

Division of Game and Fish.

Facts

Attention is called to the order of April 27th issued by the Director of the Division of Forestry, and which was approved by yourself as Acting Director of the Division of Game and Fish. This order prohibits the taking of brook trout from Lake, Cook, and St. Louis counties, between May 1st and May 14th, inclusive. It was issued under the authority and provisions of Mason's Supplement 1940, Section 4031-35½j.

Question

"As to the species of fish included within the meaning of the term 'brook trout,' and the areas or types of water in which fishing for such species is prohibited" under the order.

Opinion

Mason's Supplement 1940, Section 4031-35½j, provides in part as follows:

> "Whenever after investigation the commissioner of forestry and fire prevention shall determine that conditions conducive to forest fire hazards exist at any place in the forest areas of the state as defined by the forestry act in the vicinity of any waters frequented by persons taking or attempting to take brook trout and that the presence of persons attracted by the opportunities for taking brook trout in such vicinity tends to aggravate such fire hazards, he may by written order, with the approval of the commissioner of game and fish, prohibit or restrict, upon such conditions as he may prescribe, the taking of brook trout in such waters during such period in any year as he may deem necessary for the purpose of reducing such fire hazards. * * *"

It is our opinion that the term "brook trout" as there used was undoubtedly intended to cover the species of trout usually found in or frequenting the brooks and streams of the timbered areas of the state.

The term "brook trout" is not a technical one. It is occasionally restricted in popular usage to designate a species of char, the scientific designation of which is **salvelinus fontinalis.** However, in popular concept this fish is considered a trout. This char is also popularly referred to as "eastern brook," "speckled trout," "eastern speckled," "native brook trout" and "square tailed trout." Unquestionably he is included within the meaning of brook trout as used by the section of the statute above referred to.

So, too, is the ordinary German brown trout, the rainbow trout, the Loch Leven, cut throat and other species found customarily in these streams.

This conclusion is buttressed by the treatment of trout in the regular game and fish laws of the state. The many species of trout are divided generally into two classes: Those which are generally considered the stream or the brook trout, being treated in Mason's Supplement 1940, Section 5565, as amended, wherein all such trout are grouped for the purpose of seasons and regulations with the exception of the lake trout or land locked salmon. The latter fish are regulated under the provisions of Mason's Supplement 1940, Section 5567.

For the purposes of our game and fish laws, the only distinction between the various species of trout, therefore, is between the lake trout or land locked salmon and the other trout commonly referred to as brook trout or stream trout.

You have further inquired the area or types of water in which fishing for such species is prohibited by the order of the Director of Forestry.

It is a matter of common knowledge that these fish have been introduced and planted in numerous small spring ponds and lakes within the forest area.

It is our conclusion that under the statute above quoted from, the order may and it in fact does prohibit the taking of these trout from any or all waters within the counties covered, whether they be spring ponds, beaver flowages or inland lakes.

The legislative use of the word "brook" in modifying trout was intended to designate the species, fishing for which could be restricted or prohibited, and authorizes the prohibition to extend to any waters in which they are to be found within the forest areas, and not merely to those fish when found in brooks.

Any other conclusion would lead to absurd results. Certainly no intention could be extracted from the act which would authorize the prohibition of fishing in the inlet or outlet of a spring pond, flowage or lake, but permit the hazard to exist upon or around the shore of such waters between the inlet and outlet. Furthermore, an order which permitted the taking or having in possession of such fish anywhere within the counties except while the fisherman was actually upon the shore of a creek or stream with a fish rod in his hand and a trout on the hook would make law enforcement impossible.

The purpose of the statute was to reduce the fire hazard occasioned by fishermen going into these timbered areas under certain conditions.

MANDT TORRISON,
Special Assistant Attorney General.

April 29, 1942. 211-C-13

5

Taking of—War time schedule to be disregarded in respect to hours for taking game or fish where prescribed by statute—L 41, C 60; C 424; (MS41 §§ 100.09, 101.04).

Division of Game and Fish.

Facts

Certain game and fish laws prescribe certain hours during which the taking or doing of other things with respect to taking of certain species of wild animals is prohibited.

Question

What effect or application the new war time schedules are to be given to such statutory provisions prescribing certain hours during which trapping, hunting or fishing is prohibited.

Answer

You have specifically called attention to Game and Fish Laws 1941-1942, Section 101.04 (Laws 1941, Chapter 424), prohibiting trout fishing between 9 p.m. and one hour before sunrise, and Game and Fish Laws 1941-1942,

Section 100.09, Subdivision 2 (Laws 1941, Chapter 60), which prohibits setting, visiting, or removing any trap for muskrats between the hours of 8 p.m. and 6 a.m.

With respect to those specific Minnesota statutes which prescribe certain hours daily for the taking of certain animals, it is clear that those hours were designated by the legislature in contemplation of the then existing daylight hours prescribed by standard or sun time. All of the statutes were passed prior to and without any knowldege of an intention to change the time schedule by advancing the hands of the clock one hour and designating such changed schedule as war time.

To give effect to the legislative intent, therefore, in each instance it will be necessary to add one hour to the war time table where a specific hour is named by statute.

Thus in applying the statute with respect to the trapping of muskrats to the war time table, it will make the hours for setting, visiting, or removing traps in accordance with war time from 7 a.m. to 9 p.m. instead of 6 a.m. and 8 p.m., and for the taking of trout, the hours in accordance with the war time schedule must be from one hour before sunrise until 10 p.m.

Of course this problem does not arise with respect to most of Minnesota's game and fish laws. The authority to regulate the taking of most game is vested in the Director of Game and Fish or the Commissioner of Conservation, who may prescribe suitable regulations, and therefore determine the hours during which game may be taken. Those regulations are set up shortly in advance of each season, and undoubtedly the difference between war time schedule and what may be described as "sun time" or "standard time" can be taken into account in setting the hour restrictions. This is particularly true of game birds.

Migratory wildfowl are regulated by Presidential proclamation issued shortly in advance of each hunting season for those species, and undoubtedly the hourly restrictions upon the taking of such wildfowl may be changed in order to make allowances for the change from the standard or sun time to war time.

MANDT TORRISON,
Special Assistant Attorney General.

February 19, 1942. 208-A-3

FORESTRY

6

Timber—On tax forfeited lands taken by trespass and seized by conservation department, cannot legally be released to the trespasser—M27 § 6394-32 (MS41 § 90.35).

Division of Forestry.

Facts

Certain lands which forfeited to the state for non-payment of taxes were sold by the county board of Aitkin County without a separate timber

appraisal, or the approval thereof as required by law, and such sales have been discontinued by the county board, but a number of timber operators who purchased the lands without the timber appraisals have cut timber and disposed of a portion of it. Other portions of that timber have been seized by officers of your division, and are being held subject to disposition. Some of this timber or its products are subject to deterioration, if held for any length of time.

Question

May an arrangement be made whereby the division could release the timber seized and allow removal of timber products now on the land without affecting our rights to prosecute the cases in court as trespass?

Answer

We assume from your statement of facts and the phraseology of the question that the course under consideration is the release of the timber to the persons who have cut the same or from whose possession it was seized.

The situation is governed by Mason's Minnesota Statutes of 1927, Section 6394-32, reading in part as follows:

> "The auditor" (now Commissioner of Conservation) "**shall take possession of any timber heretofore or hereafter unlawfully cut upon or taken from any land owned by the state,** wherever found, and may sell the same at public auction after giving such notice as he deems reasonable. * * *
>
> "So far as permitted by the state constitution, the auditor, or any employe by him authorized, may determine the manner and method of sale or disposal of any timber seized hereunder and said auditor, or any employe by him authorized, may provide for the transportation of all such timber to available markets or places for advantageous sale thereof or to places suitable for storage or preservation thereof, or may do such other things as seem reasonably necessary to realize ultimately the largest net price therefor. * * *"

The general authority to sell or dispose of this timber is limited by the proviso, "so far as permitted by the state constitution," undoubtedly a reference to timber taken from trust fund lands and containing the legislative thought that such timber might be held subject to the constitutional provision for public sale only.

As to timber taken from other state lands, the method of sale or disposal is left to the discretion of the state auditor, now the Conservation Department, subject only to the qualification that such acts be directed toward an ultimate realization of the largest net price for the timber.

An examination of the language clearly indicates that the statute contemplates a disposition or sale by the state at the highest price obtainable.

This necessarily rules out any thought of release to the individual trespassers. Such an action indeed would be contrary to all principles of dealing

with state property. The title to this timber being in the state, it cannot be passed on to individuals, except as in the manner authorized by the legislature.

Our conclusion that this seized timber must be sold by the state as provided by statute eliminates the necessity of considering what effect, if any, an attempted release to trespassers might have upon the action against them for trespass.

MANDT TORRISON,
Special Assistant Attorney General.

October 10, 1941. 27-G

GAME

7

Deer—Shooting on posted property—Ownership of deer still in State and not in either the owner of property or shooter of deer—M27 § 5501; (MS41 § 100.02).

Douglas County Attorney.

Facts

A deer was killed upon posted land and the owner of the land forbids the shooter to remove it.

Question

1. To whom the deer belongs, and what recourse the owner of the land has against the man who shot the deer.

Answer

Minnesota Statutes 1941, Section 100.02 (Mason's Minnesota Statutes 1927, Section 5501), contains the following provision:

> "* * * No person shall at any time enter upon any land not his own with intent to take or kill any wild animals after being notified by the owner or occupant thereof not to do so. This notice may be given orally or by posting written or printed notices to that effect, in the English language, in conspicuous places on the land so protected."

This provision of the statutes is carried from the game and fish code of 1919 (Laws 1919, Chapter 400, Section 7).

It is obvious that its purpose was to afford some additional protection to wild animals to that contained in the regular refuge law, and so as to permit those land owners who desire to extend protection the right to do so with a penal provision in the event of a violation. Had the sole object or purpose been merely to protect a land owner against trespassing, a more general criminal trespass statute would undoubtedly have been enacted.

Assuming that the land was posted in accordance with the provisions of the statute, the deer in question would have been killed in violation of the provisions of the laws relating to game and fish. That fact established, the deer would belong to the State and not to either the owner of the land or the shooter.

Question

2. Assuming that the deer was shot on non-posted property, but ran onto posted land before dropping dead, would the man shooting the deer have a right to go onto the posted land for the purpose of removing the deer?

Answer

Assuming that the deer were legally shot elsewhere, but merely fell upon posted land, we do not believe the provisions of Section 100.02 would apply, and in that instance no crime would have been committed by the person shooting the deer. His claim of right to enter upon the lands of another for the purpose of removing his property is a matter of civil controversy, not involving the scope or functions of your office or that of the Attorney General.

MANDT TORRISON,
Special Assistant Attorney General.

December 1, 1942. 210-D-2

9

Migratory Game Birds—A gun is a rifle or shotgun within the meaning of Migratory Game Bird Regulations, depending on the character of ammunition used therein—(MS41 § 100.20).

Olmsted County Attorney.

Question

Whether or not a .410-gauge or other shotgun may be used in the shooting of migratory birds, when said shotgun is loaded with a slug or a single solid shot or projectile, instead of fine shot.

Answer

The 1941 regulations relating to migratory birds, approved and proclaimed by the President on August 16, 1941, 6 F. R. 4232, regulation number 3, provides in part as follows:

> "The migratory game birds on which open seasons are specified in regulation 4 of these regulations may be taken during such respective open seasons with bow and arrow **or with a shotgun not larger than No. 10 gage**, fired from the shoulder, * * *"

The Minnesota legislature has in effect adopted these regulations (Minnesota Statutes 1941, Sec. 100.20), and includes the further language:

> "* * * Rifles may not be used in taking waterfowl or rails. * * *"

The interpretation of the United States Attorney General's office of the Federal Regulations relative to the use of shotguns is that that provision excludes the use of a rifle.

It is our opinion that the terms "rifle" and "shotgun," as used in these regulations and statutes, take their distinctive character, and become applicable, to guns from and upon the kind of ammunition discharged therefrom.

Considering the purpose of these regulations and statutes, it seems clear that a gun is to be deemed a rifle when it is used to discharge a bullet, ball or slug. It becomes a shotgun when used to discharge a load of fine shot.

It appears to us that the question of whether or not the barrel of a gun contains rifling is not the determining factor in this connection. There are many smooth-bores and other guns used as rifles in which the rifling, which may at one time have existed, has practically disappeared.

We believe this interpretation, namely, that a gun takes on the character of a rifle or a shotgun, depending upon the type of ammunition used therein, is in accord with the interpretation of the Federal agencies enforcing the Migratory Game Bird Regulations.

MANDT TORRISON,
Special Assistant Attorney General.

November 26, 1941. 210-D-7

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10 See State v. Prickett, 217 Minn. 629

Violations—Right to appeal from conviction held waived upon payment of fine.

Conservation Commissioner.

Question

What effect the payment of a fine or costs imposed in a prosecution for violation of the game laws before a Justice of the Peace or Municipal Court has with respect to the right of defendant to appeal thereafter.

Answer

We assume for the purpose of this opinion that the appeal is sought to be perfected within the statutory time allowed for appeal.

The Minnesota law upon this subject now appears to be well settled. In one of the earlier cases,

State vs. Sawyer, 43 Minn. 202,

it was held that following conviction and the imposition of sentence, a defendant who voluntarily entered into a bond to abide the judgment in order to procure an extension of the stay of execution, waived the right to appeal.

Subsequently the Supreme Court in

State vs. People's Ice Company, 127 Minn. 252, held that the payment of the fine imposed in a criminal prosecution under circumstances clearly showing that the payment was voluntary and intended to terminate the

matters involved, waived the right to appeal. The Court in that case, however, called attention to a divergence of authority in the courts of the country as to whether the bare fact of payment of the fine or service of a jail sentence should operate as such waiver. Reference is made in the opinion to the argument that since the stay of execution on appeal in a criminal case is a matter of grace and not of right, the payment of the fine should not be held to be voluntary or an acquiescence of sentence.

This argument, of course, is not applicable to appeals from convictions in misdemeanor cases in Justice or Municipal Court where the proper perfection of an appeal automatically operates to stay further proceedings until determination of the appeal.

At any event, the Supreme Court appears now to have taken a definite position upon the matter.

State ex rel. Weich v. City of Red Wing, et al., 175 Minn. 222.
In that case the official scope note reads as follows:

"Where defendant acquiesces in a judgment of conviction or when he complies in whole or in part therewith, there is a waiver of the right of review."

In that case the acquiescence relied upon was merely the payment of the costs assessed amounting to $3.00. The sixty days imprisonment had not been served prior to the attempt to appeal.

That the right to appeal may be waived by payment of sentence, has been held in various opinions of the Attorney General's office.

In view of these authorities, we believe the matter has been definitely settled in Minnesota, and that a payment of the fine following conviction, whether on a plea of guilty or not guilty, constitutes a waiver of the right to appeal from judgment on conviction in misdemeanor cases tried in Justice or Municipal Courts.

MANDT TORRISON,
Special Assistant Attorney General.

February 27, 1942. 208-G

11

Wolves—Harboring in an enclosure held not an offense against game laws, provided such wolves do not propagate—M27 § 5497; M40 § 6254; (MS41 § 97.04, 348.07).

Commissioner of Conservation.

Question

Whether a party may harbor in a secure enclosure two or three wolves, and without purpose or result, to harbor the wolves for breeding purposes.

Answer

No doubt it is the intention of the person harboring these wolves to do so for exhibition purposes.

Wolves are completely unprotected in Minnesota. Possession of wolves or parts thereof at any time of the season is therefore not unlawful.

Since no protection is accorded wolves, a pet or exhibition permit is not required.

The liability for injuries to which a person harboring these wolves might be subject in the event they escaped, is not a concern of yours in your official capacity.

Neither, we presume, is it a matter of concern of yours whether some individual seeks to kill these wolves, even though enclosed. Wolves are wild animals under the statutory definition thereof. Mason's Minnesota Statutes of 1927, Section 5497, provides in part as follows:

> "No person shall acquire any property in any wild animals in this state, except as authorized by this act."

There is no statute dealing with the keeping or possession of wolves alive. The statutes relating to bounties recognize possession and title to a wolf, which has been killed, and the statute relating to predators, authorizes the taking of a wolf at any time in any manner.

So long as these wolves fail to breed, the statutes applicable to license requirements and other conditions imposed on those who are engaged in propagating wild animals, do not seem applicable.

It is true that the theory of harboring wolves is contrary to that of the statutes, not only affording them no protection, but actually offering a bounty for their destruction. Apparently, however, the prospect of anyone's protecting and harboring wolves has never occurred to the legislature, and therefore it has not taken action to prohibit such a contingency.

It is our opinion, therefore, that so long as these wolves do not breed, keeping them enclosed alive does not constitute an offense against the game laws.

It may, however, be pertinent for you to call to the attention of whoever seeks to harbor wolves, the provisions of Mason's Supplement 1940, Sec. 6254, relating to wolf bounties. Under that section the right to collect a bounty upon wolves killed in this state, is contingent upon not having spared the life of a wolf he could have killed. It is probable, therefore, that the harboring of wolves would disqualify the individual from collecting bounties on others which he kills.

MANDT TORRISON,
Special Assistant Attorney General.

August 15, 1941. 210-D-8

LANDS AND MINERALS

12

Royalties—Iron Ore—Method of computing down to one hundredth of one per cent approved—L 21, C 412; L 27, C 389; L 41, C 546

Division of Lands and Minerals.

Question

As to the proper method of computing royalties on iron ore under Laws 1941, Chapter 546.

Opinion

The problem arises from the language contained in Sec. 5 of that act, setting up seven schedules for the payment of royalties upon the different types of iron ore.

The language of the statute outlining these schedules is approximately the same in each instance and follows closely the language contained in the previous royalty provisions set up by Laws 1921, Chapter 412, and Laws 1927, Chapter 389. The problem is illustrated by the language set up for schedule 1, reading as follows:

> "Schedule 1. On a gross ton of direct shipping open pit crude ore in its natural state, before beneficiation of any kind, other than crushing or dry screening, averaging in iron, when dried at 212 degrees Fahrenheit, 25 per cent or less, 12 cents. For a ton of ore averaging 26 per cent in iron dried at 212 degrees Fahrenheit, 12 cents, with a five per cent increase over 12 cents, or a royalty of 12.6 cents per ton. For a ton of ore averaging 27 per cent iron dried at 212 degrees Fahrenheit, 12.6 cents plus five per cent increase or a royalty of 13.23 cents; and so on, adding five per cent to the amount of royalty for a given grade for the next higher per cent, disregarding all thousandths of one cent that do not equal five and counting those that are five thousandths or above as one hundredths of a cent."

It will be noted that while these royalty schedules contain a direction to disregard fractions of a cent running smaller than one hundredth of one cent, they are silent with respect to what fractional portion or percentage of iron ore should be disregarded.

It appears from the statement contained in your inquiry that there have been four leases in operation under the 1921 and 1927 laws, two leases under the 1941 law, and that a number of further leases are expected to result from approximately sixteen iron ore prospecting permits which have been issued under Laws 1941, Chapter 546. There are also a number of taconite leases in effect from which large ore shipments may be expected to be made.

From the six leases which have been in force, over a half a million tons have been shipped. The royalties have been computed in each instance for

each year during which these leases have been in force upon the quantity of dried iron per ton down to the hundredths of one per cent. In other words, fractional percentages of the amount of iron ore content running less than one one-hundredth of one per cent have been disregarded just as the legislature has directed similar fractions to be disregarded in respect to the price percentages.

No question has heretofore been raised as to the correctness or fairness of this method of computation.

It is our opinion that the method of computation as used is the correct one. Since the legislature has authorized fractions of a cent less than one one-hundredth to be disregarded, it appears reasonable to use the same measure in disregarding the thousandth decimal in figuring percentage of iron ore content. It is obvious that at some point fractions must be disregarded.

The fact that this system of computing royalties has been in operation since 1921 or shortly thereafter, and that the legislature has re-enacted at least two new laws using the same language and the same basis for computing royalties, presumably with full knowledge of the practical interpretation and application of the schedule, is strong support as to the correctness of that interpretation.

MANDT TORRISON,
Special Assistant Attorney General.

February 16, 1942. 311-H

NAVIGABLE WATERS

13

Jurisdiction—Joint consent of federal and state governments required to permit a change of the cross section of a river—L 37, C 468; M40 § 6402-2, et seq.; (MS41 §§ 93.08; 111.43-111.63 incl.).

Division of Water Resources.

Facts

Attention is called to the proposed lease for the removal of sand and gravel in the Minnesota River near Mankato, Minnesota, under the authority of Mason's Supplement 1940, Sec. 6402-2, et seq.

As a preliminary to obtaining such a lease from the state, the applicant has applied for a permit from the Commissioner of Conservation under Laws 1937, Chapter 468, as amended, in view of the fact that the work proposed to be done under the lease will probably effect a change in the cross section or gradient of the river involved.

Question

Since the Minnesota River is a navigable stream, what effect the jurisdiction which has presumably been assumed by the United States Army Corps of Engineers over this river has upon your authority to issue such a permit.

Answer

It is our opinion that jurisdiction assumed by the proper agency of the United States Government over navigable waters within the state of Minnesota in no wise affects your authority to issue the permit nor the necessity imposed upon those seeking to change the cross section or gradient of navigable waters of obtaining such a permit.

It is well established that where the proper federal agency has assumed jurisdiction over navigable waters in the aid of commerce, the jurisdiction of the federal and state authorities is joint and concurrent. The right of private individuals to appropriate and use such waters, is subject to the regulation of both sovereigns, and must comply with the requirements of each.

A permit issued by the Commissioner of Conservation to place an obstruction or to change the current or cross section of a stream, is permissive only. It does not and could not be construed as granting a vested right as against the prohibition or lawful restrictions imposed by the sovereign exercising concurrent jurisdiction.

That fact would probably follow, irrespective of Laws 1937, Chapter 468, Sec. 18. That section, reading in part as follows:

> "* * * nothing in this act shall be construed so as to interfere with the exercise of the lawful jurisdiction of the government of the United States or its duly constituted agencies over the waters of the state * * *"

merely clarifies the status of a permittee as simply having a license or permission insofar as the duly constituted state authorities are concerned.

It is clear under the decisions that until the duly constituted agency of the federal government has assumed jurisdiction over navigable waters within the state, the state authority to regulate is full and complete. However, where jurisdiction has been assumed by the federal government, the joint consent of both the state and federal governments is required.

Minnesota Canal and Power Co. vs. Pratt, 101 Minn. 197.

It is our opinion further that it is immaterial which of the two sovereigns grants the first consent.

It is true that the opinion above cited refused to grant a petition in condemnation until the consent of the proper federal agency had been obtained. A logical dissenting opinion held that the consent of the federal agency was not a condition prerequisite to the petition to condemn. However, a different situation is presented by a petition to condemn than merely a permit to appropriate and use waters. In the first instance, the exercise

of the right of eminent domain is only proper where the use is public and a necessity exists. To authorize the granting of a petition, it must therefore be found that all prerequisites to the consummation of the project have been complied with, since otherwise the public use would necessarily fail, and the right to condemn would not be present. A permit under Chapter 468, Laws 1937, is permissive only, and is not dependent upon the requirement of public necessity or public use.

MANDT TORRISON,
Special Assistant Attorney General.

June 26, 1942. 370

14

Public Uses—Right to appropriate without compensation to riparian owners
—L 37, C 468; (MS 41 §§ 111.43, et seq.).
Scott County Attorney.

Facts

Prior Lake, Minnesota, a navigable lake located in Scott County, has no visible or surface outlet, but that as developed in a hearing held by the Commissioner of Conservation under the authority of Laws of 1937, Chapter 468, as amended, the water escapes from Prior Lake through seepage occurring in the Candy Coves. These coves are bays, one beyond the other, joined to the main body of Prior Lake in times of normal high water by a comparatively narrow channel. For the past several years, water in these Candy Coves has been at a considerably lower level during a portion of the summer months than the main body of the lake, by virtue of the fact that a natural bar across the mouth of Candy Cove has prevented the flow of water from the main body of the lake into the coves.

From the evidence taken at the hearing to which you have referred, it appears that an artificial channel has been dug through this bar, but unless water runs in that channel, there has been no means of access by boat from the coves to the main body of the lake.

The shore about Candy Cove has been platted in places, and several cottages built on these lots; that in periods of low water, these cottage owners have no access to the main lake, but during high water periods there is access to the main lake through the mouth of Candy Cove. About December 15th, 1940, the commissioner of conservation issued an order establishing the natural ordinary high water level in Prior Lake, and authorized the County of Scott to construct a dam or dyke across the mouth of Candy Cove to prevent the escape and loss of water from the main lake through these conditions of seepage and percolation existing in the bottom of the Candy Cove. It is proposed that the dam so constructed will be provided with controls designed to restore the natural ordinary water levels of Prior Lake, and when so restored, to discharge the surplus waters into Candy Cove.

Question

Whether the owners of the lands facing and abutting upon Candy Cove have such rights as to entitle them to compensation in case the dam is built across the mouth of the Cove as provided, and whether it is necessary to condemn any riparian rights of such owners.

Answer

The ownership of the state, in its sovereign capacity, of the beds of its navigable lakes and the waters therein, with the right to regulate and control the same within natural ordinary limits is too well established to require citation of authority.

Chapter 468 of the Laws of 1937, Section 3, contains the following language:

> "The commissioner (of conservation) shall devise and develop a general water resources program for the state. This program shall contemplate the proper conservation, **allocation** and development of all of the waters, surface and underground, of the state **for the best interests of all of the people of Minnesota,** and shall guide the commissioner in issuing of permits for the use and appropriation of the waters of the state and the construction, reconstruction, repair, removal or abandonment of dams, reservoirs, and other appurtenant structures as hereinafter provided. * * * He is also authorized to cooperate with any department, bureau or body of the federal government, state agency, **county board,** town board, city or village council, private corporation or organization or individual in carrying out the provisions of this act."

Section 5 provides:

> "From and after July 1, 1937, it shall be unlawful for the state or any agency thereof, * * * or in any manner other than in the course of usual operation of dams beneficially using water prior to July 1, 1937, to change or diminish the course, current, or cross-section of any stream or body of water, wholly or partly within this state, **without a written permit from the commissioner previously obtained.** * * *"

Section 8 contains the following discussion:

> "If the commissioner shall be of the opinion from all of the evidence submitted that, in pursuance of the policy of the state for the conservation of its water resources in the general public interest as herein declared, that the plans of the applicant provide for the greatest practicable utilization of the waters of the state and will adequately protect public safety and will promote the general public welfare he shall grant the permit to appropriate or to use the waters, or to construct, reconstruct or remove or abandon the proposed reservoir, dam, or water-way obstruction, or to accomplish any combination of these objects. * * *"

The language of this act as quoted, together with other portions of the act, clearly demonstrates the legislative intent to impose upon the commissioner the duty of allocating, distributing, controlling, or otherwise appropriating the waters for the greatest public beneficial use.

It is true, of course, that neither the state nor any agency thereof can take private property without compensation. Damage to private property through trespass by water has many times been construed as a taking.

The specific question with which we are confronted, however, is whether the rights of riparian owners including the right of access to navigable waters, constitute private property which cannot be taken without compensation, notwithstanding the ownership of the state in the bed of the lake or its water. In other words, can the state appropriate the water which might naturally flow past a riparian owner, for the general beneficial use of the public, without compensation to the owner.

It is our opinion that this question has been determined in favor of such an appropriation by the state.

Dunnell's Minnesota Digest, Sec. 6939.

Minneapolis Mill Co. vs. Board of Water Commissioners of the City of St. Paul, 56 Minn. 485.

Heiberg vs. Wild Rice Boom Company, 127 Minn. 8.

Because the cases cited appear so directly on the point, we refer to the following language. In

Minneapolis Mill Co. vs. Board of Water Commissioners of the City of St. Paul, supra,

the court says:

> "The plaintiffs are riparian owners on a navigable or public stream, and their rights as such owners are subordinate to public uses of the water in the stream. * * * There can be no doubt but that the public, through their representatives, have the right to apply these waters to such public uses without providing for or making compensation to riparian owners. * * * In thus taking water from navigable streams or lakes for such ordinary public uses, the power of the state is not limited or controlled by the rules which obtain between riparian owners as to the diversion from, and its return to, its natural channels. Once conceding that the taking is for a public use, and the above proposition naturally follows."

Again in the Heiberg case, supra, the court says:

> "The state has exclusive control of navigable lakes and rivers within its borders, with full power and authority in the improvement thereof for the purposes of navigation. It may delegate this authority to corporations organized for the purpose, and the corporation to which it is so delegated acts in a representative capacity for the state, performing a public function. No person or corporation, whether riparian owner or otherwise, not so authorized, has a right to make changes or alterations in such rivers, * * * **The power and authority so granted, being for a public purpose and in aid of navigation, is superior and paramount to the rights of riparian owners.** * * * In other words the

riparian owner holds his land subordinate to the public rights in the river, and subject to the power of the state to make necessary improvements therein in the aid of navigation. * * *"

It is true that the court adds this statement:

"It has the right to construct flooding dams in the river tributaries, but no right to unreasonably detain the water from the riparian or lower mill owners."

That the proposed dam and the restoration of the natural ordinary water level with its stabilization is in the aid of navigation and other beneficial public uses can, we believe, be taken for granted.

The appropriation of these waters which might normally flow into Candy Cove, for the general purposes of the lake, is temporary. When the normal water levels have been restored under the order of the commissioner, the surplus will again be discharged into Candy Cove. For the past several years, under natural conditions, these riparian owners have not had access to the lake. It is difficult to say where the construction of this dam will do anything but benefit these owners ultimately.

Be that as it may, it is our opinion that the public has a paramount right to the waters of Prior Lake, and to appropriate such waters for the benefit of the general public and for general public uses, without making compensation to riparian owners on Candy Cove.

MANDT TORRISON,
Special Assistant Attorney General.

May 20, 1941. 211-D-19

PUBLIC LANDS

15

Subdividing trust fund lands into small parcels or lots—Authority of commissioner to dedicate streets and alleys to the public—L 41, C 222; M27, §§ 6270, 6273, 8236; (MS41, §§ 84.03, 92.09, 92.10, 505.01).

Commissioner of Conservation.

Question

Whether the Commissioner of Conservation has legal authority to make a dedication of streets and alleys to public use in subdividing trust fund lands into small parcels or lots.

Answer

Mason's Minnesota Statutes of 1927, Section 6270 is the general provision of law which has been in effect for many years, authorizing subdivision of any land in the public domain, when, in the opinion of the State Auditor (now Commissioner of Conservation), the best interests of the state will be promoted thereby.

Section 6273 merely requires a map of the subdivisions to be filed with the Register of Deeds.

These sections do not specify any particular method of dedication.

The general provisions for platting are contained in Chapter 64 of Mason's Minnesota Statutes of 1927. Section 8236 in that chapter contains the provision that all donations to the public, as shown in a plat, shall operate to convey the fee of the lands so donated for the purposes and uses named or intended. Section 8238 provides for the dedication and the certification of the plat.

Neither Chapter 222 of the Laws of 1941, nor Mason's Minnesota Statutes of 1927, Section 6270, set up any special machinery for recording plats. The provision for recording a map with the Register of Deeds, as contained in Section 6273, appears more in the nature of a general provision outlining procedure, and is not inconsistent with the general platting provisions of the statute. There may be occasions where a plat containing specific dedications may not be necessary in subdividing a general tract into smaller parcels.

It is our opinion, however, that where a plat of the subdivision containing dedicated streets and alleys or plots of ground for other uses is necessary or advisable, that then the provisions of Mason's Minnesota Statutes of 1927, Chapter 64, should be followed insofar as those provisions are applicable.

The authority to subdivide into small parcels or village lots, necessarily implies the authority to set aside strips of land which shall provide access or right of passage necessary and convenient for the full use of the small parcels or lots. Without streets or alleys, a subdivision into lots would mean little or nothing, and many of the parcels probably would be unsalable.

This conclusion is inevitable from the history of platting as effected for many years under Section 6270, and the practice which has been followed of dedicating streets and alleys in such plats. The legislature has tacitly approved the exercise of such authority.

You are further advised that the form of the certificates, used in the plat of the State Addition to Eveleth, as executed in July of 1925, appears to follow the form prescribed and to comply with the provisions of Chap. 64 of Mason's Minnesota Statutes of 1927, and such form should be used in carrying out the provisions of Laws of 1941, Chap. 222.

MANDT TORRISON,
Special Assistant Attorney General.

July 25, 1941. 700-D-26

WARDENS

16

May enter and inspect locker plants where game and fish are customarily stored, without warrant, or without reasonable grounds for believing illegal wild animals are stored therein—U. S. Const., Art. IV; Minn. Const., Art. I, § 10; M27, § 3223; M40, § 5631; M27, § 5632; (MS41, §§ 97.26, 97.27).

Division of Game and Fish.

Facts

Attention is called to the fact that there are locker plants throughout the state of Minnesota operated upon the following plan:

The proprietor or owner of the plant maintains a sharp freezer room and a series of individual lockers. Meats, including game and fish, are frequently and customarily brought to these locker plants by patrons, placed in the sharp freezer until properly frozen, then wrapped and kept within the individual lockers which are rented to the individual patrons of the plant.

A number of locker plants keep and maintain a master key or a set of keys which will open the individual lockers, but that some plants permit patrons to place padlocks upon individual lockers. The individual lockers are serviced and kept at the desired temperatures by the operators of the plant.

As a whole the managers and operators of the plants cooperate with the Division of Game and Fish and permit entry and inspection by state game wardens, but difficulty has been encountered in a few isolated instances where the right to enter has been protested.

Question

Whether the Division of Game and Fish, through its agents and wardens, has the right to enter and inspect the lockers wherein these meats, including game and fish, are customarily stored, and if so, what force may be used to effect entry where keys are not provided or entry is protested.

Answer

The right to enter and inspect premises is equivalent to the right to search. The Federal constitution, Art. IV, and the State constitution, Art. I, Sec. 10, forbid unreasonable searches and seizures. These constitutional provisions do not attempt to define what constitutes an unreasonable search and seizure. That definition has been left in the first instance to the various legislatures, and in the second instance, for the purpose of testing the reasonableness of their enactments to the Courts.

With respect to searches of property and premises, the Minnesota legislature has provided different requirements in different types of prop-

erty. Houses actually occupied as dwellings may not be searched without a warrant issued in accordance with certain statutory and constitutional requirements.

(See Mason's Minnesota Statutes 1927, Secs. 3223 and 5632.)

On the other hand, game wardens are given authority by the legislature

> "* * * with or without a warrant, to open, enter, and examine all buildings, camps, vessels, boats, wagons, automobiles or other vehicles, cars, stages, tents, suit cases, valises, packages, crates, boxes and other receptacles and places where they have reason to believe the wild animals, taken or held in violation" (of the game and fish laws) "are to be found." (Mason's Supplement 1940, Sec. 5631.)

As to that type of premises, therefore, the officer must have reason to believe that contraband will be found before he is entitled to make a search.

Then, again, the legislature has authorized the game wardens

> "To enter and inspect any hotel, restaurant, cold storage warehouse, plant, ice house or building, actually used for the storage of dressed meats, game or fish, for the purpose of determining whether game or fish are kept or stored therein in violation" (of the game and fish laws).

As to this latter type of premises, the legislature has imposed no other requirement than that the premises be actually used for the storage of dressed meats, game or fish.

We do not find that the courts of this state or others have passed upon this or a similar authority in game wardens. The question therefore arises as to whether or not such entry and inspection without reasonable grounds to believe contraband is there stored, constitutes an unreasonable search within the constitutional prohibition.

In our opinion it does not constitute an unreasonable search. In passing upon the statutes of various states authorizing searches without warrant of certain types of property, such as automobiles, vehicles, and temporary structures, where the officer has reasonable ground to believe contraband exists, the Courts have been unanimous in holding that no constitutional protection against unreasonable searches has been violated.

See Carroll vs. U. S., 267 U. S. 132,

Stacey vs. Emerson, 97 U. S. 642.

The basis for these decisions is the type and character of the property involved. The theory of the Courts in upholding such searches has been that because of the uses to which the property is susceptible, and because of the practical difficulties of going through the formalities of procuring judicial process, a search is not unreasonable if made upon reasonable grounds for believing there is contraband.

That a locker plant such as you have described comes within the class of property which the Minnesota legislature has authorized to be entered

and inspected without a warrant and without grounds for belief of the existence of contraband, cannot be doubted. The storage of great quantities of game and fish in plants, freezing rooms, and various types of refrigerator systems, has become a very common practice. The game and fish laws provide individual possession limits, seasonal restrictions and other formalities and requirements to make legal the possession and keeping of such game and fish. The contents of these locker plants are subject to change from day to day. Their operation is a commercial enterprise, the strict policing of which is essential to enforcement of game and fish laws.

An entry and inspection of this type of property does not invade the sanctity or privacy of the home or cause offense to the person.

We conclude, therefore, that because of the nature of the business being conducted upon these premises, the semi-public character of the plant, the necessity of strict supervision and policing, and the difficulty which would be involved in having to procure judicial process to authorize the search or in obtaining reasonable grounds for belief of contraband stored therein, that the legislative authority to enter and inspect without other knowledge than that dressed meats, game and fish are customarily stored, is not a violation of the constitutional protection against unreasonable searches.

With respect to the second part of your question, namely what force may be used to effect entry where keys are not provided or entry is protested, you are advised that only such force as is reasonably necessary to carry out the duties imposed upon the officer may be used, and that only such damage as was reasonably incidental to accomplish the result can be justified.

MANDT TORRISON,
Special Assistant Attorney General.

September 18, 1941. 208-I-3

CORPORATIONS

CHARITABLE

17

Corporations engaged in adjusting, prorating and liquidating debts although no charge is made—Family Welfare Association of Minneapolis—M40, §§5887-51, et seq.; (MS 41, § 332.04).

Hennepin County Attorney.

Facts

The Family Welfare Association, a charitable corporation under Minnesota laws, is engaged in extending professional social service without charge to residents of Minneapolis. Its activities are purely charitable. In pursuance of the very commendable purposes for which it is created, it sometimes becomes advisable and necessary for the association to give financial advice and to work out and carry through plans for the prorating and liquidation of debts owed by families who are receiving advice and assistance from the association.

The corporation proposes to extend this service free of charge to persons in defense industries. You recognize, as does this office, that it is highly desirable during the war emergency for some such organization as the Family Welfare Association to supply a service of this nature to the employees of the various defense plants located in and near Minneapolis.

This problem of debt liquidation becomes an acute one with some persons if they have been out of work or on relief for some time and now suddenly are reemployed at a good salary. The just demands of creditors become harassing and troublesome if some plan of liquidation over a period of time is not evolved.

Question

Whether Chapter 347, Laws 1935, being Mason's 1940 Supplement, Secs. 5887-51, et seq., applies to a charitable organization such as the Family Welfare Association?

Answer

The statute does not refer simply to corporations that engage in this business for profit. By the terms of id. Secs. 5887-51, it applies to any person, co-partnership, association or corporation "who shall engage in or hold themselves out as engaging in the business of compromising, settling, adjusting, prorating or liquidating the indebtedness of a debtor." Charitable corporations are not excepted from this provision.

Section 5887-58 of said law contains an enumeration of those to whom the law does not apply, but charitable corporations are not listed therein. The inference is that charitable corporations are not excepted from the operation of the act; and, therefore, in answer to your inquiry, it is my opinion that a charitable corporation such as the Family Welfare Association comes under, and must be governed by, the terms of this law.

RALPH A. STONE,
Special Assistant Attorney General.

June 29, 1942. 102

COURTS

COSTS AND DISBURSEMENTS

18

Actions for recovery of more than $50.00 but less than $100.00—Actions for recovery of less than $50.00—M27, §§ 9471, 9473; (MS41, §§ 549.02, 549.04).

Pope County Attorney.

Questions

1. In a default action in the district court where the amount claimed is more than $50.00 and less than $100.00 and the clerk is authorized to enter judgment without an order of the court, should the clerk enter in the judgment costs and disbursements in favor of the plaintiff?

2. In such case where the amount claimed is less than $50.00, should the clerk enter in the judgment costs and disbursements for the plaintiff?

Answer

This answer to your questions applies only to actions for the recovery of money (1) of which a justice of the peace would have jurisdiction, (2) where judgment is entered by the clerk without order of the court, (3) the sum sued for and recovered is less than $100.00 but more than $50.00 or (4) where the sum sued for and recovered is less than $50.00.

The answer to your questions involves a consideration of the following sections of Mason's Minnesota Statutes of 1927, viz. Sec. 9471:

> "In actions commenced in the district court, costs shall be allowed as follows:
>
> To plaintiff: (1) Upon a judgment in his favor of one hundred dollars or more in an action for the recovery of money only, when no issue of fact or law is joined, five dollars; when issue is joined, ten dollars. (2) In all other actions, except as otherwise specially provided, ten dollars. * * *"

Section 9473:

> "In every action in a district court, the prevailing party shall be allowed his disbursements necessarily paid or incurred: Provided, that in actions for the recovery of money only, of which a justice has jurisdiction, the plaintiff, if he recover no more than fifty dollars, shall not recover any disbursements; if he recover less than fifty dollars, he shall pay the defendant's costs and disbursements, which shall be taxed and allowed by the clerk upon notice as in other cases, and shall be deducted by the clerk from the amount of plaintiff's recovery. In case such amount exceeds plaintiff's recovery, he shall enter judgment against plaintiff and in favor of defendant for the amount of such excess."

Question 1

Suit and Judgment for More Than $50 But Less Than $100

Section 9471 has been construed to mean that the plaintiff is entitled to costs in an action for the recovery of money where the amount of the recovery is less than $100.00.

Kimball Printing Co. v. Southern Land Improvement Co., 57 Minn. 37,

Potter v. Mellen, 36 Minn. 122,

Greenman v. Smith, 20 Minn. 418.

In each of these cases the amount sued for was more than $100.00 but the recovery was less than $100.00. The conclusion reached in these cases, that the plaintiff was entitled to his costs, apparently has never been questioned. That is to say, the words "in all other actions," as used in Sec. 9471, subdivision (2), relating to costs, have been construed to mean actions where the judgment is less than $100.00.

Section 9473 allows disbursements in every action in the district court not coming within the proviso clause of that section. An action to recover more than $50.00 but less than $100.00 does not fall within the terms of the proviso.

Therefore, it is my opinion that in a suit in the district court for the recovery of money where the amount sued for and recovered is less than $100.00 but more than $50.00, the plaintiff, upon the entry of a default judgment by the clerk, is entitled to have taxed and included his costs and his disbursements.

Question 2

Suit and Judgment for Less Than $50

The answer to this question is in the negative. A suit for the recovery of less than $50.00 where a justice of the peace would have jurisdiction falls within the proviso clause of Sec. 9473. That clause reads in part, "* * * if he recover less than fifty dollars, he shall pay the defendant's costs and disbursements * * *." Plainly the plaintiff cannot have his costs and disbursements in an uncontested suit to recover less than $50.00 where, if the case had been contested, he could not have taxed the same.

See Felber v. Southern Minnesota Railway Company, 28 Minn. 156.

I understand that the views expressed herein are in accordance with the construction which has been placed upon these statutes by the legal profession throughout the state.

RALPH A. STONE,
Special Assistant Attorney General.

March 12, 1942. 144-B-5

DISTRICT

19

Clerk Fees for satisfying judgment entered by confession—M40, §§ 2176-14, 2176-16d; L. 41, C. 17, § 5; (MS41 §§ 279.29, 281.50).
Itasca County Attorney.

Facts

Mason's Statute 2176-14 and 16-D, and Chapter 17, Section 5, of the 1941 Session Laws, deal with the Clerk of Court's fees for entering records under a confession of judgment.

The language in question reads as follows: "and 15c for each full or partial release thereof."

Suppose a man confesses judgment on his delinquent taxes in the amount of $100.00. His first payment then would be $10.00 plus 30c clerk fees. Then suppose a year later, the judgment debtor decides to pay all of the remaining nine payments at once.

Question

Whether the clerk should collect only 15c for the clerk's fees in releasing the judgment, or whether the clerk is entitled to his 15c for each one of the remaining unpaid installments which in this case would be the sum of $1.35.

Answer

Section 2176-14, Mason's 1940 Supplement, being Minnesota Statutes 1941, Section 281.50, reads as follows:

> "The fees to be paid the clerk of the district court for certified copies of the judgment shall be 50 cents for each judgment and 15 cents each for the entry and full or partial release of judgment, which shall be paid for by the party or parties making such confession of judgment."

Section 2176-16d, Mason's 1940 Supplement, being Minnesota Statutes 1941, Section 279.29, reads as follows:

> "The party or parties making such confession of judgment shall pay the county auditor a fee of 50 cents, a fee of 50 cents to the clerk of the district court for entry of judgment, and 15 cents for each full or partial release thereof, which shall be collected by the county auditor."

The language of Section 5, Chapter 17, Session Laws of 1941, is to the same effect.

In our opinion it is very plain that for one satisfaction of judgment, whether full or partial, there shall be paid a fee of 15c. The release inquired about in your illustration would be a full release, but it would be only one release or satisfaction and would only entitle the clerk to one fee of 15c.

RALPH A. STONE,
Assistant Attorney General.

December 15, 1942. 144-B-5

FINES

20

Disposition—Traffic Laws—Arrest made by sheriff — Mason's Supplement 1940, Section 2554, subdivision 18 (a) and (b); M27, § 9707; M40, §§ 2554-18a, 2554-18b; (MS41, §§ 161.03, 574.34).

Swift County Attorney.

Question

Whether fines collected under highway traffic violations should be paid to the State Treasurer or to the County Treasurer when the arrest is made by the sheriff and no highway employee has taken part in the prosecution.

Answer

Laws 1935, Chapter 304, being Mason's Minnesota Statutes 1927, 1940 Supplement, Section 2554, subdivision 18 (b), provides that all fines from traffic law violations, collected from persons apprehended or arrested by employees of the commissioner of Highways (known as the highway patrol, subdivision [a]) shall be paid into the state treasury and shall be credited to a separate fund thereby established for that purpose.

The quesion which you propose is what should be done with the money when the arrest is made by the sheriff. Subdivision (b), above quoted, does not relate to arrests by the sheriff, but by the highway patrol. When the arrest is made by the sheriff the money should be paid into the county treasury as provided by Mason's Minnesota Statutes 1927, Section 9707.

CHARLES E. HOUSTON,
Assistant Attorney General.

January 9, 1942. 199-B-4

JUSTICE

21

Jurisdiction — Bench warrants — Traffic violation — M27 §§ 10671, 10672; (MS41 §§ 630.03, 630.04).

Aitkin County Attorney.

Facts and Question

The State Highway Patrol prosecuted the driver of a motor vehicle before one of our local justices of the peace for a violation of traffic laws of this state. A conviction resulted, and a fine was imposed. A stay of execution was granted to allow the defendant to pay his fine. The fine has not been paid. The highway patrol has now applied to the justice for a bench warrant directing the patrol to take the defendant into custody. The justice is rather doubtful of his authority to issue a bench warrant, and he has asked that I secure an opinion from your office on the same.

Answer

There is no provision for the justice of the peace to issue a bench warrant. Sections 10671 and 10672 refer only to district courts.

Also, a justice of the peace has no right to stay the execution of sentence; but in any event he still has the right to enforce a judgment and sentence by issuing at this time an "order of commitment." Under such order the sheriff can take the defendant into custody and compel him to serve his time unless the fine and costs are paid.

M. TEDD EVANS,
Assistant Attorney General.

June 12, 1941. 266-B-27

22

Sentences—Fines—Successor to the office entitled to enforce conviction of predecessor.

Division of Game and Fish.

Facts

In a number of instances throughout the state, justices of the peace have died or otherwise vacated their office, leaving dockets upon which sentences of conviction for violations of the game laws remain unsatisfied.

In one instance, where the Justice of the Peace has died, there remain eight cases tried before his death where fines of $50 in each were imposed and have not been paid.

Question

Whether the justice appointed or elected to succeed him has authority to enforce collection of the fines remaining unpaid upon the docket of his predecessor.

Answer

Justices of the peace occupy constitutional offices. The authority and jurisdiction of such justices are vested in the office and the individual occupying it merely fulfills the functions of the office while holding tenure.

It is our opinion that where a case has been fully tried, the defendant found guilty and sentence imposed by one encumbent of the office, his successor has full authority to carry on the functions of the office with respect to enforcing the terms of the sentence.

Any other result would defeat the ends of justice and thwart the interests of the state by permitting an offender who has been tried and convicted, to raise the defense of double jeopardy in a subsequent prosecution on the same offense, but permit him to escape the consequences of his crime wherever the occupant of the office of justice of the peace vacated the office before the sentence could be executed.

MANDT TORRISON,
Special Assistant Attorney General.

July 11, 1942. 266-B-11

JUVENILE

23

Jurisdiction—Dependent child—Power to enforce orders—Habeas corpus to enforce order of Juvenile Court—M27 § 907; M41 § 8646-1; (MS41 §§ 260.11, 387.03).

Koochiching County Attorney.

Facts

A petition was filed by the welfare board of Koochiching County in the Juvenile Court for that county, alleging that a child of about one year of age was dependent. The court heard the proceedings, found the child to be dependent, and by its order committed her to the temporary custody and control and guardianship of the Koochiching County welfare board of International Falls in the County of Koochiching and State of Minnesota, and provided therein that said child shall there remain until a permanent guardian has been appointed by the court. It appears that this was done by virtue of the authority of the court under Laws 1941, Chapter 158, Section 2, Mason's Supplement 1941, Section 8646-1.

The child was born to an unmarried mother. For some time before the hearing the child had been, and still is, in the home of the mother of the man who is said to be the father of the child. She refuses to surrender custody of the child to the child welfare board.

Question

What proceedings can the welfare board take to secure custody of the child? What authority has the Juvenile Court to enforce its orders and decrees? Is there any commitment or order which the Probate Court can issue to the sheriff or other officer to go into the home where the child now is and see to it that the child is delivered to the custody of the welfare board?

If the Probate Court has no authority, then may a writ of habeas corpus issue out of the District Court to produce the child in court for such disposition as the court may direct? Will the District Court say that this is a matter still pending in the Probate Court and that the District Court has no jurisdiction? How may the welfare board obtain the actual custody of the child?

Answer

The Juvenile Court is established by statute. In certain counties, it is a branch of the District Court. In certain other counties, the Juvenile Court is presided over by the judge of the Probate Court, but, nevertheless, it is the Juvenile Court. It must be the intent of the law that the Juvenile Court, whether presided over by a judge of the District or Probate Court, is nevertheless, the Juvenile Court and it has the same authority in one county as in another, irrespective of which judge may preside. There can be no question that the judge in a county where the Juvenile Court is a branch of the District Court may enforce its orders by writ. Mason's Supplement 1941, Section 8646-1, provides that:

"* * * the court may make an order committing the child * * * and may make an order placing the child in the temporary care or custody of the county welfare board * * * ."

The intent of this law is plain. We see that it is the intent that the order of the Juvenile Court determining what shall be done concerning the custody of the child shall be executed by an order of commitment. If there is any doubt about what the legislature meant by this legislation, then light is thrown upon it by Mason's Minnesota Statutes of 1927, Section 8667, wherein it is provided that this act shall be liberally construed to the end that its purpose may be carried out. We read the way to carry out the purpose is to execute its provisions. The court has, according to law, determined that the child shall be placed in the custody of the Koochiching County welfare board of International Falls. If this order is directed to the sheriff, and another order is made addressed to the sheriff referring to this order and requiring that he shall execute its terms, it appears to me that that would be in conformity with the terms of the act, and it is a reasonable construction of the law.

Mason's Minnesota Statutes of 1927, Section 907, which defines the powers and duties of the sheriff, provides that, "He shall * * *execute all * * * writs * * * and orders issued or made by lawful authority and to him delivered * * * ." This is not limited to orders of the District Court. It further appears to me that you have available the remedy of habeas corpus in the District Court. I believe that this remedy is cumulative. The welfare board may avail itself of either method of procedure. If a writ of habeas corpus should issue, it is my opinion that the District Court would not refuse to dispose of the question on the merits for the reason that the matter is pending in the Juvenile Court.

CHARLES E. HOUSTON,
Assistant Attorney General.

February 26, 1942. 840-a-6

MUNICIPAL

24

Fines—Disposition of—General Funds—Fines payable into. City Charter of Mankato, Section 76, subdivision Eighth, Fifteenth, Thirteenth, and Sixteenth—L 27, C 61.

City Attorney, Mankato.

Question

Whether municipal court fines should be paid into the municipal court fund or into the general fund, both of which are created by your charter.

Answer

It appears that your municipal court operates under Laws 1927, Chapter 61. There is no specific provision governing the disposition of fines, except

that Section 30 thereof provides that fines and penalties, when collected, are to be paid into the city treasury.

Section 76 of your charter authorizes the council to levy a tax upon all taxable property in the city for the support of several named funds. One of them is a municipal court fund (Paragraph Eighth); and another is a general fund (Paragraph Fifteenth), and it is provided in that paragraph that

> "There shall be paid into this fund all moneys received from any source save when received for a specific use and purpose."

There is no provision in your charter requiring that fines be paid into the municipal court fund. In the absence thereof, it would seem that the sentence above quoted would require that such fines be paid into the general fund. This conclusion is supported by the fact that specific provision is made in another paragraph of Section 76 for the payment of moneys derived from special sources into special funds. See, for example, Section 76, Paragraph Thirteenth, which provides that moneys derived from the sale of any property acquired for or used in connection with any water and light plant of the city shall be paid into the water and light fund. See also Paragraph Sixteenth, which requires moneys derived from special assessments to be paid into the permanent improvement fund.

I note, however, that specific provision is made in Section 76, Paragraph Second, for the payment into the sinking fund of five per cent of all fines collected by the city. I, therefore, advise, although the provisions of the charter are far from clear on the proposition, that ninety-five percent of all fines are to be paid into the general fund, and five per cent thereof are to be paid into the sinking fund.

EDWARD J. DEVITT,
Assistant Attorney General.

May 23, 1941. 306-B-7

25

Judge—De facto—Salary—Municipality cannot recover compensation paid under facts stated—L 35, C 253.

Village Attorney of New York Mills.

Facts

Laws 1935, Chapter 253, establishes a municipal court at New York Mills, Minnesota. In accordance with the act, a municipal judge was appointed within thirty days after the effective date of the act, to-wit, April 24, 1935. The judge served until his resignation shortly after March 28, 1941. On that date a writ of quo warranto was obtained from the Supreme Court challenging the legality of the court on the ground that the act establishing it had not received the two-thirds vote of the legislature required by the constitution. During the de facto existence of the court, the judge received compensation aggregating approximately $350.00.

Question

(1) Whether the salary received by the judge during such period was lawfully paid to him.

Answer

Yes. The court was a de facto court and the judge a de facto officer. Burt vs. Winona, 31 Minn. 472, 18 N. W. 285, State vs. Bailey, 106 Minn. 138, 118 N. W. 676, Attorney General's opinion dated February 21, 1941.

Where a de facto officer exercises the functions of his office, under color of authority, and with apparent regularity, other county officers and third persons may properly deal with him as such officer, and be protected.

> "* * * the fact that a person is in the quiet and notorious possession of an office, and exercising its functions under color of authority, is a perfect warrant for every one to recognize his official character, both by invoking his powers, and paying him the fees allowed by law for his services. I cannot see any reason why the board of supervisors, in paying the salary of an officer of the county, should be governed by different rules. They are not officially in possession of any facts concerning the election or eligibility of an official beyond those open to the private citizen. The circumstances of this case forcibly illustrate the impracticability of requiring any one to look beyond the presumption arising from the possession, exercise, and enjoyment, of the office, in determining who is the officer, as they show that the disqualification may flow from facts wholly occult; and as this presumption is sufficient to justify the board in engaging the official services of the person in possession, in behalf of the county, it must also afford them protection in paying to him the fees or salary allowed by law as his compensation." Parker vs. Supervisors Dakota County, 4 Minn. 59 (30).

(2) You further ask whether or not the village can compel repayment of salary in the above circumstances.

Our court has not directly passed upon this question. However, in Badeau vs. United States, 130 U. S. 439, the Supreme Court of the United States said:

> "As between individuals, where money has been paid under a mistake of law, it cannot be recovered back, but it is denied that this rule is applicable to the United States, upon the ground that the government is not bound by the mistakes of its officers, whether of law or of fact. United States v. Kirkpatrick, 9 Wheat. 720; United States v. Bank of Metropolis, 15 Pet. 377; McElrath v. United States, 102 U. S. 426. But inasmuch as the claimant, if not an officer de jure, acted as an officer de facto, we are not inclined to hold that he has received money which, ex aequo et bono, he ought to return."

A similar situation was before the Supreme Court of Pennsylvania in Jones vs. Duseman, 246 Pa. St. 513, 92 A. 707, Ann. Cas. 1916D, p. 474, in which it was held:

"Whose then is the money so paid? The city parted with it in mistake of law; it gave it over to one who, because of color of title to the office to which the money attached, received it in good conscience. The city is in no position to recover it back, being precluded by the rule that forbids recovery against one who has received money under a claim of right and in ignorance of its true ownership. Therefore, the money is not the city's. The party to whom the money was paid, this appellee, being without legal right to receive it, since it was not recoverable at law by him, can have no right to retain it as against the demand of one with better title. It is his as against the city, and as against every one except the true owner. The true owner of the office from which the money resulted is this appellant, * * * "

It is the general rule that money paid under a mistake of law cannot be recovered back where there was no fraud, concealment, or over-reaching by the recipient.

"We hold that money paid under mistake of law cannot be recovered back where the transaction is unaffected by any fraud, trust, confidence, or the like, but both parties acted in good faith, knew all the facts, and had equal means of knowing them, * * *. It would be impossible to foresee all the consequences which would result from allowing parties to avoid their contracts in such cases on the mere plea of ignorance or mistake of law affecting their rights." Erkens vs. Nicolin, 39 Minn. 461.

In the instant case, both the village and the de facto judge had equal means of knowledge as to the validity of the law which assumed to establish the court. The village has received substantial value for the money paid as compensation to the de facto judge. In these circumstances, we believe the village should not and could not recover the monies paid under such mutual mistake of law.

ROLLIN L. SMITH,
Special Assistant Attorney General.

August 25, 1941. 307-I

26

Reports—To Bureau of Criminal Apprehension—M27, § 228; L 35, C 197, §2; M40 § 9950-7; (MS41 §§ 488.16, 626.34, 626.35, 626.36).

Bureau of Criminal Apprehension.

Facts

Mason's Supplement 1940, Section 9950-7, Laws 1935, Chapter 197, Section 2, requires court clerks to furnish to the superintendent of the bureau of criminal apprehension statistics and information concerning criminal prosecutions.

Question

Whether a judge of municipal court, who has no clerk, is required to report to the superintendent of the bureau of criminal apprehension.

Answer

Mason's Minnesota Statutes 1927, Section 228, defines the duties of the judges in municipal courts in all municipal courts organized since March 1, 1906. That section states that the duties and powers of judges and clerks of the municipal courts are the same as the duties of the judges and clerks of the district courts in like cases. Therefore, it appears that the duties of a judge of the municipal court organized since March 1, 1906, do not require him to make these reports because the judge of the district court does not have to make them.

As to the clerks of municipal courts organized before March 1, 1906, their powers and duties are the same as they were at the time the revised laws took effect, and in order to know what those duties are we must know under what law they were organized.

Perhaps a remedy for the situation which you have in mind may best be found by legislation requiring such reports.

CHARLES E. HOUSTON,
Assistant Attorney General.

March 10, 1942. 985-F

PROBATE

27

Psychopathic personality—Governed by same laws as dangerously insane—May not release patient on bond before commitment—Provisions for parole, release, or restoration to capacity—M27 § 4524; L 39, C 369; M40 §§ 4523, 8992-143, 8992-178, 8992-179, 8992-180, 8992-184 a, 8992-184 b, 8992-184 c, 8992-184 d; (MS41 §§ 253.15, 253.16, 525.760, 525.761, 525.762, 526.09, 526.10, 526.11).

Nicollet County Attorney.

Opinion

1. Under the express provisions of Mason's Supplement 1940, Section 8992-184b, except as otherwise provided, cases of psychopathic personality are governed by the laws relating to insanity. Under the definition of psychopathic personality given in id. Section 8992-184a, an adjudication of this condition necessarily involves a finding, among other things, that the patient is dangerous to other persons. Consequently such cases are subject to all the provisions of law applicable to persons found to be dangerously insane. See opinion No. 32, 1940 Report.

2. It follows that the probate court has no authority to release a psychopathic personality patient on bond before commitment under Mason's Supplement 1940, Section 8992-178. That section expressly provides that no person who is dangerous to the public shall be so released.

3. Provisions authorizing the superintendent of the hospital or the director of public institutions (as successor to the state board of control) to parole, release, or discharge persons who have been committed as insane, applicable to psychopathic personality cases, will be found in Mason's Supplement 1940, Section 4523, Mason's Minnesota Statutes of 1927, Section 4524, and Mason's Supplement 1940, Section 8992-179, all subject to the controlling provision of id. Section 8992-180, that "no patient found by the committing court to be dangerous to the public shall be released from custody by such board or any institution except upon order of a court of competent jurisdiction."

4. A psychopathic personality patient, like an insane patient, may be restored to capacity by the court which committed him, under id. Section 8992-143, but only upon petition, after notice and hearing, as provided by that section.

CHESTER S. WILSON,
Deputy Attorney General.

December 26, 1941. 248-B-11

CRIMINAL LAW

CONVICTIONS

28

Gambling—Gambling devices and slot machines—Authority of county attorney to institute prosecutions on Indian Reservations — M27 § 10214; (MS41 § 614.06).

Cass County Attorney.

Facts

It appears that the Minnesota Chippewa Tribe of Indians maintain a store on certain lands in Cass County, title to which is vested in the United States in trust for the Tribe. The store sells to the general public.

Question

Whether the state laws are violated if the store maintains a slot machine or gambling device on the premises.

Answer

The answer depends, in the first instance, upon who maintains the slot machine or gambling device.

If a gambling device is maintained by any person other than a Tribal Indian (one under the guardianship of the United States Government), then such person is amenable to our state laws and may be prosecuted under Mason's Minnesota Statutes of 1927, Section 10214, for keeping a gambling device. State v. Campbell, 53 Minn. 354, 55 N. W. 553. The statement is subject to any treaty provisions to the contrary.

If a gambling device is maintained by a Tribal Indian (one under the guardianship of the United States Government), then your right to prosecute him under state laws is dependent upon his status under existing treaties and federal statutes. As you know, the Federal Government, by the United States Constitution, Article I, Section 8, has exclusive jurisdiction over Indian Tribes. The Congress has enacted legislation relinquishing its jurisdiction over certain tribes and making them amenable to state laws. Thus by Act of February 8, 1887, 24 St. 388, 25 U. S. C. A., Sections 331, et seq., a system for the division of Tribal lands among the various individual members of the Indian Tribes was established. Under this statute the Secretary of the Interior is authorized to issue to certain Indians patents, by the terms of which the United States Government holds the land in trust for them for a period of twenty-five years. Upon the expiration of that period, the land is conveyed to the Indian, and he is given the benefit of, and made subject to the civil and criminal laws of the state or territory in which he resides. Under this statute it was held in State vs. Joe Bush, 195 Minn. 413, that a full-blooded Chippewa Indian was properly convicted of violating the game and fish laws of the State of Minnesota by trapping muskrats on the Reservation during the closed season. The defendant resided on the White Earth Indian Reservation in Mahnomen County.

You do not say, and I am not informed as to the particulars of any treaty under which your Chippewa Tribe of Indians are governed, nor is it within our province to interpret the federal statutes with reference to their emancipation. I would suggest that you communicate with the United States District Attorney with reference to this phase of your question.

Categorically, therefore, you are advised that:

1. State laws are violated and you are authorized to prosecute any person other than a Tribal Indian or any Indian allottee under the circumstances defined in State v. Bush, above, for the maintenance of a slot machine or gambling device within your county.

2. Whether or not state laws are violated when a slot machine or gambling device is maintained by a Tribal Indian or Indian allottee is dependent upon the existing treaties under which he lives in tribal relationship or which govern the allotments made, and the provisions of the federal statutes governing amenability to state laws, the granting of allotments and emancipation of Indian wards.

EDWARD J. DEVITT,
Assistant Attorney General.

September 17, 1941. 733-D

MISDEMEANORS

29

Bang's disease—Violation of livestock sanitation regulations relative to testing cattle—M27 §§ 5396, 5407; L 39, C 217, § 7; M40 § 5460-27; (MS41 §§ 35.03, 35.31, 35.70).

Pennington County Attorney.

Question

Relative to the penal provision for failure to comply with rules and regulations of the state livestock sanitary board relating to testing of cattle for Bang's disease.

Answer

Laws 1939, chapter 217, section 7, also known as Mason's Supplement 1940, section 5460-27, provides that the board shall have power to make and enforce such rules and regulations necessary to carry out the provisions of the act for the control and eradicating of Bang's disease. In our opinion the rules and regulations adopted for the testing of cattle for Bang's disease may be deemed to have been made under the general power of the board to protect the health of domestic animals of the state under Mason's Minnesota Statutes of 1927, section 5396, and hence subject to the same penal provisions. Laws 1939, chapter 217, merely supplied the procedure for action with respect to testing for Bang's disease.

It is also our opinion that chapter 217 may be regarded as an addition to chapter 30, Mason's Minnesota Statutes of 1927. Such was no doubt the understanding of the legislature.

The objection raised by counsel for the defense is very similar to that raised in the case of State v. Figge, 177 Minn. 483. The court there held that Mason's Minnesota Statutes of 1927, section 9908, which was part of Revised Laws 1905 and expressly referred thereto, was applicable to a later penal statute. The court considered that the later act became part of the body of the criminal law, and was subject to the statute on reasonable construction thereof (section 9908). So here, chapter 217 should be regarded as part of the general body of law dealing with livestock sanitation, and subject to the penal provisions attached thereto in section 5407. Under that section violation of the regulation in question would be a misdemeanor.

JOHN A. WEEKS,
Assistant Attorney General.

May 14, 1941.

293 b-1

MORTGAGED PROPERTY

30

Removing—Intent necessary ingredient of the crime—(MS41 § 621.21). Koochiching County Attorney.

Facts

A person has left Minnesota to engage in work in a defense plant in another state. Upon leaving he has taken his automobile with him to his new place of employment. The automobile is subject to a conditional sales contract on which there is an unpaid balance.

Question

What is to be done in such a case?

Opinion

Of course you are the judge of what prosecutions should be instituted in your county, but certain general observations may be helpful to you.

The alleged offender is not necessarily guilty of a crime when he has left the state and taken his automobile with him. To constitute a crime, he must remove the car **"with intent** to place mortgaged personal property beyond the reach of the mortgagee or his assigns." Minnesota Statutes 1941, Section 621.21.

A person accused of crime under this statute is not guilty unless the intent, aforesaid, is present. Whether such intent is present is a question of fact.

The following considerations would all have a bearing on the existence of such intent:

(1) Whether the accused concealed his departure;

(2) Whether he concealed the whereabouts of himself or of the automobile;

(3) Whether his absence was to be only temporary or permanent;

(4) Whether he has use for the automobile in going back and forth to his work, and

(5) Many other considerations which can readily be brought to mind.

This office, of course, can not advise you whether to institute a criminal prosecution. You must be governed by your own good judgment as to whether a crime has been committed and whether evidence is obtainable to prove it, bearing in mind that the mere fact that the conditional vendee has gone away and taken his automobile with him is not a crime unless accompanied by the specific intent above mentioned.

Another consideration in all such cases is this: Whether the complainant is not seeking primarily to effect collection of the debt or to secure possession of the automobile rather than to prosecute the alleged offender for his crime. Of course extradition would not be granted in any case where the primary proceeding is to facilitate the collection of a private debt or the repossession of the car. Extradition should not be undertaken in such a case. You yourself would have to certify that such is not the object of the extradition proceedings. The chances are that extradition would be granted upon the request of the Governor of Minnesota, but before you initiate such proceedings you should very carefully consider the matter and determine in your own mind whether any prosecution is justified by the facts, whether the evidence is available to prove the crime charged, and whether the desire to collect a private obligation is the real purpose of the complainant.

It should also be called to the attention of the complainant that the return of the conditional vendee to Minnesota by virtue of extradition proceedings would not result in the return of the automobile also. Neither county nor state could or would undertake to return the car to Minnesota. The conditional vendor would in any case have to repossess the car in the foreign state if that is his desire.

In these days when war work is so essential, a man employed in a munitions plant should not be interfered with and prosecuted unless the circumstances clearly warrant it.

RALPH A. STONE,
Assistant Attorney General.

September 11, 1942. 133-b-59

EDUCATION

SCHOOL DISTRICTS

31

Board — Contract — Interest of member in depository bank — M41 § 10305; (MS41 § 620.04).

Department of Education.

Facts

In Renville there is one bank. This bank has been designated by the school board as depository for the funds of the school district in the hands of the treasurer. The owner of the bank has been elected a member of the school board. Under the provisions of Mason's Supplement 1941, Section 10305:

> "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 employe of such officer, who shall voluntarily become interested individually in such sale,

lease, or contract, directly or indirectly, shall be guilty of a gross misdemeanor; 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 * * *."

Questions

1. Whether some other bank could be designated as a depository.

2. Whether funds, never to exceed $5,000 (the amount covered by the F.D.I.C.), could be kept in the local bank to cancel checks issued locally, and whether such funds kept in the bank under those conditions would then be protected by the F.D.I.C.

Answers

1. Another bank may be designated as a depository.

2. Funds may not be deposited in the local bank without that bank being designated as a depository.

In our opinion, under the section of the law quoted above, the local bank may be designated as a depository by a two-thirds vote of the board.

In rendering this opinion it is the intention to expressly overrule the doctrine announced in an opinion rendered March 23, 1933, from this office and since followed in subsequent opinions. The opinion of March 23, 1933, held that Laws 1931, Chapter 212, was unconstitutional. It is our opinion that the conclusion was incorrect. It is our opinion that the law is constitutional.

J. A. A. BURNQUIST,
Attorney General.

July 9, 1942. 90-C-2

32

Board—Expenses for attending Minnesota School Board Association's annual meeting lawful—Not lawful to pay more than one member—L 41, C 169, Art. VI, § 6, subd. 19; M41 § 3156-6 (6), subd. 19; (MS41 § 125.06).

Commissioner of Education.

Under date of February 26, 1942, you submitted to this office a question relative to the payment of expenses of school board members to the Minnesota School Board Association's annual meeting in March.

Question

May a school board legally pay the expenses of more than one board member attending the meeting of the Minnesota School Board Association?

Answer

Laws 1941, Chapter 169, Article VI, Section 6, subdivision 19 (Mason's Supplement 1941, Section 3156-6(6), subdivision 19), reads:

> "The school board of any school district of this state by a two-thirds vote may become a member of the Minnesota school board association and by a similar vote appoint one of its members to attend the annual meeting thereof, and the amount of the annual membership dues in such association and the actual and necessary expense incurred in attending such meeting shall be paid as other expenses of the district are paid."

The authority herein granted is plainly expressed. It is lawful to pay the expenses of one member of the board in attending such meeting. It is not lawful to pay the expense of sending more than one member to the meeting. It would be unlawful to attempt to evade the law by paying one member more than enough to cover his expenses and then such member using the excess to reimburse another member who attended for his expenses. Such procedure would be clearly illegal.

When the law says that the board may pay the expense of one member it means that the board cannot pay the expense of more than one member. What cannot be done directly cannot be done indirectly by doubling the expense of one member to allow him to reimburse another member.

RALPH A. STONE,
Special Assistant Attorney General.

March 5, 1942. 161-a-12

33

Board—Expenses—For travel of members to meetings of board in district not authorized—L 41, C 169, Art. VI, § 6, Subdv. 16 and 17; (MS41 §§ 125.06-16, 125.06-17).

Commissioner of Education.

Question

Can the members of the Cyrus school board be reimbursed for the miles they travel to and from school board meetings?

Answer

You report that three members travel twelve miles to each meeting of the board in this independent consolidated district. Laws 1941, Chapter 169, Article VI, Section 6, subdivisions 16 and 17, Minnesota Statutes 1941, Section 125.06-16, provides that the board shall defray the necessary expenses of the board, including record books, stationery, and other incidental matters as may be proper.

I consider the expense under consideration to be expense of the members rather than the expense of the board. Minnesota Statutes 1941, Section 125.06-17, authorizes reimbursement for travel in attending a meeting of the school boards of the county. Subdivision 19 of the same section authorizes the payment of necessary expense incurred in attending a meeting of the Minnesota School Board Association. This indicates that the legislature considered it necessary to authorize such expenditures. The fact that other expenditures for travel are not mentioned would indicate a legislative intent not to authorize reimbursement therefor.

When the members of the board accepted the office which they hold, they knew the burden connected therewith. They knew there was no compensation involved, and in accepting the office they were rendering a public service.

If it is just that they should be paid for such travel, that is a question for legislative determination, but until the legislature authorizes reimbursement to the school board members for the expense of travel from their respective homes to the place of meeting, it is our opinion that such reimbursement is not authorized by law.

CHARLES E. HOUSTON,
Assistant Attorney General.

September 11, 1942. 161-a-12

34

Board—Hot noon lunches—Authority to serve at school house—Authority to serve lunch free of charge to certain students.

Commissioner of Education.

Question

Whether the Minneapolis Board of Education may spend public funds for the purpose of providing free lunches for school children at the noon hour.

Answer

Opinion No. 323, Report of the Attorney General 1934, relative to free lunches for pupils, concludes:

> "If the school board in its honest judgment is of the opinion that the serving of hot lunches to all students at noon at the school house will promote physical and mental development of the school children and will tend towards the maintenance of an efficient school system, the board may adopt a rule to that end."

That opinion has not been disturbed by any court and has been acquiesced in by several legislatures. It is reasonable to assume that the school districts where lunches are served with or without charge have been guided to some extent by said opinion. Some weight must also be accorded the practical construction placed upon the statutes by the school authorities who have made provision for such lunches.

In the circumstances, we feel that Opinion No. 323, Report of the Attorney General, 1934, should not be reversed by this office, and if any change in this respect is to be made, the legislature should make it.

Another question raised in your communication is whether a charge may be made for some pupils and free lunches furnished to others.

Assuming the correctness of the 1934 opinion, the board may, by establishing rules based on valid educational reasons, charge some pupils for lunches and furnish them without charge to others. If, for example, because of malnutrition, the physical and mental growth of some pupils demands different treatment from that given others, the school board may establish rules and regulations within reasonable limits and classifications which will promote the education of those handicapped. As stated in the case of Wilson vs. Board of Education of Chicago, 84 N.E. 697, "the courts will not interfere unless there is a clear abuse of the power and discretion vested in the board."

You are therefore advised that under the 1934 opinion there is no constitutional, statutory or charter obstacle which prevents the board of education of Minneapolis from adopting sound rules and regulations with respect to furnishing free lunches.

In establishing classifications for the purpose of determining who shall be required to pay for lunches and who shall receive them free of charge, the board must base its regulations on reasonable grounds and on such as are related to the promotion of education.

If charges are to be made, such lunch rooms must not be operated for profit and lunches are not in any event to be served to the general public. Goodman vs. School District, 32 F. (2d) 586.

J. A. A. BURNQUIST,
Attorney General.

November 4, 1941. 159-B-11

35

Bonded Indebtedness—Detached property to be taxed for indebtedness, as if no change had been made—M40 § 2748; (MS41 §§ 122.09-10-11-12).

Olmsted County Attorney.

Facts

An individual here had an acre of land located in Common School District No. 143 in the Township of Rochester, Olmsted County, Minnesota. The school district took out a State loan and this made an additional tax on the lands in the district. Later on this acre of land referred to was added to the City of Rochester and is taxable now by the City of Rochester and for its public schools.

Under the statute regarding this matter of school bonds and State loans, it appears that the State loan taken out by School District No. 143 follows this land no matter if it is incorporated into another municipality.

Question

After the acre of land was added to the City of Rochester, the person owning it improved the same by putting up buildings. The question is whether or not the increased valuation of this acre of land must be taken into account in levying the tax for the above named school district loan, or is the valuation taken as it existed prior to the time the acre of land was incorporated within the city limits of the City of Rochester.

Answer

Section 2748, Mason's Supplement 1940, in part reads as follows:

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

As a matter of practice the county auditor makes the levy rate sufficient to meet the interest on bonds, and principal payments as they become due. The only possible basis for taxation is the current assessed valuation. It would therefore be impossible for him to levy a tax on the basis of the value of this property before the improvements were made.

M. TEDD EVANS,
Assistant Attorney General.

April 24, 1941. 159-a-4

36

Boundaries—Change of—Not a change of school site within the meaning of—M27 §§ 2798, 2815; (MS41 §§ 124.01, 125.06, 124.09).

Department of Education.

Facts

School District No. 36, Ramsey County, has voted to erect a new school house and has available funds with which to proceed with the erection of a new school house. Recently an election was held to secure authority to change the site to another portion of the school district. This election failed.

Their present school site is 295 feet long from east to west and 385 feet wide from north to south. An attempt is being made to call a new election for the change of the school site, the net effect of which would be to leave the site exactly the same size, including a strip of additional land 15 feet wide along the western boundary of the school site and excluding a strip 15 feet wide along the eastern boundary of the school site.

Question

Would such a change in the boundaries of a school site constitute a change of school site within the meaning of the section of law above cited? It is obvious that at least a portion of the building and possibly all of the new building would be located on land now contained within the present school site.

Answer

The question does not involve a **change of school site,** as contemplated under Section 265 of the School Law (2798 Mason's Minnesota Statutes). It should be noted that the school board has authority, without a vote of the electors, to purchase the additional strip of land 15 feet wide if they so desire. Under Section 341 of the School Law (2815 Mason's Minnesota Statutes) the school board, without a vote of the electors, may acquire other land adjacent to or near the school site, up to one full block in any village or city, and up to two acres if outside of any village or city.

M. TEDD EVANS,
Assistant Attorney General.

March 7, 1941. 622-I-4

37

Bus Routes—Removal of snow from—Authority to enter into contract with highway department—M40 § 2554(21); M41 § 3156-6(19); (MS41 §§ 125.19, 161.03).

Department of Highways.

Opinion

Mason's Minnesota Statutes 1927, 1941 Supplement, Section 3156-6(19), a reenactment of Section 2816-10, 1940 Supplement, contains the following provision:

> "3156-6(19). Removal of snow on bus routes.—The school board of any school district is hereby authorized to enter into contracts with the state, or any political subdivision thereof, or any corporation, partnership, association or individual for the removal of snow from the roads used for regular bus routes transporting school pupils to and from school either within or without the district."

This section together with the provision in Mason's Minnesota Supplement 1940, Section 2554, subdivision 21, in my opinion authorizes a contract with any school district provided that it is limited to the removal of snow from the roads used for regular bus routes transporting school pupils to and from school, and otherwise complies with said sections.

J. A. A. BURNQUIST,
Attorney General.

November 15, 1941. 377-a-11

38

Busses—Purchase of on installment plan—Computation of interest—L 41, C 333; (MS41 § 125.065).

Department of Education.

Facts and Question

Reference is made to Laws 1941, Chapter 333, which authorizes school boards to purchase school busses on the installment payment plan, "and the deferred payments to bear a rate of interest of not to exceed four per cent per annum."

Copy of memorandum by the Director of Rural Education reads:

"A question has been raised as to the method of calculating the interest upon the unpaid balances in the purchase of a school bus.

(1) Shall the interest be calculated at 4% on the unpaid balances, commonly known as straight interest?

(2) May the interest be calculated at 4% on the unpaid balances at the beginning of the interest period and then included in the total due, which is the common practice used in financing the purchase of automobiles?"

Answer

If the payment of interest in advance, or the adding of interest to the total unpaid balance and dividing up that sum into installments, results in a higher rate than four per cent, it is forbidden in so far as school districts are concerned.

For example, if the school district purchases a bus for $1500, of which $500 is paid down, then the maximum interest which the district is authorized to pay on the unpaid balance is $40.00 for one year. Manifestly if one year's interest at four per cent on $1000, or $40, if added to the balance of $1000 and that total of $1040 is divided into twelve payments of $86.666, the district will in fact be paying nearer eight per cent than four per cent on the deferred installments. While such an arrangement is lawful and proper between individuals who are free to contract, it is not permitted in the case of a school board. The maximum interest it may pay on a deferred installment is four per cent per annum.

ROLLIN L. SMITH,
Special Assistant Attorney General.

November 10, 1941. 622-D

39

Cafeteria — Sale of soft drinks — Whether municipal ordinance regulating sale applicable—(MS41 § 461.02).

City Attorney, Stillwater.

Facts

Stillwater has a soft drink license ordinance which provides in effect that no person, firm, or corporation can engage in the business of selling—or disposing at retail, so called soft drinks without first having obtained a license from the City.

The Board of Education of the City of Stillwater maintains a cafeteria in which students may obtain meals, and at such cafeteria the Board permits the sale of soft drinks. No license has been applied for by, or issued to the Board.

Question

Whether the City may compel the Board to take out a soft drink license.

Answer

You have not furnished us with a copy of the ordinances referred to. Therefore, I cannot pass upon the question of whether the ordinance is broad enough in its scope to include a school district cafeteria. For the same reason, I cannot pass upon the question whether it was the intent of the city council in passing the ordinance to make it applicable to school districts.

The only question I can consider is whether there is authority vested in the city council to require a license from a school district for its school cafeteria engaged in selling soft drinks.

I am assuming that the school district does not sell non-intoxicating malt beverages and that the question does not involve the issuance of a malt liquor license under Section 340.01, Minnesota Statutes 1941.

The applicable section is Section 461.02, Minnesota Statutes 1941, which reads as follows:

> "There is hereby conferred upon each city, borough, and village in the state the authority by ordinance to license and regulate the business of vendors at retail of non-intoxicating beverages, to impose such reasonable license fee therefor as may be prescribed by such ordinance, and to provide for the punishment of any violation of any such ordinance according to the provisions of law."

The question presented therefore is narrowed to this: what is the meaning of the words "business of vendors at retail" as used in this statute? In passing upon this question, I make the assumption, which is justified, that such school cafeteria is not operated for profit and that in selling soft drinks the school is not actuated in any degree by an intention to make money or gain a profit.

I am inclined to give to these words a restricted meaning for the following reasons:

The ordinary meaning of the word "business" involves a profit motive and includes activities which are carried on for profit. Business is that which occupies the time, attention and labor of men for the purpose of a livelihood or profit. An enterprise not conducted as a means of livelihood or for profit does not come within the ordinary meaning of the term "business." In this connection, I refer to Volume 5 of "Words and Phrases," pages 998 to 1005. You will find there a collection of citations of more than 60 cases defining the word "business" as having the meaning above given to it.

Furthermore, there is no particular reason why the activity of the school district in furnishing soft drinks to the school children in its cafeteria should be regulated. Such places are under the regulation of the school authorities and the need for regulation, which exists as to other private places which are operated for profit, is not present with respect to a school district cafeteria.

I hold that the statute conferring upon your city authority to regulate the business of selling soft drinks at retail does not apply to a school district which permits the sale of soft drinks in its school cafeteria, there being no profit motive involved.

RALPH A. STONE,
Assistant Attorney General.

September 24, 1942. 634-D

40

Facilities—Provision for education of children where no facilities exist— L 41, C 169, Art. IV, Sec. 27; (MS41 § 123.27).

Commissioner of Education.

Facts

In the Lake County School District some timber operations are about to be established. A number of families will move into the district. Among these families will be twenty-five to thirty children of school age. The persons engaged in the timber operations have offered to put up temporary buildings to house the children for school instruction and request the county school district to furnish the teacher, furniture, and supplies.

Question

Whether under Minnesota law such instruction is required.

Answer

Minnesota Statutes 1941, Section 123.27, Laws 1941, Chapter 169, Article IV, Section 27, provides that:

"It shall be the duty of the board to furnish school facilities to every child of school age residing in any part of the county district, either by building school houses, leasing schoolrooms, transporting the children to the nearest school, boarding the children within convenient distance of school at the expense of the board, or otherwise, and to provide necessary supplies and text and library books."

The language of the quoted statute is clear. The board has the duty to furnish the school facilities. It has its choice whether the children shall be instructed in their own neighborhood, transported to the nearest school, boarded, or otherwise provided. The board has no duty to anticipate these persons now non-resident of the district will become residents. It has the duty to provide for the education of the children only when they actually reside in the district. If the board shall consider it good business to anticipate that the children will reside in the district, they may proceed upon that anticipation, but there is no obligation that it do so.

CHARLES E. HOUSTON,
Assistant Attorney General.

October 28, 1942. 169-B

41

Funds—Appropriation—Recreational program—Joint city and school district—L 37, C 233, §§ 1 and 2; (MS41 §§ 471.15, 471.16).

Commissioner of Education.

Facts and Question

Independent School District No. 12 and the city of Ely have undertaken a joint recreational program. They have delegated the operation of the program to a recreational board and each appropriates money for this purpose to this board. An opinion is requested on the legality of turning over such funds by the school district to the recreational board.

Answer

Attention is called to Laws 1937, Chapter 233, Sections 1 and 2. The law enables a city, village, borough, town, county, school district, or any board thereof to operate a program of public recreation and playgrounds.

Section 2 permits any city, village, borough, town, county, school district, or any board thereof to operate such program independently,

"* * * or they may cooperate in its conduct and in any manner in which they may mutually agree; or they may delegate the operation of the program to a recreational board created by one or more of them, and appropriate money voted for this purpose to such board. In the case of school districts the right to enter into such agreements with any other public corporation, board or body, or the right to delegate power to a board for operating a program of recreation, shall be authorized only by a majority vote cast at an annual school election * * *."

The question has arisen whether this is unlawful delegation of authority by the school district or other municipality. In the absence of legislative authority, it is our opinion that it is an unlawful delegation; but, with specific legislative authority, it is our opinion that it is a regulation of power by the legislature and a lawful delegation of authority. While municipal corporations operate by delegated authority, the authority comes from the legislature. Operating within that delegated authority, the powers of the municipal corporation are lawful.

CHARLES E. HOUSTON,
Assistant Attorney General.

February 25, 1942. 159-a-16

42

Funds—Building—Proceeds of bond issue—War priorities prevent building—Investment of funds—M40, § 1973-14; (MS41 § 118.12).

Commissioner of Education.

Facts

Independent school district No. 42, Caledonia, voted bonds for the purpose of building an addition to the school. These bonds were sold to private investors. The proceeds, $115,000.00, have been deposited in the First National Bank of Winona, since priorities and the war have prevented building.

Question

Does the school board of Caledonia have authority to invest the proceeds of the bond issue, and, at some future date, sell the securities and erect a building?

Could these funds be placed in a surplus building fund and invested in accordance with Sections 1973-14 to 1973-16, Mason's 1940 Supplement?

Answer

These funds must be devoted to the building of an addition to the school house. It is impossible to build at this time. The funds must be preserved and so kept as to ultimately be devoted to the purpose for which they were raised. Good business judgment indicates that the money should be put at interest, if possible.

In my opinion Mason's 1940 Supplement, Section 1973-14 does authorize the temporary investment of the funds until they are needed and can be devoted to the purpose intended. That section provides:

> "Whenever * * * the school board of any school district in this state, by a unanimous resolution, deem it advisable, such * * * school

board may invest such amount of funds in such * * * school treasury as will not, in the opinion of such board, be needed by such * * * school district during the fiscal year, in any of the bonds"

of certain enumerated municipalities, districts and sub-divisions.

The funds about which you inquire are in the school district treasury; they will not be needed by the school district during the fiscal year because it is impossible to use them. The conditions present meet the requirements of the quoted law.

RALPH A. STONE,
Special Assistant Attorney General.

April 24, 1942. 159-a-13

43

Funds—Expenditure of—Booth at farmers' fair—M41 §§ 3156-6(6), 3156-6(8); (MS41 §§ 125.06, 125.08).

Department of Education.

Question

Whether an independent school district in connection with an education exhibit, may expend school funds for a booth at a farmers' fair.

Answer

The powers of school boards under the 1941 revision of Minnesota school laws, Laws 1941, Chapter 169, are now set out in Mason's 1941 Supplement, Article VI, Chapter 14A. Section 3156-6(6), deals generally with the powers of school boards. Section 3156-6(8), deals with those of independent school boards.

These sections, with but slight changes not now material, reenact previous laws the construction of which by the courts and by this office must therefore be regarded as acquiesced in by the legislature. Under such construction the powers of school boards are limited strictly to educational purposes and such incidental matters as are expressly authorized by statute or necessarily implied as a matter of law.

Consistent with the uniform construction by this office, we must, therefore, answer your inquiry in the negative.

ALFRED W. BOWEN,
Special Assistant Attorney General.

September 19, 1941. 159-B-10

44

Funds—National forest lands—Received from—16 USCA 500; M40 § 6536-11; L 41, C 169, Art. IX, § 25; (MS41 §§ 94.52, 128.25).

Cook County Attorney.

Opinion

The county of Cook receives funds from the federal government for and on account of the Superior National Forest lands located in Cook County. These moneys are paid into the state treasury pursuant to the act of Congress as of May 23, 1908, as amended. (35 Stat. 260, March 1, 1911, C. 186, Section 13; 36 Stat. 963, June 30, 1940, C. 131; 38 Stat. 441, 16 U. S. C. A., Section 500). This act provides:

> "Twenty-five per centum of all moneys received during any fiscal year from each national forest shall be paid, at the end of such year, by the Secretary of the Treasury to the State in which such national forest is situated, to be expended as the State legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated * * *."

Pursuant to this law, the state legislature enacted Laws 1913, Chapter 58, which, as amended, now appears as Mason's Supplement 1940, Section 6536-11. The pertinent language thereof is as follows:

> "All sums heretofore or that may hereafter be received from the United States government, on account of an act of Congress approved May 23, 1908 (35 Stat. 260) (Mason's U. S. Code Anno., title 43, § 500), or any amendments thereof hereafter enacted shall be expended as follows:
>
> "One-half for public schools, and the remainder for public roads in the counties in which the national forests are situated * * *."

It should be noted that under the provision of the federal act above quoted the moneys in question shall be expended for the benefit of the public schools and public roads. It was undoubtedly the intention of Congress that neither the public schools nor public roads should be excluded from the designated benefits but that both should share therein.

The state law, above referred to, prescribes an equal division of the national forest moneys received by a county for the two purposes heretofore mentioned. Under this law, there is no doubt that only one-half of the moneys so received can be used for school purposes.

Laws 1941, Article IX, Chapter 169, Section 25, provides:

> "The board of county commissioners of any county, may, in its discretion, place the money, or any part thereof, received by such county from the federal government for and on account of any national forest lands situated therein, into a special fund to be disbursed and paid over to any school district now or hereafter maintaining and operating any

school wholly or partly within an area now or hereafter constituting a part of any auxiliary or state forest. Such action shall be taken by said board by resolution duly adopted by it, which resolution shall specify the terms and conditions under which said money shall be so paid over and disbursed to any school district or districts."

This last quoted section, in my opinion, authorizes the board of county commissioners to establish a separate fund for moneys received from national forest lands and to be paid the school districts. The special fund so created should include only one-half of the county's share of receipts from the federal government under the congressional act herein considered. The other half must, under the law, be expended for public roads.

J. A. A. BURNQUIST,
Attorney General.

March 25, 1942. 159-a-10

45

Funds—Sinking—Surplus may be invested in United States Defense Bonds— M27 §§ 1938-11, 1949; (MS41 §§ 475.30, 475.37).

Commissioner of Education.

Question

Where a district has established a sinking fund and has funds which are available for investment, may such funds be invested in United States Defense Bonds?

The net return on these bonds is less than 3½ per cent per annum.

Answer

Mason's Minnesota Statutes of 1927, Section 1938-11, provides that:

"Taking care that enough cash is always retained in a sinking fund to provide for the annual payments of principal and interest on the obligations for which such fund was instituted, the surplus, if any, in any sinking fund heretofore or hereafter created in any municipality may be invested under the direction of the governing body as follows:

(A) In any interest bearing bond or other evidence of indebtedness of the United States. * * *

"In the words 'sinking fund' as used herein are included any and all funds or moneys held in the treasury of any municipality which have been appropriated or set aside for the payment of the principal and interest, or either of them, of any of its obligations."

This is authority that a school district may invest moneys in its sinking fund in United States Defense Bonds, subject to the limitations mentioned.

You call attention to an opinion rendered October 1, 1941, relating to the investment of surplus funds of a school district. In the consideration of the problem now before us, you may disregard that opinion for the reason that that did not relate to a sinking fund but to surplus funds only. You will observe that a sinking fund is defined in the statute quoted as devoted to a specific purpose.

It has been held that Mason's Supplement 1940, Section 1949, which also relates to the investment of a sinking fund, did not repeal the statute above quoted.

CHARLES E. HOUSTON,
Assistant Attorney General.

March 12, 1942. 159-a-13

46

Instruction—Course of job instruction training offered within War Industry Plant but outside school district—Act of Congress, Public Act 647, 77th Congress, 2nd Session, Chapter 475.

Commissioner of Education.

Facts

On July 2, 1942, the Congress by Public Law 647, 77th Congress, Chapter 475, second session, adopted an act whereby certain moneys were appropriated, and among other things for the purpose of paying all expenses necessary to enable the federal security administrator to conduct his program of encouraging apprentice training in National Defense Industry. I am informed that on October 3, 1942, the Minnesota State Board for Vocational Education reviewed and approved a state plan to carry out its part under a scheme for training. It appointed a director of Vocational Training for War Production Workers on October 14, 1942. One course under this plan is for job instruction training. It is proposed that this training shall take place at one of the War Industry Plants in Minnesota. The War Industry Plant at which the training is to take place is not situated in a district which conducts one of the larger school systems of the state.

Question

Whether an independent school district in one of the larger systems may offer a course of training within the War Industry Plant but outside that school district.

Answer

I understand the practice to be that the entire salary and incidental expenses of the instructor, if any, who will be employed by the school district mentioned, and who will work in the War Industry Plant is to be

furnished and paid by the United States. The school district will furnish such supervision as may be necessary but the United States government will furnish the money to pay the instructor. The program is really one initiated by Congress. The State Board for Vocational Education and the school district are merely cooperating in a war program which involves no additional outlay on the part of Minnesota taxpayers. From the very nature of the program, it can be carried on only where there is a plant engaged in war industry. Because there is no school within the district where the plant is located which is capable of the supervision required, such supervision must come if at all from the outside.

On these facts, I see no objection to the plan.

CHARLES E. HOUSTON,
Assistant Attorney General.

October 23, 1942. 170 H

47

Libraries—Library service—Not included in so-called recreational programs —(MS41 §§ 471.15, 471.16, 471.17, 471.18, 471.19).

Commissioner of Education.

Facts

Several school districts centered at Lismore in Nobles County, and several other school districts near St. Kilien are conducting recreational programs based on authority of Minnesota Statutes 1941, Sections 471.15 to 471.19.

Question

Whether under this program there may be included library service.

The question is, what was the legislative intent?

Answer

This law is taken from Laws 1937, Chapter 233. Title of the act is:

> "An act authorizing all cities, however organized, or any villages, boroughs, towns, counties, school districts or any board thereof to acquire recreational facilities and operate programs of public recreation and playgrounds."

To my mind this indicates an intent to provide for physical recreation. There is no suggestion of establishing or maintaining libraries.

Minnesota Statutes 1941, Chapter 134, provides for libraries in connection with the operation of schools. Libraries may be established and maintained pursuant to the provisions thereof. This indicates to my mind that

when the legislature contemplated the establishment and maintenance of libraries it was capable of finding language suitable for the expression of its intent and nothing was left to inference. Furthermore the provisions of the law relating to the establishment and maintenance of libraries were in force before the recreational activities law was passed. In the laws of 1937, relating to recreational activities, no reference is made to the existing laws relating to libraries, and there was apparently no intention on the part of the legislature to amend the library laws.

The conclusion therefore is that under the authority of Chapter 134 library service may not be established or maintained.

CHARLES E. HOUSTON,
Assistant Attorney General.

October 2, 1942. 285-D

48

Maintaining high school—Eligibility of state aid—Attendance of non-resident pupil at school of agriculture—L 41, C 523, § 6, Item 2.

Commissioner of Education.

Facts

Certain pupils, residents of school district No. 1 of Itasca County, a district comprising over ten townships and maintaining a high school, have been attending the North Central School of Agriculture at Grand Rapids, which now asks the school board of district No. 1 to pay it "board aid" of $4.00 a month for each pupil given instructions.

Question

Whether or not such aid is authorized.

Answer

The source of the authority to pay state aid for the transportation and board of pupils attending state schools of agriculture is Laws 1941, Chapter 523, Section 6, item 2, p. 1009, which contains a proviso limiting the amount which may be expended to reimburse districts.

> "* * * for the transportation or board of non-resident high school pupils and high school pupils and students attending the state schools of agriculture, such transportation or board to be at rates, and under rules and regulations to be determined by the state board of education."

Inasmuch as the pupils in question are not non-resident high school pupils, their attendance at the state school of agriculture does not entitle the home district to reimbursement from the state. Even if it did, there would be no obligation on the part of the home district to provide board or transportation for these pupils. Laws 1941, Chapter 169, Art. IX, Sections 7 and 8, do not apply to the situation described.

ROLLIN L. SMITH,
Special Assistant Attorney General.

October 27, 1941. 168

50

Schools—Closing—Discontinuance of certain grades—Necessity of vote by electors—Emergency—What constitutes—L 41, C 169, Art. VI, § 6, Subd. 13; L 41, C 376; M41 §§ 2822, 3156-6(14); (MS41 § 125.14).

Department of Education.

Facts

Laws 1941, Chapter 169, Article VI, Section 6, subdivision 13 (Mason's Supp. 1941, Sec. 3156-6(14) approved April 10, 1941), authorizing a school board to close its schools, or any grades therein, and to arrange for instruction of the pupils in a nearby district; and reference is also made to Laws 1941, Chapter 376 (Mason's Supp. 1941, Sec. 2822, approved April 21, 1941), empowering a school board to discontinue its schools, or certain grades thereof, **"in any emergency,"** and requiring a favorable vote of the electors as a prerequisite thereto in other cases.

Question

Whether or not a school board may, acting under the authority of Chapter 169, supra, discontinue its eighth grade, and provide for the transportation and instruction of its eighth grade pupils elsewhere without first securing a vote of the electors.

Answer

Question cannot be answered categorically. Chapter 376 specifically changed the law from what it was. Furthermore, it was the later enactment (April 21, 1941). Consequently, its provisions supersede conflicting provisions of Chapter 169, which was a codification. It follows that Chapter 376 (Mason's Supp. '41, Sec. 2822) governs in this regard.

We repeat, that chapter authorizes a school board to discontinue its schools "in any emergency," or in any case "upon authorization by a majority of the voters." What constitutes an emergency within the meaning of Chapter 376 is a question of fact to be determined, in the first instance, as an administrative matter by the school board. No facts are stated in your letter in support of any claim that an emergency exists. We, of course, have no way of knowing just what reasons are impelling the board to wish to discontinue the eighth grade in its schools. Under such circumstances, the only safe procedure is to submit the question to a vote of the electors, as provided by Chapter 376.

ROLLIN L. SMITH,
Special Assistant Attorney General.

October 1, 1941. 161-B-2

51

Tax Levies—County School—Apportionment and distribution—L 21, C 357; L 41, C 363.

Commissioner of Education.

Facts

Laws 1921, Chapter 357, is an act to provide for county school tax levies in certain counties and for the apportionment and distribution of the same. Section 1 thereof provides that in certain counties the county auditor shall levy not to exceed eight-tenths of one mill upon all taxable property in the county, and that he shall apportion the proceeds of the tax among the school districts as in this chapter provided. That section is not amended by the 1941 law.

Section 2 of the 1921 act provided that in each common, independent, special and unorganized district in the counties referred to in section 1, in which a tax levy of thirty mills does not bring a revenue equal to ninety dollars per pupil, the county auditor shall apportion to such districts an amount equal to the difference between what a thirty mill tax levy brings per pupil and the amount of ninety dollars per pupil; provided that where the tax levied under section 1 does not in any year produce a sum sufficient to pay the per pupil allowance of ninety dollars in full, then the auditor shall for that year automatically reduce the maximum of ninety dollars per pupil to an amount that will allow all obligations to be paid in full, and the amount so paid shall be the full amount to be paid any school district under this act for that year.

The 1941 act amends section 2 of the 1921 act. Where the words thirty mills are used in the 1921 act, the words are changed to thirty-five mills. Where the words ninety dollars are used in the 1921 act, the words are changed to seventy dollars.

Section 5 of the 1941 act reads:

"This act shall apply to taxes for the years 1941 and 1942."

Question

Does Section 5 of Chapter 363, Laws 1941, make the entire 8/10 mill law ineffective after 1942 or does it merely make ineffective the amendment that was passed in 1941?

Answer

As previously stated, section 1 of the 1921 act is unaffected by the 1941 act. The only thing affected by the 1941 act is the changes hereinbefore mentioned as they apply to taxes for the years 1941 and 1942.

Question

If no action is taken during the coming session of the legislature relative to this act does that (Section 5, Chapter 363, Laws 1941) nullify com-

pletely Chapter 357, Laws 1921, or does Chapter 357, Laws of 1921, become operative again the same as if Chapter 363, Laws 1941, was never enacted?

Answer

The first part of this question has been answered. Laws 1921 is amended by the 1941 act in so far only as it applies to taxes for the years 1941 and 1942. Otherwise it is unchanged. We do not predict what a future legislature may do. We speak of the law as it now is.

CHARLES E. HOUSTON,
Assistant Attorney General.

November 20, 1942. 519-M

52

Tax Levies—Maximum levy in Eveleth—Spending Savings of previous year
—L 41, C 543; (MS41 §§ 275.11 to 275.161).

Department of Education.

Facts

It appears that next year the maximum tax levy permitted the Eveleth school district by Laws 1941, Chapter 543, will be approximately $74,000 less than this year. Every effort possible is being made to save a substantial sum out of the current levy, and the district contemplates spending the money so saved next year, along with the levy for that year.

Question

"Can we spend next year's levy plus the savings we have left over from this year? In other words, is there anything in the statutes to prevent our spending more than the levy next year provided we have the money on hand as a result of savings from the previous year?"

Answer

The act referred to places a limitation upon the total amount of taxes (which may be) levied by or for any school district of the class specified for the years designated. It does not place any limitation upon the amount which such a district may spend in any one year. If the limitation as to the amount of the levy is not exceeded, then there has been a compliance with the act.

I have not found any other statute containing a provision to the effect that an unexpended balance in a school district treasury, as a result of savings out of a school district levy for one year, must be included in calculating the total taxes which may be levied for the following year. Accordingly, your inquiry is answered in the affirmative.

ROLLIN L. SMITH,
Special Assistant Attorney General.

September 23, 1941. 519-M

53

Teachers—Contracts—Legality—Terms—L 41, C 169, Art. X, Sec. 18; (MS41 § 130.18).

Commissioner of Education.

Facts

The teacher's contract specifies that the teacher will teach during the school year at an annual salary payable in monthly installments. It contains the following provisions:

"This contract shall remain in force and effect, except as modified by mutual consent, until terminated by a majority vote of the full membership of said board or by the written resignation of the teacher before April first. Such termination shall take effect at the close of the school year in which the contract is terminated in the manner aforesaid.

"Provided, further, that this contract may be terminated at any time by mutual consent of the contracting parties.

"IT IS AGREED that ..... shall deposit with the Board of Education the sum of thirty-five dollars ($35.00) which sum shall be returned to h..... upon the termination of this contract; provided, such termination occurs between the date of the closing of school and before July 1st. If such contract is terminated between July 1st and August 31st, this sum will be forfeited as liquidated damages. If such contract is terminated September 1st or thereafter during the school year the teacher shall be required to deposit with the Board of Education an additional fifteen dollars ($15.00). If the sum is not deposited, it shall be deducted from the teacher's salary and this sum shall be considered as liquidated damages. (Note: If the teacher prefers, the deposit shall be made by deducting $5.00 per month from the first salary checks.)"

Question

"1. Would a clause in a teacher's contract be legal and binding which provided that the teacher shall deposit a certain specified amount, such amount to be forfeited as damages if the teacher resigns within a certain specified period?"

Answer

No. Forfeits are not enforced in the law. If the contract had stated that in case of the resignation of the teacher contrary to the provisions of the contract the teacher should pay the actual damages which the school district should sustain and that in the meantime the school district should hold the deposit as security against such damages or until she completed her contract, then, in my opinion, the agreement would be valid. The law does not permit the exaction of penalties, and, if this was intended as a penalty or forfeiture, it is unenforceable.

Many decisions are to be found relating to the subject of liquidated damages, penalties and forfeitures. The doctrine is well stated in J. I. Case Threshing Machine Company v. Fronk, 105 Minn. 39, on page 41, wherein Mr. Justice Brown stated:

> "1. Whether the amount stipulated in a contract to be paid by the party refusing performance is to be treated as a penalty, or liquidated damages, is frequently a question not easy of determination. The general rule controlling the question is well settled, but its application to particular cases is often difficult, and the authorities are not in full accord. The general rule, laid down in several cases in this state, is that where the actual damages are readily ascertained by the application of appropriate rules of law, and the amount stipulated to be paid is greatly in excess of the actual injury, the stipulated damages will be treated as a penalty, and the complaining party limited in his recovery to his actual loss. Fasler v. Beard, 39 Minn. 33, 38 N. W. 755; Taylor v. Times Newspaper Co., 83 Minn. 523, 86 N. W. 760, 85 Am. St. 473; Womack v. Coleman, 89 Minn. 17, 93 N. W. 663; Carter v. Strom, 41 Minn. 522, 43 N. W. 394. And such is the rule applied by the courts generally. See note to Condon v. Kemper, 47 Kan. 126, 27 Pac. 829, 13 L.R.A. 671, and cases cited in 13 Cyc. 93, and 1 Sutherland, Dam. 279, et seq. The rule requires no further discussion than will be found in the authorities cited. Whether a particular stipulation for damages should be held a penalty, or liquidated damages, must be determined by the language of the writing, the situation of the parties, the surrounding circumstances, and especially the particulars, when disclosed, in respect to which compensation was intended in the event of a failure or refusal to perform by one of the parties. If the particular elements of loss or damage be given, and the actual loss in those respects may be definitely ascertained and shown by evidence, an amount greatly disproportionate thereto will as a general rule be treated as a penalty."

As stated by Mr. Justice Brown in that decision, the difficulty is in applying the law to the facts. Here we are dealing with a subject in which I do not know that there has been any breach of the contract. If there has been a breach, then, before coming to a definite conclusion, we would have to know all of the facts; all of the circumstances surrounding the transaction.

Question

"2. Does such a clause give the teacher the right to release from the contract without obtaining the consent of the school board?"

Answer

In my opinion it does not. Higbie v. Farr, 28 Minn. 439.

Question

"3. Would a clause in a teacher's contract be legal and binding which provided that the teacher shall pay a certain amount if she fails to fulfill the terms of the contract (resigns, breaks the contract, etc.)?"

Answer

In my opinion the answer to this question is that such a clause, if intended as a penalty, is unenforceable. If intended as security for the payment of actual damages sustained by the district, it is good. The reasons are hereinbefore stated.

Question

"4. Does such a clause give the teacher the right to release from the contract without obtaining the consent of the school board?"

Answer

No. Minnesota Statutes 1941, Section 130.18, Laws 1941, Chapter 169, Article X, Section 18, provides in respect to a written contract between a teacher and a school district that:

> "Such contract shall specify the wages per year, and remain in full force and effect, except as modified by mutual consent of the school board and the teacher, until terminated by a majority vote of the full membership of the school board, or by the written resignation of the teacher, before April 1. Such termination shall take effect at the close of the school year in which the contract is terminated in the manner aforesaid. Provided, further, that such contract may be terminated at any time by mutual consent of the school board and the teacher * * *."

This section is applicable to the school district under consideration but does not apply to school districts in cities of the first class. Now, this is a legal requirement. The parties do not have the power to waive its provisions. Hence a clause placed in this contract in conflict with the law is of no effect.

Question

"5. Would a clause in a teacher's contract be legal and binding which provided that a certain specified amount per month shall be withheld as guarantee that the teacher will complete the school term?"

Answer

There is no legal objection to such a provision in the contract.

Question

"6. Does such a clause give the teacher the right to release from the contract without obtaining the consent of the school board?"

Answer

The teacher may, before April 1 during the school year, resign, the resignation to take effect at the end of the school year, without the consent of the board, but she is not released from her contract by a resignation after April 1 unless the board agrees thereto.

Question

"7. Where a school board has adopted a rule to the same effect as any one of the 'damage' clauses mentioned above and the clause is not incorporated in the contract, but there is a statement in the contract to the effect that the teacher agrees to abide by the rules and regulations adopted by the school board, and the school board gives the teacher official notice of this rule, could such rule be enforced?"

Answer

The practice is not to be encouraged that contracts in writing make reference to rules which are not included in the written contract. The question of uncertainty is likely to arise therefrom. But, where such contract is made, a rule would probably be considered a part of a contract if not inconsistent with the terms stated in the contract. Any rule in derogation of the terms of the contract would not be a part thereof. Neither would the rule be good if it is in derogation of the law. It is, therefore, much better that no rule be attempted to be incorporated in a contract without being actually written therein. The terms which the law requires must be specified in the contract. The contract must be in writing. Our conclusion is that if the rule is not in derogation of law and not inconsistent with the terms of the contract, if the rule is in writing and is definite and certain, it can be enforced if not contrary to law. I refer to the law as is herein stated. It would be good practice to print the law on the back of the contract and make reference thereto in the contract as a part thereof.

Question

"8. Does such rule adopted by the school board give the teacher the right of release without the consent of the school board?"

Answer

It does not unless the resignation is made before April 1.

CHARLES E. HOUSTON,
Assistant Attorney General.

December 21, 1942. 172-C-2

54

Teachers—Contracts—Maternity—Does not constitute cause for termination of—L 41, C 169, Art. X, § 18; (MS41 § 130.18).

Department of Education.

Question

Whether a school board may terminate a teacher's contract for cause when she states that she will be unable to assume her duties as a teacher until at least one month after the opening of school on account of maternity.

You state that the teacher in question is married and it is assumed, for the purposes of your inquiry, that the board had not adopted any rules or regulations prohibiting a person from teaching if married, pregnant, or a mother, nor was there anything in her contract authorizing its termination upon such contingencies.

Answer

Laws 1941, Chapter 169, Article X, Section 18, govern contracts entered into by school boards and teachers outside of cities of the first class. It provides in part as follows:

> "Contracts for teaching or supervision of teaching can be made only with qualified teachers. Such contract shall specify the wages per year, and shall remain in full force and effect, except as modified by mutual consent of the school board and the teacher, until terminated by a majority vote of the full membership of the school board, or by the written resignation of the teacher, before April 1. Such termination shall take effect at the close of the school year in which the contract is terminated in the manner aforesaid. Provided, further, that such contract may be terminated at any time by mutual consent of the school board and the teacher, and provided further, that this section shall not affect the powers of a school board to discharge a teacher for cause under and pursuant to Article VI, Section 6, Subdivision 10."

Subdivision 10 authorizes boards to employ and contract with necessary qualified teachers and discharge the same for cause.

A school board in districts outside of cities of the first class may make rules and regulations governing the selection and removal of teachers, and it may establish a policy relative to the employment of unmarried teachers to the exclusion of married teachers, for which the teacher's contract may be terminated for violation thereof. Backie vs. Cromwell Consolidated School District No. 13, 186 Minn. 38, 242 N. W. 389. The question arises as to what constitutes cause for which the teacher's contract may be terminated. The word "cause" when used in connection with the discharge or removal of public employees means legal cause. It implies some personal misconduct or fact rendering the incumbent's further tenure harmful to the public interest. Where cause is required it must not be arbitrary or capricious. It must be a just or reasonable cause, or that which is good or sufficient. The reason must affect the ability or fitness of the person to perform his or her duties. It is contrary to removal at pleasure or at the mere whim, caprice, prejudice, passion, or discretion of the employer. It means some substantial shortcoming which renders continuance in his or her office or employment in some way detrimental to the discipline and efficiency of the service, and something which the law and the sound public opinion will recognize as a good cause for him or her to no longer occupy the position. 6 Words and Phrases 328.

In State vs. Duluth, 53 Minn. 238, 55 N. W. 118, involving the construction of the provisions of the charter of the City of Duluth under which any member of the board of Fire Commissioners might be removed by a vote of

two-thirds of all the members elected to the common council of said city for a sufficient cause, the Supreme Court of Minnesota used this language:

> " 'Cause,' or 'sufficient cause,' means legal cause, and not any cause which the common council may think sufficient. The cause must be one which specially relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. The cause may be one touching the qualifications of the officer, or his performance of his duties, showing that he is not a fit or proper person to hold the office. An attempt to remove the officer for any cause not affecting his competency or fitness would be an excess of power, and equivalent to an arbitrary removal. In the absence of any statutory specification the sufficiency of the cause should be determined with reference to the character of the office and qualifications necessary to fill it."

You are advised that maternity is not a sufficient cause for termination of a teacher's contract. Your inquiry is, therefore, answered in the negative.

JOHN A. WEEKS,
Assistant Attorney General.

September 15, 1941. 172-C-3

55

Teachers—Military Service—Reinstatement—L 41, C 120; M41 §§ 254-50b to 254-50f, incl.; (MS41 §§ 192.26 to 192.264, incl.).

Commissioner of Education.

Facts

Regarding the employment status with the Minneapolis Board of Education of A..... P....., when he returns from his military service. Mr. P..... has been a "short-call" substitute in Minneapolis since February 4, 1937. During that time he has been teaching for 583½ days, up to April 10, 1942, at which time he left to enter the armed forces. For the present school year, he has taught 99½ days.

Question

Does Mr. P..... have an assured position with the Minneapolis Board of Education when he returns from military service, as he was only a "short-call" substitute at the time of his departure?

What is the status of substitute teachers in Minneapolis with relation to the provisions of Chapter 120 of the 1941 laws?

Opinion

Chapter 120, Laws 1941 (Mason's Minnesota Statutes, 1941 Supplement, Sections 254-50b to 254-50f), provides for leaves of absence for public

employees in the military service and for their reinstatement upon the completion of such service. In Subdivision 2 of that law (Mason's Minnesota Statutes, 1941 Supplement, 254-50c, Subdivision 2) it is provided:

> "Except as otherwise hereinafter provided, upon the completion of such service such officer or employee shall be reinstated in the public position which he held at the time of entry into such service at the same salary which he would have received if he had not taken such leave, upon the following conditions: (1) that the position has not been abolished or that the term thereof, if limited, has not expired; (2) that he is not physically or mentally disabled from performing the duties of such position; (3) that he makes written application for reinstatement to the appointing authority within 45 days after termination of such service; (4) that he submits an honorable discharge or other form of release by proper authority indicating that his military or naval service was satisfactory. Upon such reinstatement the officer or employee shall have the same rights with respect to accrued and future seniority status, efficiency rating, vacation, sick leave, and other benefits as if he had been actually employed during the time of such leave. No officer or employee so reinstated shall be removed or discharged within one year thereafter except for cause, after notice and hearing; but this shall not operate to extend a term of service limited by law."

In answer to your first question, therefore, I would state that in my opinion Mr. P..... (upon completion of his service, and upon compliance with the four conditions specified in the above quoted section of the law) will be entitled to reinstatement "in the public position which he held at the time of entering into such service."

The second question asked is indefinite. Attention is directed to no particular facts. I can only answer it in a general way by referring to the provision of the law for reinstatement last above quoted.

RALPH A. STONE,
Special Assistant Attorney General.

May 27, 1942. 172

56

Terms — Saturdays and holidays — holding school on — (MS41 §§ 128.10, 131.09, 131.21, 131.22); M41 §§ 3156-9(2), 3156-9(10), 3156-11(21), 3156-11(22).

Commissioner of Education.

Question

1. Would there be any objection by the State Department of Education, if our district, during the second semester, held school six days each week, closing school on May ninth?

Answer

Laws 1941, Chapter 169, Art. XI, Section 21, Mason's Supplement 1941 to Mason's Minnesota Statutes of 1927, Section 3156-11(21), reads:

> "The school shall be maintained for not less than eight months, but this provision shall not apply to night schools or kindergartens. The school month shall consist of four weeks. Every Saturday shall be a school holiday and all legal holidays shall be counted as a part of the school week."

It thereby appears to be the public policy of the state that school shall not be held on Saturday. It is the duty of all state departments to follow the plain intent of the legislature in matters of public policy and statutory enactment. Therefore, the state department of education cannot consent to holding school on Saturday in the present state of the law.

Question

2. In order to close school two weeks earlier in the spring, may a school dispense with the spring vacation and sundry holidays, and conduct school on Saturday?

Answer

It is my opinion that the board may, in its discretion, dispense with the spring vacation, but it may not compel a teacher to teach on Saturday or compel a pupil to attend on Saturday. It may conduct school on Lincoln's and Washington's birthdays, Election Day and Armistice Day, provided that on Washington's Birthday, Lincoln's Birthday and Armistice Day at least one hour of the school program be devoted to patriotic observance of the day. Laws 1941, Chapter 169, Art. XI, Section 22, Mason's Supplement 1941, to Mason's Minnesota Statutes of 1927, Section 3156-11(22).

Question

3. May a school be considered to have nine months of school if school was in actual session during 34 calendar weeks during which time school was conducted on ten Saturdays in addition to the regular school days?

Answer

Specifications of requirements and the length of a school year for various schools are contained in Laws 1941, Chapter 169, Art. IX, Section 10, Mason's Supplement 1941 to Mason's Minnesota Statutes of 1927, Section 3156-9(10). Therein reference is made to "nine months" and "eight months" with reference to schools.

Laws 1941, Chapter 169, Art. XI, Section 21, Mason's Supplement 1941 to Mason's Minnesota Statutes of 1927, Section 3156-11(21), requires a school year to consist of at least eight months and defines the school month to consist of four weeks, every Saturday being a holiday. This means that

a school week consists of the five days beginning on Monday and ending on Friday; that four of these weeks make a school month and that nine of these months make a school year.

Question

4. Would a local school board in a rural area be within its rights in declaring an emergency due to the war situation and operate schools on Saturday in order to maintain school for the number of days equivalent to a nine-month term?

Answer

The school board lacks the power to so declare. The legislature has spoken, and the law controls.

Question

5. Can a day which has been lost on account of snow storm be made up by teaching on Saturday?

Answer

If the teacher and the pupils are willing, yes. The teacher cannot be compelled to teach on Saturday, and the pupils cannot be compelled to attend.

Question

6. Can a child be compelled to attend school on Saturday under the provisions of the compulsory attendance law?

Answer

The previous statements in this opinion are, in my judgment, an answer to this question. The legislature has declared the policy. That policy is that school shall not be held on Saturday. If a school board holds school contrary to law, no child can be compelled to attend.

Question

7. Can days attended on Saturday be counted in computing average daily attendance for purposes of distributing state aid?

Answer

The legislature has very definitely declared the time that school shall be in session. In computing daily average attendance under Mason's Minnesota Statutes of 1927, 1941 Supplement, Section 3156-9(2), (11), the legislature must have had in mind that the computation would be made on the basis of the attendance during the time required by its rules which it had laid down. It would, therefore, be my conclusion that the legislature intended to exclude Saturday, but I would see no harm in an administrative rule in your department on this subject. I have every confidence that it would be reasonable, and, if for some good administrative reason you considered that an occasional Saturday should be included where both the teacher and the pupils consented to attend, I see no harm in such rule.

CHARLES E. HOUSTON,
Assistant Attorney General.

January 16, 1942. 160-C

57

Transportation—Pupil residing with parents at summer home—Pupil to be included in school census.

Commissioner of Education.

Question

Whether school district is required to provide transportation for a pupil whose parents reside temporarily on lakeshore property or in a summer home.

Answer

The law as to tuition and transportation requires no fixed period of residence. We are, therefore, of the opinion that District No. 21 is required to furnish transportation under these circumstances.

We might also suggest that they are undoubtedly entitled to include this pupil in their school census, and thereby be entitled to some state aid for such pupil.

M. TEDD EVANS,
Assistant Attorney General.

December 8, 1941. 166-a

58

Tuition—Authority to pay nine months—M27, 2823; (MS41 § 132.02).

Department of Education.

Question

As to the right of the school district to pay nine months tuition where they are sending two students who live more than two miles from the school house to an adjoining district, after the annual school meeting has voted an eight months school.

Apparently arrangements were made by the school board pursuant to Mason's Supplement 1940, Section 2823 (same as School Laws 365).

The school board feels they can only pay tuition for eight months and the parents of some of the children are unable to pay tuition for the extra month.

Answer

We are of the opinion that the school district should pay the tuition for the full nine months. To hold otherwise would mean that some of the students would be unable to complete the work of the school year and would fail to pass.

We are further of the opinion that the authority of the school board, pursuant to Section 2823, to provide for the instruction of its pupils in an

adjoining district is broad enough to give them the power to pay such tuition as is necessary for each student to complete the school year in the adjoining or nearby district.

M. TEDD EVANS,
Assistant Attorney General.

June 9, 1941. 180 a

59

Tuition—High school pupils—Power of electors to compel school board to levy tax sufficient to pay—L 41, C 169, Art. V, Sec. 10; M41 § 3156-6(7); (MS41 § 124.10).

Department of Education.

Question

(1) May the electors of a common school district in Ramsey County compel the school board of such a district to levy a tax sufficient to pay the cost of providing tuition for non-resident high school pupils, apparently estimated at $10 a pupil, and

(2) May they compel the board to pay this tuition to a St. Paul high school when the pupils can attend another high school without the payment of tuition?

Answer

(1) It is for the voters assembled in an annual or special meeting in a common school district to vote such funds as may be necessary for the maintenance of the district. The school board may not spend more than the meeting votes. Laws 1941, Chap. 169, Art. V, Section 10, Mason's Supplement 1941, Section 3156-6(7) sub. 1.

Whether or not such a meeting may vote specific sums of money for designated purposes, such as transportation, tuition in schools in other districts, teachers' salaries, and so on, thereby tying the hands of the board to that extent, is a close question. It is not apparent what the legislature intended in this regard. Previous informal expressions of opinions by this department have been to the effect that a school meeting may vote a fixed sum of money for a specific purpose, and that thereafter the board of that district may use the money so voted only for the purpose designated. We agree with these unofficial expressions of opinion. You are advised that money voted by a school meeting for transportation or for some other specific purpose may only be used by the board for the particular purpose designated.

Management of the affairs of a common school district is vested in the school board of such district, except where the statute expressly provides otherwise. Mason's Supplement 1941, Section 3156-6(1). While a school meeting may place a maximum on the amount which a school board may

spend for a designated purpose, it may not compel the board to spend the full amount so appropriated for that purpose. In other words, the meeting has no veto or control over the board's action in administrative matters. If the board fails to carry out the wishes of the voters, their only remedy is political. Categorically, your first inquiry is answered in the negative.

(2) Your second question is also answered in the negative for the same reasons.

ROLLIN L. SMITH,
Special Assistant Attorney General.

October 3, 1941. 180

60

Unorganized—County board of education—Officers—Chairman—Election of —Term—L 41, C 541; M41 § 3156-4(39) Note.

Cass County Attorney.

Facts

Reference is made to Laws 1941, Chapter 541 (Mason's Supplement 1941, Section 3156-4(39) Note), which relates to the county board of education for unorganized territories in counties of a class in which Cass County falls.

Question

Whether or not a chairman of said board should be elected at the November, 1942, general election, to hold office for a four year term commencing on the first Monday in January, 1943.

Answer

The act cited provides that within sixty days after its passage the county commissioners shall appoint a chairman of the county board of education for unorganized territory,

> "* * * who shall serve until the first Monday in January, 1943, and every four years thereafter, the chairman of the county board of education for unorganized territory shall be elected. All laws applying to candidates for and election of county officers shall apply to election of such chairman except that he must reside in such unorganized territory at the time of his election and is to be voted on only by the qualified electors residing in such territory * * *."

The wording of the section is ambiguous. It might be argued that "thereafter" meant "after January, 1943." On the other hand, the legislature has said very clearly that the appointee shall hold office only "until the first Monday in January, 1943."

We regard this as a careless and inaccurate use of language, and not

as indicating an intention that the appointee should serve until a successor chosen four years hence assumes office. Four years after 1943 is 1947. There is no general election of county officers in 1947.

What the legislature probably meant was that at the 1942 general election a successor should be elected to assume office in January, 1943, at which time the term of the appointee comes to an end. The act is so construed. Your inquiry is, therefore, answered in the affirmative.

ROLLIN L. SMITH,
Special Assistant Attorney General.

February 27, 1942 768-C

61

Unorganized—Officers—Clerk's Salary—Increasing under facts stated—L. 41, C 169, Art. I, § 11, Subd. 11; L 41, C 295; M41 § 3156-1(11), subd. 11; (MS41 § 120.11).

Commissioner of Education.

Facts

Laws '41, Chapter 295, fixing the salaries and clerk hire of county officers in counties of a class which includes Cass County. It is provided by Section 8 of that act:

> "The salary of the superintendent of schools of any such county shall be $1,000 per annum."

and by Section 9 thereof:

> "The salary of the clerk of the school board for unorganized territory for any such county shall be $800.00 per annum and he shall be allowed not to exceed $600.00 per annum for clerk hire."

Laws '41, Chapter 169, Art. I, Section 11, subd. 11 (Mason's Supp. '41, Section 3156-1(11), subd. 11), empowers the state board of education,

> "* * * to enter into contracts with the United States Department of the Interior for the education of Indians in Minnesota, to receive grants of money from the federal government, and to disburse the same in accordance with the terms of the contract and such rules and standards as the state board of education may establish."

It appears that the state board has entered into a contract with the federal government pursuant to this subdivision. Under this contract the state department of education receives from the federal authorities an annual grant of $120,000. This money is paid into the state treasury, and is disbursed among the various school districts under direction of the state board of education. It is intended to provide aid in lieu of taxes for schools enrolling Indians living on tax-exempt land. In some cases special services, such as nursery schools, hot lunches and the like, are provided.

In actual practice, the state department of education assists in the preparation and approval of a budget for each school to which it allows aid from this fund. These budgets are not always itemized. Sometimes a lump sum is given for "instructional expense," including "general control"; sometimes a specific allowance is made for "general control." Amounts allocated to "general control" are intended to be used for maintenance of the county superintendent's office. The department does not in any case disburse this money to any particular officer in a local school system. Funds are transmitted directly to the school board of each district for disbursement by that board, and are transmitted with the understanding that where the budget for that district is itemized the money will be spent for the purposes specified.

It appears that the superintendent of schools of Cass County receives a salary of $1,000 and that he acts as clerk of the school board for the unorganized territory, for which he receives $800 a year. The local authorities recognize the clerk's salary is inadequate, as managing the affairs of the unorganized territory and supervising the Indian schools is a full-time position. The school board of the unorganized territory is willing to pay an additional sum to its clerk out of federal funds earmarked for that purpose.

Question

Would it be possible for him (the county superintendent and clerk) to receive additional compensation for his services as clerk of the unorganized territory, the same to be paid from funds received by the unorganized territory from the United States Indian office through the state department of education?

Answer

We have serious doubt as to the power of the local board to increase the clerk's compensation beyond the amount fixed by Chapter 295, supra. If the federal authorities wish to employ the school district clerk for some purpose not incompatible with his duties as such and are willing to compensate him for his services, he may accept such employment and compensation without forfeiting his office or violating any state law. That, however, is not the case here. There has been a grant of federal funds to the state for certain purposes. These funds have been paid into the state treasury. The suggested increase, if granted, would result in the clerk's receiving compensation in excess of what the law allows.

We feel that before the school board in question may increase the clerk's salary in the manner indicated there should be legislation authorizing such action. Consequently, your inquiry is answered in the negative.

ROLLIN L. SMITH,
Special Assistant Attorney General.

November 21, 1941. 162-B

ELECTIONS

BALLOTS

62

Absent voter's—Attesting witness—Postmaster acting as—Provision requiring authentication by cancellation stamp mandatory — M40 § 601-4(1)f, 601-4(1)i; (MS41 §§ 203.07, 203.10).

Blue Earth County Attorney.

Question

Whether or not an absentee ballot signed by a postmaster as attesting witness, his signature not being authenticated by the cancellation stamp, may be received by the local election officials.

Answer

The absent voter's act provides a method whereby absent voters may cast their ballots by mail. The manner in which this privilege may be exercised is prescribed by law with elaborate detail. Among other things it is provided that there shall be an attesting witness. A postmaster is authorized to act as such. (Mason's Supplement 1940, Section 601-4(1)f, same as Minnesota Election Law Compilation, Section 203.07). This attesting witness is required to sign two certificates. One is designated "Voter's Certificate." After its execution it is enclosed in the "return envelope" which is thereupon sealed. Another, printed on the back "return envelope" is executed after the envelope has been sealed. If the local election officials, after comparison, find the signatures of the attesting witness on the voter's certificate and on the back of the return envelope the same, and if the postmaster's signature is authenticated by his cancellation stamp, they endorse it received, and thereafter deposit the marked ballots in the prepared ballot boxes. (Mason's Supplement 1940, Section 601-4(1)i, same as Minnesota Election Law Compilation, Section 203.10).

The purpose of this provision is apparently to furnish the local election officials with proof that the absentee voter has not exhibited his marked ballot to anyone.

It should be borne in mind that absentee ballots are marked in hospitals, in bedrooms, and in all sorts of private places where the opportunity for the commission of fraud or for violation of our statutory provisions designed to insure secrecy of the ballot are much greater than at a regular polling place equipped with election officials and often guarded by unofficial watchers.

Your question resolves itself into whether the requirement that the postmaster's signature as an attesting witness be authenticated by his cancellation stamp is directory or mandatory.

Directory provisions are not intended by the legislature to be disregarded, but where the consequences of not obeying them in every particular are not prescribed, the courts must judicially determine them. If it appears

that noncompliance with the law would not result in preventing anyone from voting, courts are disinclined to set the election aside. 18 Am. Jur. 330, Section 224. Thus our court has held that the failure of the election judges to initial the ballots is not fatal. Truelsen v. Hugo, 87 Minn. 139.

Our absent voter's act has never been before our supreme court for consideration, although similar acts have been before the courts of other states. Sartwelle v. Dunn, 120 S.W. (2d) 130 (Tex.); Evans v. Reiser, 2 P (2d) 615 (Utah); State ex rel. v. Whatcom, etc., 83 P (2d) 345 (Wash.); State ex rel. v. Tucker, 143 So. 754 (Fla.); Hansen v. Lindley, 102 P (2d) 1058 (Kan.). The general trend of these decisions is that a substantial compliance with the statutory regulations governing the transmission and delivery of absentee ballots is sufficient, and that noncompliance with purely directory provisions relating thereto is not fatal. 29 C.J.S. 304. It has been held that the use of ink instead of a pencil in marking an absentee ballot is fatal. Whitacre v. Waggoner, 14 N.E. (2d) 22 (Ohio); Lester v. Fairbairn, 89 P (2d) 1091 (Cal.). On the other hand a provision that absentee ballots be placed in the ballot box has been held directory and not mandatory. Seidschlag v. May, 2 N.E. (2d) 836 (Ill.).

All the reported decisions seem to deal with situations where the irregularity was due to some act or omission by the election officials, and where the ballot has been actually cast.

In the case under consideration the irregularity took place before the ballot was cast. The failure of the postmaster to authenticate his signature as an attesting witness, with his cancellation stamp, was not due to any error or omission on the part of the election officials. Assuming it was an oversight on his part, the fault must be charged to the voter. He ought to have inspected the postmaster's authentication and made certain that there was a compliance with the statute before he mailed the return envelope.

Granting that a technical noncompliance with statutory provisions by an election official will not necessarily invalidate an absentee vote, it does not follow that a failure by a voter to comply with the provision of the law which is expressly made a preliminary to the exercise by him of his right to vote by mail can be disregarded.

If the provision under consideration is to be held directory, that holding would amount to telling the local election officials they might disregard one of the express provisions of the law. We do not believe the requirement in question can be nullified in this manner. To do so would be to increase the opportunities for fraud in absentee voting and to destroy one of the safeguards placed around this method of voting by the legislature.

Accordingly you are advised that the provision of Mason's Supplement 1940, Section 601-4(1)i, same as Minnesota Election Law Compilation, Section 203.10, requiring a postmaster's signature as attesting witness to be authenticated by his cancellation stamp, is mandatory and not directory, and that the local election officials may not receive an absentee ballot improperly authenticated by the attesting witness.

ROLLIN L. SMITH,
Special Assistant Attorney General.

January 29, 1942. 639-a

63

Names—Nominees by petition should be followed by words "nominated by petition"—(MS41 § 202.29).

Lac qui Parle County Attorney.

Question

"Whether under Section 202.29, 1942 Minnesota Statutes, the words 'nominated by petition' together with the party designation should appear on the ballot."

Answer

The law, namely, Section 202.29, Minnesota Statutes 1941, reads as follows:

"After the name of each candidate nominated by petition shall be placed the words 'nominated by petition,' and such other designation as may be now permitted by law, except that the word 'non-partisan' shall not be placed after or to designate any candidate not duly nominated at a primary election on the non-partisan ballot."

This statute requires the auditor to place the words "nominated by petition" after the name of each candidate nominated by petition. It seems to me that the statute is very plain.

RALPH A. STONE,
Assistant Attorney General.

October 14, 1942. 28-B-3

64

Names—Placing names of candidates on who failed to file in time—Effect—M40 §§ 601-9(1)h, 601-11(2)c; (MS41 §§ 210.09, 212.31).

Anoka County Attorney.

Facts

The town clerk of a certain township placed the name of a candidate for town office, who had failed to file within the time specified by Mason's

Supplement 1940, Section 601-11(2)c, on the official ballot. This candidate received a majority of the votes cast and was declared elected.

Question

Whether or not election of this candidate was invalid.

Answer

No. The general rule stated in 18 Am. Jur. "Elections," Section 183, to the effect that irregularities in an official ballot due to error or mistake of an election officer do not vitiate the vote of an elector innocent of any wrong or default in the matter unless such irregularities have been declared by statute to be fatal to the validity of the election, or unless such irregularities serve as distinguishing marks. In this regard see Peabody v. Burch, 89 P. 1016 (Kan.); Allen v. Glynn, 29 P. 670 (Col.); Bowers v. Smith, 20 S. W. 101 (Mo.). Our statutes do contain a provision making the misprinting of a ballot a criminal offense, Mason's Supplement 1940, 601-9(1)h. You are, of course, in a position to judge whether or not there has been a violation of this section.

ROLLIN L. SMITH,
Special Assistant Attorney General.

March 25, 1941. 434-B-2

65

Name — Writing in — Candidates — Maiden name — Counting — M40 §§ 601-3(1)c, 601-6(10)k; (MS41 §§ 202.04, 206.50).

Redwood County Attorney.

Facts

It appears that at a recent school election in your county two persons were candidates for school district office, namely Elmer Becker, and Nellie Davis, who was also known as Mrs. Ray Davis and as Nellie Mann, her maiden name. Apparently they did not file affidavits of candidacy, for as we understand your letter their names were not printed on the official ballot. Voters wrote in the name of one or the other of these two candidates in the blank space provided on the ballot for the purpose.

Both candidates were well known and had lived many years in the community. Mrs. Davis was known for many years as Nellie Mann. After her marriage 10 or 12 years ago to Mr. Davis she left the community. Three months ago she returned and resumed her residence in the school district involved.

Two ballots cast at the election were marked "Nellie Mann," instead of Mrs. Ray Davis, or Nellie Davis.

Question

Whether or not these ballots should be counted as votes cast for Nellie Davis.

Answer

If the law was complied with the election judges appointed by the school board canvassed the ballots cast and submitted the same to the school board immediately after the close of the polls. Laws 1941, Chapter 169, Section 2, Subsection 1. After the judges have counted the ballots they are functus officio. They cannot reconvene and recount the votes. Opinion to Caldwell, June 2, 1941, copy enclosed.

We have held that a person may adopt any name by which he desires to be known without legal proceedings, and may have his name printed on the ballot in the same way he signed his affidavit. Opinion 4, Selected Opinions relating to Elections 1928.

Furthermore, the statute expressly permits a woman to use the prefix "Mrs." and the full name or initials of her husband before his last name when filing for office. Mason's Supplement 1940, Section 601-3(1)c found in election law compilation as Section 202.04. Clearly Mrs. Davis could have filed, and have had her name printed on the official ballot in either one of three ways, to-wit: "Nellie Davis," "Mrs. Ray Davis," or "Nellie Mann." However, having failed to file, and the voters having written her name on the ballots in each of three forms indicated, it is a close question whether all these votes should be counted for her. My personal view is that the election judges, taking official notice of facts known to them might properly have counted these ballots for her.

The trend of recent supreme court decisions seems to be in favor of counting ballots if the voter's intention is ascertainable, and his markings do not render the ballots susceptible of identification. Hanson v. Emmanuel 297 N. W. 177, 749 (May 2, 1941), Pye v. Hanzel, 273 N. W. 611. Mason's Supplement 1940, Section 601-6(10)k. The rule announced in Newton v. Newell, 26 Minn. 529 (cited with approval in reelection contest, Itasca County, 178 Minn. 578, and in Sullivan v. Ebner, 195 Minn. 232, and said to be in accord with the great weight of authority by an article in 20 C. J., page 160, and in 18 Am. Jur. Elections, Section 195, page 311), is that the ballot should be counted if the name written thereon "designates the person intended to be voted for with reasonable certainty," or if it spells a word "idem sonans" with the candidate's true name. Thus the court in that case counted ballots for "Nuton" and "Newten" as having been cast for "Frank H. Newell" but rejected those cast for "Null," "Neden" and "W. Null."

There does not seem to be any decision squarely in point, and your question is one which a court might decide either way. However, our conclusion is that the two ballots mentioned might properly have been counted as votes cast for Nellie Davis.

ROLLIN L. SMITH,
Special Assistant Attorney General.

July 2, 1941. 184-E

66

Names—Writing in—Use of stickers—Effect of irregularities.
Rice County Attorney.

Question

Is writing in names on ballots and the use of stickers by voters lawful?

Answer

The corrupt practices act does not apply to township elections. Consequently, stickers may be distributed at the polls. Danculovic v. Zimmerman, 184 Minn. 370. See M.S. 1941, Secs. 211.230 + 211.232 The Corrupt Practices Act

The present incumbents of town offices presumably were duly proclaimed elected and thereafter qualified. Irregularities in their election would not necessarily invalidate the election. It is a policy of courts to give effect to the votes of qualified electors, regardless of the irregularities. Nelson v. Bullard, 155 Minn. 419. In a contest it would be necessary not only to show the irregularity, but also to show that the result of the election would have been different had the irregularity not occurred. 18 Am. Jur., elections, section 224. We cannot speculate on what the results of any contest instituted at this time would be inasmuch as we have no way of knowing what facts would be established in the proceeding. However, we can advise you that the present incumbents of the offices in the township in question are entitled to exercise the duties of the offices held by them.

ROLLIN L. SMITH,
Special Assistant Attorney General.

March 5, 1941. 434-B-2

67

Use of other than official—M27 § 2799; (MS41 § 124.05).
Department of Education.

Facts

It appears that two candidates filed as candidates for board member and that the clerk prepared an official ballot carrying these two names and blank spaces where other candidates' names could be written in. On election day two other persons had a ballot printed almost identical but carrying their names. The unofficial ballots were counted and gave the candidates who had not filed a greater number of votes than the candidates who had filed.

Opinion

Our supreme court in Grimsrud v. Johnson, 162 Minn. 198, held that a provision of a former law (G.S. 1923, section 2799) requiring the printing of an official school election ballot was directory merely, and that voters at

such elections using other ballots properly marked should not be disfranchised. Two months later the legislature amended the law and added a provision reading, "and which said ballots so prepared by the clerk of said district shall be used to the exclusion of all other ballots at such annual school meeting in the election of officers of said district." Laws 1925, Chapter 295, now found in Mason's Minnesota Statutes as Section 2799.

This seems conclusive of an intention on the part of the legislature to reverse the rule announced by the supreme court. It is our opinion that unofficial ballots used at a school district election, whether properly marked or not, should not be counted.

M. TEDD EVANS,
Assistant Attorney General.

June 4, 1941.

28c-7

CANDIDATES

68

Hatch Act — Employees — County welfare board — Precluded from becoming candidate for office of township clerk or village recorder—18 U.S.C.A. 61-1.

Attorney, Town of Great Scott.

Question

"Does the Hatch Act prohibit a person who is employed by the County Welfare Board from being a candidate for an office such as Township Clerk or Village Recorder?"

Answer

The act mentioned approved August 2, 1939, Chapter 410, Section 12, added July 19, 1940, Chapter 640, Section 4, 54 Stat. 767, 18 U.S.C.A., Section 61-l, reads as follows:

"(a) No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall (1) use his official authority or influence for the purpose of interfering with an election or a nomination for office, or affecting the result thereof, or (2) directly or indirectly coerce, attempt to coerce, command, or advise any other such officer or employee to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purposes. No such officer or employee shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the

purposes of the second sentence of this subsection, the term 'officer or employee' shall not be construed to include (1) the Governor or the Lieutenant Governor of any State or any person who is authorized by law to act as Governor, or the mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a State or municipal merit or civil-service system; (3) officers holding elective offices."

The person mentioned is employed by the county welfare board. The county welfare board has the administration within the county of old age assistance, aid to the blind, and aid to dependent children. All of the money expended for aid to the blind is furnished by the United States government. Half of the money for the other two species of assistance is furnished by the United States. The employee of the welfare board appears to be covered by this section. It is almost inconceivable that a person who lends his name as a candidate for office would not seek to induce persons to vote for him. The lending of his name alone is intended to affect the result of the election.

It therefore appears to us that the Hatch Act is intended to preclude an employee of the county welfare board from becoming a candidate for the office of town clerk or village recorder.

CHARLES E. HOUSTON,
Assistant Attorney General.

October 21, 1942. 125-a-64

CORRUPT PRACTICES ACT

69

Application in general—(MS41 §§ 211.03, 211.08, 211.20, 211.27).
Mankato City Attorney.

Opinion

A political committee has been or is being formed to promote and campaign for the adoption of a proposed ordinance for the enlargement and improvement of the airport and a similar committee has been or will be formed for the purpose of opposing the adoption of the ordinance. The following will indicate the opinion of this office on the several questions submitted:

1. It has heretofore been the holding of the attorney general that the Corrupt Practices Act applies to activities of which the purpose is to secure the adoption or defeat of a constitutional amendment (Selected Opinions of Attorney General Relating to Elections, Opinion 40). By a parity of reasoning, it would follow that the Corrupt Practices Act would apply to the activities of a committee formed for the purpose of bringing about or preventing the adoption of the airport ordinance.

2. As to whether it is necessary that the names of the persons composing any such committee should be filed with any officer, I do not find any section so requiring. I think, however, that it would be well for the members of the committee to meet and adopt a written statement of some character to perpetuate the evidence of the formation of the committee and to preclude any charge that excessive expenditures had been made by any individual.

3. As to how the campaign literature should be signed, this can best be answered by an illustration, e. g.: "Prepared and circulated by the Pro-Airport Ordinance Volunteer Committee, John Doe, Secretary, 100 Blank Street, Mankato, Minnesota, for the purpose of promoting the adoption of the ordinance relating to the enlargement and improvement of the Municipal Airport."

4. As to whether a person would violate the law by writing a letter to a newspaper stating his views on the airport question, which letter he asks the newspaper to publish and which is accordingly published by the newspaper.

Minnesota Statutes 1941, Section 211.08, provides:

> "Any person * * *who shall publish * * * otherwise than in a newspaper, as provided in section 211.03, * * * any publication tending to influence voting at any primary or election which fails to bear on the face thereof the name and address of the author * * * shall be guilty of a misdemeanor * * *."

Giving this statute a literal application, it would seem to forbid an individual from causing such a letter, signed only with the word "Taxpayer" or "Subscriber," to be published. But I am loath to hold that the legislature intended to forbid such an act by an individual citizen or to bar the newspaper from publishing such a letter. A newspaper ought to be free to publish the sentiments of its subscribers as a matter of news, or to comment on the same editorially. The newspaper could undoubtedly publish in its editorial columns an editorial stating that it had received a letter from one of its subscribers or a taxpayer, quote the letter so received and comment on it, and it would not violate any law in so doing.

I decline to apply this law literally. To do so would be to restrict, in some degree, the freedom of the press. Another situation would be presented if such letters were used intentionally and systematically as a subterfuge to avoid compliance with the law requiring newspaper advertising to be labeled as such. Minnesota Statutes 1941, Section 211.03.

5. As to the filing of a statement of expenses by the committee, I believe that this is answered by the following provision contained in Minnesota Statutes 1941, Section 211.20:

> "Statements shall also be made by any other political committee showing the total amount of receipts and disbursements, and for what purpose such disbursements were made. Such statement shall be filed with the auditor of the county in which such committee has its headquarters within 30 days after any primary or election."

6. I find no limitation placed on the amount which may be expended by a committee opposing or favoring such an ordinance, but, of course, no expenditures may be made except for purposes permitted by the Corrupt Practices Act.

7. Minnesota Statutes 1941, Section 211.27, provides as follows:

"No corporation doing business in this state shall pay or contribute, * * * directly or indirectly, any money * * * to any political party, organization, committee, or individual for any political purpose whatsoever, * * *."

RALPH A. STONE,
Assistant Attorney General.

October 14, 1942. 627-B-1

70

Transporting voters to polls—Wearing tags showing person voted—Volunteering to relieve person going to vote—(MS41 § 211.14).

City Attorney, Owatonna.

Question

1. Whether on election day the League of Women Voters may distribute to persons who have voted tags with the words printed thereon: "I have voted, have you?" The purpose of the League in so doing is to get the voters to go to the polls and vote. The League does not favor or promote the campaign of any particular candidate.

Answer

Issuing and distributing such tags would not violate the spirit or intent of the Corrupt Practices Act. However, the tags should not be distributed by the election judges or clerks or inside the polling place. They may be distributed outside the polling place. They would not in my opinion come within the meaning of the words "political badges, buttons, or other insignia" as used in Section 211.14 Minn. Stat. 1941.

I find no statute prohibiting a person from volunteering to relieve a girl whose duty it is to answer telephone calls during the time when she wishes to go to the polls to vote. Such an employee, however, is entitled to time to go to the polls.

Question

2. Whether the League of Women Voters have the right to convey voters to the polls.

Answer

This office over a period of years has held that the language of the statutes absolutely prohibits the furnishing of transportation to voters by whomsoever furnished.

Opinion issued March 10, 1931, held that the statute "forbids any person, committee or organization conveying or furnishing a vehicle for the conveyance of voters to the polls," and wherein it is further stated that it made no difference whether the person conveying the voters was a candidate or not.

Under date of October 27, 1920, this office wrote:

> "The attorney general has been and now is of the opinion that the section cited intends and does absolutely prohibit the furnishing of transportation to voters whether it is furnished by friends and relatives and whether for a compensation or as a donation. This applies to persons who are not candidates and are not in any way connected with the candidate for office * * *."

RALPH A. STONE,
Assistant Attorney General.

October 21, 1942. 627-L

71

Filing Expense—Candidates—Accounts—Corrupt Practices Act—Applicability to municipal primary elections—M40 § 601-10(1)j; L 41, C 51; (MS41 § 211.20).

City Attorney, South St. Paul.

Question

Whether or not Mason's Supplement 1940, Section 601-10(1)j, which requires the filing of expense accounts by candidates, applies to candidates for municipal office at the approaching primary and election in South St. Paul, which is a city of the fourth class.

Answer

We have heretofore held that the legislature by changing the dates for filing such expense accounts at its 1939 session intended to except candidates for municipal office from the operation of this section.

The 1941 legislature amended the section cited. It added a provision requiring candidates for nomination or election in cities of the first class to file as therein specified. The amendment does not refer to cities of other classes or to villages. Laws 1941, Chapter 51.

Clearly the legislature intended this provision to apply only to candidates in cities of the first class. It follows that candidates for municipal office in your city are not subject to the provisions of said section 601-10(1)j.

ROLLIN L. SMITH,
Special Assistant Attorney General.

March 10, 1941. 627-B-8

FILING

72

Affidavit of candidacy—Must be signed and sworn to by candidate—Duty of auditor in case of illegal filing—(MS41 §§ 202.08, 205.78).

Itasca County Attorney.

Facts

On July 30, 1942, the last day for filing of candidates' affidavits for the primary election to be held September 8, 1942, one Mr. S came into the county auditor's office and signed an affidavit in his wife's name "submitting his wife as a candidate for the office of county superintendent of schools"; Mrs. S. had been in the auditor's office on July 28 and told the auditor's clerk of her intention to file on July 30; by reason of illness in the family, Mrs. S was unable to go to the auditor's office on July 30 to make and file her affidavit of candidacy; she, believing that the auditor's office already knew of her intention, told her husband to go to the auditor's office and sign her name to the affidavit of candidacy; the affidavit of candidacy which was filed for Mrs. S was never signed by her, and never sworn to by her.

It appears that only one other candidate filed, so there will be no primary election contest, and the names of both candidates will go directly upon the general election ballot if the filing above described be held legal.

Opinion

Every affidavit of candidacy must be signed and sworn to by the candidate personally. This filing of an affidavit to which the husband signed his wife's name and which was not sworn to by the wife was of no validity.

It is the duty of the county auditor to disregard the attempted filing and omit the name of the candidate from the general election ballot. If the auditor should, nevertheless, indicate his intention to put the name on the ballot, he could be restrained by action.

The policy of the auditor should always be: where a filing is clearly illegal, omit the name from the ballot; where there is merely some irregularity about the filing, not amounting to a fatal defect, put the name on. Any reasonable doubt should be resolved in favor of the applicant. In any case, any party adversely affected may contest the decision of the auditor by proper court proceedings. See Minnesota Statutes, Sections 202.08, 205.78. Of course, in the event of such proceedings, the auditor would have to follow the order of the court. The law does not require the auditor to give the interested parties formal notice of his intention in such cases. His only legal duty in that connection is to prepare a sample ballot and to file, post or publish it, as the applicable statute may require. It is incumbent on the candidates to examine the sample ballot if they wish to check it in any particular. However, where a filing is rejected the applicant should be promptly informed of the reason, and in any case where there is a controversy over the omission or inclusion of a candidate's name on a ballot, it is advisable for the auditor to give the persons directly affected prompt infor-

mation as to what he proposes to do, so that they may take legal action if they wish before the regular ballots are printed. Of course, such information should be given impartially to all parties concerned.

I think in this instance the defect in the filing is clearly fatal, so the county auditor should reject it and return the filing fee. If the would-be candidate accepts return of the filing fee, of course she has waived any right she might have to claim a place on the ballot; if she does not accept a return of the filing fee, she has an opportunity to assert her rights in a court action.

There is no way in which the applicant could rectify the defective affidavit at this time. She could not file another affidavit properly signed and sworn to, as the time for filing has elapsed.

RALPH A. STONE,
Special Assistant Attorney General.

August 6, 1942. 911-I

JUDGES

73

Villages—Not separated for election purposes—Members of Council shall be judges—M40 § 601-6(6); (MS41 § 205.45).

Renville County Attorney.

Facts

Mason's Minnesota 1940 Supplement, Section 601-6(6)a, reads in part as follows:

> "In villages having but one district, and not included in any town, the members of the council shall be judges, subject to the qualifications and restrictions provided for members of town boards in like cases."

Question

The village of Hector in your county has but one district. Whether the members of the council of this village can act as judges of election. A doubt arises in your mind by reason of the use of the language "and not included in any town."

Answer

It is my opinion that the words "not included in any town" mean "not included in any town for election purposes" or "not included in any town election district."

Hence, if the village of Hector is a separate election district from the town in which it is located, the members of the village council should serve as judges of election, they being otherwise qualified and the village containing but one district.

On the other hand, if the village of Hector is not a separate election district from the town in which it is located, but for election purposes is still a part of the town, then the controlling section of the law is Section 601-6(6), Mason's Minnesota 1940 Supplement.

The law originally read "and not included in any town district"—manifestly meaning in any town "election" district. I still attribute that meaning to these words even though the word "district" was dropped in the 1939 codification of the election laws.

Confusion and doubt would arise as to the selection of judges in villages not so separated if any other meaning were given to this language. This construction is further fortified by the fact that in a town which contains a village not separated for election purposes, the town board determines the election districts. If the town board has authority to district the town, that board should also have authority to determine the election officers in the manner prescribed by law. The doubt which you have expressed concerning the meaning of the law disappears when given the construction which I have placed upon it.

RALPH A. STONE,
Assistant Attorney General.

August 19, 1942. 183-H

JUDGES AND CLERKS

74

Ballot Judge—Father-in-law of Candidate—Cities of the fourth class—(MS41 §§ 205.46, 205.51).

City Attorney, Stillwater.

Question

Whether a member of the city council is eligible to the office of ballot judge.

Answer

1. Your inquiry as framed relates only to "ballot judge." I do not think that it is intended to so limit the question. "Ballot judges" strictly speaking, are not appointed in cities of the fourth class. (See Section 205.55.) You will note that this section which relates to ballot judges provides that their appointment is authorized only in cities of the first, second and third classes.

The appointment of regular judges of election is governed by Section 205.46, Minnesota Statutes 1941 (Laws 1939, Chapter 345, part 6, Chapter 6, Section 2—Mason's Minnesota Statutes, 1940 Supplement, 601-6(6)a).

I do not find that the previous history of this statute throws any light on the question to be considered.

Section 205.46, Minnesota Statutes 1941, which must be construed in order to answer your question, reads as follows:

"205.46. JUDGES IN MUNICIPALITIES EXCEPT CITIES OF THE FIRST CLASS. The council of each municipality, except cities of the first class, at least 25 days before any election, shall appoint three qualified voters of each district therein to be judges of election. In villages having but one district, and not included in any town, the members of the council shall be judges, subject to the qualifications and restrictions provided for members of town boards in like cases. In cities of the first class judges and clerks shall be appointed by the city clerk at least 25 days before an election from a list of qualified voters in each district certified by the civil service commission of the municipality. At least 60 days before an election the civil service commission shall receive applications on verified forms prepared by it from persons qualified to act as such judges and clerks in which application the applicant shall state his party affiliation, and the commission shall conduct such inquiry, investigation, and examination as it deems necessary to establish the qualifications of the applicants. The commission shall set up such rules and regulations as it deems necessary for carrying out the provisions of this section. At least 30 days before an election such civil service commission shall certify to the city clerk a list of such persons in each district who have satisfied the commission of their qualifications to act as judges and clerks. The commission shall certify the names of two persons having the highest rating from each political party for each district. From this certified list the city clerk shall appoint three judges and two clerks provided that no more than two judges and one clerk shall belong to the same political party. If there be not two qualified persons in each political party for each district, then in that event the commission shall certify those having the next highest rating without regard to party affiliation in order that six persons may be certified for each district. Should the list certified by the civil service commission not contain the names of sufficient qualified persons in each election district, the city clerk shall appoint a sufficient number of qualified voters of the district to act as such judges and clerks. Vacancies in the office of judges and clerks shall be filled by the city clerk from the list certified by the civil service commission. The commission shall certify additional names to the city clerk when the eligible list for any election district is exhausted. No two election judges or clerks, or both, shall reside in the same building. No two judges or clerks in any district shall bear the relationship to each other of husband and wife, parent or child or brother or sister, nor shall they bear that relationship to any candidate for election, or any officer or employee of such city. No city official or employee shall act as judge or clerk. Any person appointed as a judge or clerk under this section shall not acquire any right or status as a regular city employee.

"This section shall not apply to any city of the first class while there is in effect a resolution adopted within 60 days after the passage

thereof by a majority vote of the governing body of the city electing not to accept or come under this section, in which event the council of such city of the first class shall appoint three qualified judges of each district therein to be judges of election. The council shall appoint the judges from that number of citizens who have made application therefor and the council may require that they designate their party affiliations thereon."

You will note that this section is entitled "Judges in municipalities except cities of the first class." As a matter of fact, the greater part of the section relates to judges of election in cities of the first class. By combining the conditions relative to cities of the first class and provisions relative to other cities and villages all in one section, it is made difficult to determine just what provisions apply to first class cities only.

The language which is provocative of the question you submit is found in the following condition: "No city official or employee shall act as judge or clerk." A reference to the context in which these words are used is the only available guide to a determination of their application. Does the language last quoted mean that no city official or employee in cities of the first class shall be a judge of election, or does it mean that officials and employees in any city of any class may not be judges of election?

The first three lines of the section under consideration clearly and expressly relate to municipalities other than first class cities.

Lines 4, 5 and 6 of this section relate to villages having only one district. All the balance of the section, in my judgment, relates to first class cities.

Let us consider several sentences immediately preceding the words "No city official or employee shall act as judge or clerk." The statute has been concerned with the list of eligibles filed with the civil service commission in first class cities. The fourth sentence preceding the doubt provoking language reads thus: "Vacancies in the office of judges and clerks shall be filled by the city clerk from the list certified by the civil service commission." Manifestly this has reference to the judges and clerks in cities of the first class. The third sentence before the language under construction reads: "The commission shall certify additional names to the city clerk when the eligible list for any election district is exhausted." This language also very clearly refers to judges and clerks of election in cities of the first class.

The second sentence preceding the language under construction reads: "No two election judges or clerks, or both, shall reside in the same building." Does the legislature at this point depart from giving its attention to judges of election in cities of the first class and refer to all cities?

The first sentence preceding said language to be constructed reads: "No two judges or clerks in any district shall bear the relationship to each other of husband and wife, * * *" etc. Here again the last question asked above is pertinent. Is the legislature at this point departing from its consideration in cities of the first class?

Then follows the language which raises your question "No city official or employee shall act as judge or clerk." But immediately following this sentence the legislature refers again unquestionably to first class cities only in the last sentence which reads: "Any person appointed as a judge or clerk under this section shall not acquire any right or status as a regular city employee." This clearly refers to the civil service status of judges of election in first class cities. And the following paragraph of the section relates entirely to first class cities.

It would seem strange if the legislature intended to sandwich in between provisions, all of which relate to first class cities, the language of the sentences above quoted with the intention that those sentences should relate to all cities. I can not so hold.

Thus construing this language in the light of its context, it is my opinion that the words "No city official or employee shall act as judge or clerk," do not apply to judges and clerks of election in cities of the fourth class.

Other portions of the election laws exhibit no legislative policy to prevent members of the governing boards of municipalities from serving as judges of election. Members of town boards are expressly made judges of election (Section 205.45 Minnesota Statutes 1941). In villages having but one district which are not included in any town, the members of the council shall be judges. (Section 205.46 Minnesota Statutes 1941). Another section of the statutes undertakes to define the eligibility of judges. See Section 205.51 Minnesota Statutes 1941, which reads as follows:

> "No person while receiving compensation from the United States, the state or from any county, any city of the first, second, or third classes, or from any village now or hereafter having more than 10,000 inhabitants, as an officer or employee thereof, shall be eligible to serve as a judge or clerk at any election in this state where the laws provide for the payment of compensation to such judges and clerks for their services as such; and no person, who is the husband, wife, parent, child, brother, or sister of a candidate for an elective office, shall be eligible to serve as judge or clerk in any district in the state."

Had it been intended to disqualify councilmen of cities of the first class from serving as judges of election, had there been any legislative policy to disqualify municipal officers from so serving, it should have been and probably would have been stated in this section.

Consequently I conclude that, there being no reason for their disqualification, the members of the city council may appoint judges of election from among their own number.

Question

2. "Can the father-in-law of a candidate for an office to be voted on at the general election be an election judge?"

Answer

In our opinion such person can be an election judge. He is not related to the candidate either as "husband, wife, parent, child, brother or sister." (Section 205.51, Minnesota Statutes 1941.) Therefore, a person is not ineligible on that account.

RALPH A. STONE,
Assistant Attorney General.

October 16, 1942. 183-F

JUDICIARY

75

District court judges—Vacancy—No candidate in the primary election—May be nominated by petition for a term of six years—Minn. Const., Art. VI, §§ 4, 10; Minn. Const. Art. VII, § 9; (MS41 §§ 202.26, 202.27).

Hennepin County Attorney.

Opinion

Relative to the election situation in Hennepin County, created by the death of Judge Mathias Baldwin.

Article VI, Section 4, of the State Constitution, provides that:

> "* * * In each judicial district, one or more judges, as the legislature may prescribe, shall be elected by the electors thereof, whose term of office shall be six years * * *."

Since the decision of the Supreme Court of this state in the case of Crowell v. Lambert, 9 Minn. 267, decided in 1864, it has been held that "A person elected judge of probate, upon a vacancy happening, holds for the full constitutional term * * * and not merely for the unexpired portion of his predecessor's term." The opinion further states that the court "look(s) in vain for any direct authority in the constitution for electing any judge for a shorter period," and that "there is no fair ground for distinguishing between the judges of probate and the supreme and district judges, so far as regards this question."

It is therefore clear that the successor to Judge Baldwin will be elected for a period of six years, and not for the unexpired portion of his term.

Article VI, Section 10, of the State Constitution, reads as follows:

> "In case the office of any judge shall become vacant before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and qualified. And such successor shall be elected at the first annual election that occurs more than thirty days after the vacancy shall have happened."

Article VII, Section 9, of the State Constitution, provides:

> "The official year for the state of Minnesota shall commence on the first Monday in January in each year, and all terms of office shall terminate at that time * * *."

By reason of aforesaid constitutional provisions, a successor to Judge Baldwin must be elected at the next November 3, election for a six year term beginning the first Monday in January, 1943.

In the case of State v. Frizzell, 31 Minn. 460, 466, Justice Mitchell's opinion holds:

> "That all judges of the supreme and district courts, **whenever elected,** are now holding for a term of **six** years from the first Monday in the January next succeeding their election * * *."

As, in the event of a vacancy in the office of the judge of the district court, there is no constitutional provision or statutory enactment authorized thereby for filling an unexpired term by election, the candidate who is elected as a successor holds for a term of six years; and, because the constitutional provision, as construed in aforesaid opinion by Justice Mitchell, requires that all judges of the district court, whenever elected, shall hold office from the first Monday in January next succeeding their election, the candidate elected at the general election of November 3, 1942, cannot qualify except for the term beginning the first Monday of the succeeding January.

Therefore, if the Governor makes an appointment to fill the vacancy caused by the death of Judge Baldwin, the appointee will hold the office of judge of the district court until a successor is elected and qualified. As the successor cannot qualify for any term except that beginning the first Monday in January of 1943, the appointee will hold until that date if the candidate elected then enters upon the duties of the office.

Minnesota Statutes 1941, Section 202.26, reads as follows:

> "No nomination for any office shall be made either by petition or otherwise within 30 days before the time of holding a general election, except nominations to fill a vacancy in a nomination previously made, or to nominate a candidate for an office in which a vacancy has occurred and for which no person is a candidate."

As there are no nominees for the office in question, it is apparent that the candidates therefor may be nominated by petition in accordance with Minnesota Statutes 1941, Section 202.19. As there was no candidate in the primary election for the position held by Judge Baldwin, such nominating petition may be signed by any elector resident within Hennepin County, and should be filed not later than the third Tuesday prior to election day, which is October 13, 1942. Minnesota Statutes 1941, Section 202.27. Petitions for a judicial district office shall be signed by 5% of the entire vote cast in any such district at the last preceding general election, provided that the number of signatures required for any judicial district office shall not exceed 500.

In the matter under consideration, the name of the office should be designated separately on the india tint ballot as one created by vacancy and for a six year term beginning on the first Monday of January, 1943. The names of the candidates nominated by petition therefor should be placed on the ballot in the usual manner.

J. A. A. BURNQUIST,
Attorney General.

October 1, 1942. 184-D

28 f-3

76

District court judges—Vacancy—No election for short term—U. S. Const., 17th Amend., Minn. Const., Art VI, § 10; Minn. Const., Art. VII, § 9; (MS41 § 205.05).

Secretary of State.

Question

Whether filing should be accepted at the primary election for a so-called short term for the office of District Judge, to succeed one of the present judges who was appointed to fill a vacancy. The short term for which the applicant desires to file would begin upon the determination of the result of the general election to be held November 3, 1942, and would end on the first Monday in January, 1943, when a successor elected for the regular term would take office.

Answer

The case is governed by Section 10 of Article 6 of the State Constitution, which reads as follows:

> "In case the office of any judge shall become vacant before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and qualified. And such successor shall be elected at the first annual election that occurs more than thirty days after the vacancy shall have happened."

As far as I can discover, this is the first time the question of a short term has been raised in the case of a District Judgeship. However, by several previous opinions of the Attorney General it has been held that there is no short term in the case of a Probate Judge. This ruling was based on an early decision of the Supreme Court handed down in 1864, Crowell vs. Lambert, 9 Minn. 283 (Gil. 267), in which it was determined that when a Probate Judge is elected at a general election to succeed one appointed to fill a vacancy, the election is for a full new term, not for the unexpired portion of the term in which the vacancy occurred.

The court in that case did not expressly pass upon the question whether the new term of the elected judge would begin immediately after election or

on the first Monday in January following, as in case of a regular term. Section 9 of Article 7 of the State Constitution provides that the official year for the State of Minnesota shall commence on the first Monday in January in each year, and all terms of office shall terminate at that time. The previous opinions of the Attorney General above mentioned took the view that this provision would govern in the case of a Probate Judge elected for a full term after a vacancy as well as in the case of one elected to take office after the expiration of a regular term, there being no provision in the Constitution for an elective term beginning at any other time. The conclusion necessarily followed that when a judge was appointed to fill a vacancy, he would hold office until his elected successor qualified on or after the first Monday in January following, and that there could be no election of a Probate Judge for a short term.

As a matter of fact, this conclusion was in accordance with the understanding and practice which had prevailed without question from the time of the decision of the case of Crowell vs. Lambert in 1864 until 1936, when a United States Senator from Minnesota was elected for the short term following a vacancy, giving rise to the idea that there would likewise be a short term to be filled by election in the case of a judgeship. However, there are some significant differences between the provisions of the State Constitution above quoted relating to the filling of judicial vacancies and the provisions of the United States Constitution governing the filling of a vacancy in the office of United States Senator. As to the latter, the Seventeenth Amendment to the United States Constitution contains the following provision:

> "When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct."

Acting under the authority thus granted, the Minnesota legislature enacted Minnesota Statutes, Section 205.05, reading as follows:

> "Upon failure to choose a senator in congress or upon a vacancy in said office the vacancy shall be filled for the unexpired term at the following biennial state election, provided said vacancy occurs not less than 60 days prior to the date of the primaries for nominating candidates to be voted for at such election, otherwise at the biennial state election next following. Pending such election the governor shall make a temporary appointment to fill the vacancy, and the person so appointed shall serve until the election and qualification of the person duly elected to fill such vacancy."

It is clear that under these provisions of the Federal Constitution and the Minnesota Statutes, when a vacancy occurs in the office of United

States Senator under certain conditions as to time, an election is required to fill the remainder of the unexpired term, whether it be long or short, whereas under the provisions of the State Constitution relating to judicial vacancies an election is not held for the unexpired portion of the term in which the vacancy occurred, but for a full new term.

All things considered, I concur in the conclusion expressed in the previous opinions of this office, to the effect that there is no short term to be filled by election in the case of a vacancy in the office of Probate Judge. The same rule would necessarily apply to a District Judgeship, which is governed by the same provisions of the State Constitution. Accordingly you are advised that a filing for a short term for the office of District Judge in which a vacancy has occurred is not authorized and should not be accepted.

J. A. A. BURNQUIST,
Attorney General.

July 27, 1942. 184-D

77

Supreme Court Justices—Vacancies filled by appointment—Term—Nominations by petition—Ballot—Minn. Const., Art VI, § 10; Minn. Const., Art. VII, § 9; (MS41 § 202.23).

Secretary of State.

Questions

"1. What effect does the vacancy in the office of Associate Justice of the Supreme Court created by the death of Justice Royal A. Stone have upon the nominations made for the office of Justice of the Supreme Court at the primary election September 8, 1942?

"2. Can the name of candidates for the office created by that vacancy be placed upon the ballot by petition?

"3. What effect does the retirement of Justice Andrew Holt as of October 6, 1942, have upon such nominations?"

Answer

1. Justice Stone was one of the four nominees elected at the September 8, 1942, primary for the two six-year terms of Associate Justices beginning on the first Monday of January in 1943. He died on the 13th of this month. A nonpartisan nomination vacancy was thereby created. Ordinarily in such circumstances the person receiving the next highest number of votes for the office involved becomes a candidate in the place of the deceased. Minnesota Statutes 1941, Section 202.23.

That must be the holding with reference to the situation concerning which you inquire unless it be held that the death of Justice Stone elim-

inated one of the above mentioned six-year terms beginning on the first Monday of January, 1943, and created a new term beginning immediately after the next general election.

The only case called to my attention that creates any doubt in the matter is that of Crowell v. Lambert, 9 Minn. 267, decided in 1864. The Supreme Court held in that case that "a person elected judge of probate, upon a vacancy happening, holds for the full constitutional term * * * and not merely for the unexpired portion of his predecessor's term." The opinion further states that the court "looks in vain for any direct authority in the Constitution for electing any judge for a shorter period," and that "there is no fair ground for distinguishing between the judges of probate and the supreme and district judges, so far as regards this question."

From the statements in that decision it appears that the court assumes, although it does not so specifically hold, that the elected judge may enter upon his duties in November immediately after his election; that his full term may begin from that date and that his holding over two months from November to January after expiration of his term and before the beginning of his successor's term "is not so great as to be a fraud upon the constitutional limitation of the term."

However, since the decision in 9 Minn. 267, the Constitution of the State has been amended with respect to the beginning and terminating of terms of office. Article 7, Section 9, which was adopted as a constitutional amendment by the people at the election of 1883, provides:

> "The official year for the State of Minnesota shall commence on the first Monday in January in each year, and all terms of office shall terminate at that time; * * *."

The opinion of Justice Mitchell in the case of State v. Frizzell, 31 Minn. 460, 466, written the first year after the adoption of said amendment, holds:

> "That all judges of the supreme and district courts, whenever elected, are now holding for a term of six years from the first Monday in the January succeeding their election * * *."

By reason of said constitutional amendment and the decisions of the Supreme Court above referred to, it is apparent that the elective term of a Justice of the Supreme Court begins on the first Monday in January after his election and continues for a period of six years from that date and that no provision has been made in the Constitution for an election to fill any unexpired term of a Supreme Court Justice.

However, in Article 6, Section 10, of the State Constitution, provision is made for the filling of a vacancy in the Supreme Court by the Governor. The section so providing reads as follows:

> "In case the office of any judge shall become vacant before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is

elected and qualified. And such successor shall be elected at the first annual election that occurs more than thirty days after the vacancy shall have happened."

By reason of the above quoted Article 7, Section 9, adopted as a constitutional amendment in 1883 and after the decision in 9 Minn. 267, a successor of a Supreme Court Justice elected after the happening of a vacancy cannot assume office until the first Monday in the January following his election. Therefore, if the Governor makes an appointment to fill the present vacancy which occurred more than 30 days before the general election, the appointee may hold the office only until the first Monday of January next succeeding the election.

Therefore, in answer to your first question you are advised that in my opinion the vacancy in the Supreme Court caused by the death of Justice Stone does not create a new elective term beginning immediately after the next general election; that a successor to the late Justice Stone should be elected at the next November general election for a term beginning the first Monday of January, 1943, and that by reason of the vacancy caused by his death the next candidate in number of votes below the four original successful nominees becomes the nominee to fill the nomination vacancy in question.

2. Because of the statutory provision heretofore referred to, that in the event of a vacancy in a nonpartisan nomination, the next highest candidate in number of votes shall be the nominee and in the case now under consideration such a nominee is available, there is now no such vacancy in the nominations for the Supreme Court as will permit the filing by petition of candidates for the two offices to be filled. Your second question is therefore answered in the negative.

3. Your third question pertains to the effect of the retirement of Justice Andrew Holt as of October 6, 1942. As this retirement will take place less than 30 days prior to the general election and his term expires on the first Monday in January, 1943, the retirement of Justice Holt on the date you have mentioned will have no effect on the nominations made at the last primary election for the term beginning at the expiration of the one for which he was elected and will not permit the nomination by petition of a candidate for the unexpired portion of his term.

However, on October 6, 1942, there will be a vacancy in the Supreme Court by reason of Justice Holt's retirement that may be filled by the Governor. Such appointment if made will entitle such appointee to hold the office until the first Monday in January, 1943.

J. A. A. BURNQUIST,
Attorney General.

September 21, 1942. 184-D

NOMINATION

78

Party Candidates—By petition where regular nominations fail for lack of required vote—Voters at primary may not sign petition if other candidates for same office were nominated—May sign if no nominations were made at primary—Place and time of filing petition—Party designation of candidates—(MS41 §§ 200.08, 202.19, 202.20, 202.21, 202.22, 202.23, 202.24, 202.25, 202.26, 202.27, 205.72).

Secretary of State.

Facts

The Democratic candidates for representatives in Congress failed to receive enough votes for a regular nomination at the recent primary election, as required by Minnesota Statutes 1941, Section 202.24 (Mason's Supplement 1940, Section 601-3(3)e).

Question

1. Is a voter who voted the Democratic Party ticket for the office of Representative in Congress at the September 8, 1942, Primary Election now eligible or qualified to sign a nominating petition of candidate for Representative in Congress to appear on the 1942 General Election ballot?

Answer

Minnesota Statutes 1941, Section 202.21 (Mason's Supplement 1940, Section 601-3(3)b) provides:

> "No person who has voted at a primary shall be eligible as a petitioner for any nomination to an office for which nominees were voted upon at such primary."

Under this provision, if in a given congressional district one or more political party candidates for representative in Congress were voted upon and nominated at the primary election, every person who voted at that primary, whether he voted for such a nominee or not, is disqualified from signing a petition for the nomination of any other candidate for representative in Congress. If no nominations for representative in Congress were made at the primary election in the district, persons who voted at the primary are free to sign such a petition.

The fact that no nominations for Congress were made at the primary on the Democratic ticket because of failure to poll the requisite vote does not make the persons who voted that ticket eligible to sign a nominating petition. They are none the less disqualified from signing a petition if a nomination for Congress was made at the primary in some other party column. The language of the law is plain. It makes no exception of such voters.

That no such exception was intended is indicated by the fact that Section 202.24, above mentioned, expressly provides that candidates of the party failing to receive the requisite vote at the primary shall be eligible for nomination by petition, thus expressly excepting such candidates from the effect of the provisions of Minnesota Statutes 1941, Section 202.19 (Mason's Supplement 1940, Section 601-3(3)), prohibiting generally the nomination by petition of persons who were candidates at the primary for the same office. However, Section 202.24 does not remove the bar of Section 202.21, above quoted, against the signing of petitions by persons who voted at a primary where nominations for the office were made. If the legislature had intended to remove that bar it would have said so in express language, as it did with respect to the candidates.

Again, in Minnesota Statutes 1941, Section 202.23 (Mason's Supplement 1940, Section 601-3(3)d), relating to the filling of vacancies occurring after nominations have been made, it is expressly provided that in certain cases voters of political parties who participated in the primary shall be eligible to sign nominating petitions. That provision has no direct application to the present case, but it furnishes another instance of an express exception precluding exceptions by implication, and making it clear that the general provision disqualifying primary voters from signing nominating petitions must be applied in all cases except as otherwise expressly provided.

The foregoing conclusions are in accordance with previous opinions of the Attorney General of long standing. See 1912 Report No. 300, 1918 Report No. 285, and 1922 Report No. 268 (also found in Attorney General's Opinions on Elections, 1928 Edition, Nos. 146, 147, and 144).

In opinion No. 300, 1912 Report, above cited, the writer said:

> "The evident purpose of this statute is to make it possible to rely upon the records of the primary election to determine whether the petitioner has disqualified himself from participating in any further nomination of candidates. The statute provides that the register of voters shall indicate whether a person whose name appears there has voted at the primary or not. Such register does not indicate whether the voter obtained the ballot of one party or of another, or whether the ballot which he voted was a blank in whole or in part. The statute disqualifies a voter as a petitioner not because he has voted to nominate a candidate for that particular office, but because he has participated in the primary election at which a candidate for that office was nominated, and in which nomination he may have participated."

The statutory provision in question is the same as when this opinion was written. It is clear that the above quoted statement is a correct interpretation of the law, and that it applies in the present case, even though no primary nominations were made on the Democratic ticket.

It should be noted that the provision of Section 202.21 under consideration disqualifies primary voters from signing nominating petitions only for an office for which nominees were voted upon at the primary. As before

stated, if no nominations for representative in Congress were made at the primary in a particular district, persons who voted at that primary would be free to sign nominating petitions for the office. The purpose of the law is to prevent voters from taking part in making more than one nomination, and to that end it prohibits those who might have participated in a nomination at the primary (whether they actually did so or not) from signing nominating petitions. However, where no nomination was made at the primary the prohibition obviously does not apply. Hence, in any congressional district where there was no contest for representative in Congress at the primary except for the Democratic nomination, and where such nomination was abortive for lack of the required number of votes, all persons who voted at the primary are eligible to sign nominating petitions for that office. The fact that a person voted for a Democratic candidate would not disqualify him from signing a petition, because no such candidate became a nominee within the meaning of the statute.

In such case the language, "that I did not vote at the preceding primary election," should be omitted from the oath to be taken by the signers of nominating petitions prescribed by Minnesota Statutes 1941, Section 202.22 (Mason's Supplement 1940, Section 601-3(3)c). However, such omission is not permissible in a district where the Democratic nomination for Congress was nullified through shortage of votes but where there was a nomination after a primary contest on either or both of the other party tickets. In that case, as before pointed out, the law clearly disqualifies all those who voted at the primary from signing any nominating petition for a candidate for representative in Congress, because, for all that appears upon the election registers or poll lists, they might have participated in making a nomination.

Question

2. Is such a nominating petition for the office of Representative in Congress to be filed with the Secretary of State or with the County Auditor of the county wherein the candidate resides?

Answer

Such a petition is to be filed with the auditor of the county where the candidate resides. Minnesota Statutes 1941, Sections 202.25, 202.27 (Mason's Supplement 1940, Sections 601-3(3)f, 601-3(3)h). If there is more than one county in the district, enough copies of the petition for the other counties should be prepared and presented to the auditor with whom the original is filed, to be certified and forwarded as provided by Section 202.25. It is incumbent upon the candidates or the petitioners, not upon the auditor with whom the original petition is filed, to see that the necessary copies are filed in the other counties of the district.

Under Section 202.26 (Mason's Supplement 1940, Section 601-3(3)g), all such petitions, both originals and copies, must be filed with the proper county auditors more than thirty days before the general election. This provision has been held to be controlling over the provision of Section 202.27,

that such petitions are to be filed with the county auditor on or before the third Tuesday preceding the day of election. 1918 Attorney General's Report, Opinion No. 287 (1928 Election Opinions, No. 137); 1934 Attorney General's Report, Opinion No. 386; Johnson v. Holm, 198 Minn. 192, 269 N. W. 405. Since the general election this year falls on November 3, the last day for filing such petitions will be Saturday, October 3.*

Question

3. May the certificate of nomination of a candidate for Representative in Congress carry the political appellation "Republican," "Farmer-Labor," "Democrat"?

Answer

Minnesota Statutes 1941, Section 202.20 (Mason's Supplement 1940, Section 601-3(3)a), provides that a certificate of nomination (that is, a petition) shall state, among other things, the party or political principle which the candidate represents. In the case of a petition for the nomination of a Democratic candidate for Congress in a district where there were candidates on the Democratic ticket at the primary election but where no nomination was made because of insufficiency of votes, it is proper to designate the candidate as a Democrat, assuming that he belongs to that party. This is clearly authorized by the express provision of Section 202.24, "* * * such candidate of such political party may be nominated by petition * * *."

In the absence of any provision of law prescribing a method for giving priority to a particular petition or otherwise limiting the number of petitions which may be filed in such cases, it must be assumed that any number of petitions designating the candidates as Democrats may be filed in a given district, provided they bear the required number of signatures.

However, the fact that Democratic candidates may be nominated by petition in a case where no nomination was made at the primary on account of a shortage of votes does not open the door for petitions designating candidates of other established political parties, unless they are in the same situation. Under Minnesota Statutes 1941, Section 205.72 (Mason's Supplement 1940, Section 601-6(7)1), any party having regular standing as defined by Minnesota Statutes 1941, Section 200.08 (Mason's Supplement

*NOTE. State ex rel. Gallagher v. Erickson, 6 N. W. 2d 43 (decided Oct. 16, 1942, after the foregoing opinion was written), held that the requirement for filing more than 30 days before election under Section 202.26 applies only to the original petition filed in the county of the candidate's residence, and that the certified copies may be filed in the other counties of the district on or before the third Tuesday preceding election under Section 202.27. This overrules the contrary conclusion stated in the foregoing opinion and the previous opinions cited.

1940, Section 601-1(1)ee), is entitled to the exclusive use of its party name to designate its candidates who are nominated in the regular way prescribed by law. Both the Republican and Farmer-Labor parties now have such standing. Hence in any district where those parties respectively have candidates for Congress who were nominated at the primary or who filed without opposition, the names of those parties may not be used to designate candidates in nominating petitions.

No question is presented as to any particular case involving the use of petitions to nominate Republican or Farmer-Labor candidates for Congress at the coming general election, and nothing in this opinion should be construed as pertaining thereto.

CHESTER S. WILSON,
Deputy Attorney General.

September 28, 1942. 28-B-3

79

Party Candidates—By petition where regular nominations fail for lack of required vote. Filing certified copies of petition—Candidate not entitled to have name on ballot when certified copies of petition have not been filed in proper time. (MS 41, §§ 20219, 202.24.)

Hennepin County Attorney.

Questions

"1. By reason of the fact that neither candidate was nominated at the primary election by their respective failure to poll the requisite number of votes and that subsequent thereto neither candidate filed a nominating petition, was William J. Gallagher eligible for the Democratic nomination by petition as a candidate for Representative in Congress for the Third Congressional District?

"2. Assuming that William J. Gallagher was eligible for the Democratic nomination, did the Auditor of Hennepin County properly accept for filing the original petition and should he now place the candidate's name upon the india tint ballots in that county?

"3. Assuming that the Auditor of Hennepin County properly filed the original petition and is now required to place the candidate's name on the india tint ballots in Hennepin County, should the Auditor of Hennepin County certify copies of the original petition if now presented to him after the expiration date for filing the petition, i.e. October 3, 1942, and if certified, should the Auditors of the other counties comprising the Third Congressional District accept them for filing and place the candidate's name on the india tint ballots in their respective counties?"

Answers

You are advised that in accordance with the opinion of this office, addressed to the Honorable Mike Holm, Secretary of State, and dated September 28, 1942, your first question is answered in the affirmative.

The provision of Minnesota Statutes 1941, Section 202.24, relevant to the situation, when a candidate fails to receive a sufficient number of votes to be nominated, reads as follows:

> "* * * in such case, such candidates of such political party may be nominated by petition as provided by sections 202.19 to 202.22, and the candidates of any such political party failing to receive such ten per cent of such vote shall be eligible for nomination under the terms of this provision * * *."

It is our opinion that in the case under consideration, the words "such candidates" refer to Democratic candidates. Such candidates may file by petition, as there was no nomination by the Democratic Party at the primary election, and are not limited to those filing for the nomination in the primary.

Ordinarily, by reason of the provisions in Minnesota Statutes 1941, Section 202.19, "a person who has been a candidate for an office at the primary election in any year shall not be eligible for nomination for the same office in that year by petition or certificate under the provisions of this section." However, under the provision in Section 202.24, in the situation now under consideration "the candidates of any such political party failing to receive such ten per cent of such vote shall be eligible for nomination under the terms of this provision," thus adding those candidates to the number of other Democrats who may file by petition.

To limit the number of Democrats who may file by petition in such circumstances to only those who participated in the primary would be a forced construction which the phraseology heretofore quoted does not justify. Such construction would violate the purpose of the act which we submit is to prevent the nomination by a meager minority of the party and to discourage the members of one party voting for candidates of another party. If, for example, only the one receiving the highest vote may file by petition his nomination would be assured by filing such a petition, and the purpose of the act would thereby be annulled. The intention of the election laws generally is, of course, to permit only one nominee for each political party, but here where a party has failed to cast a vote of ten per cent for any of its candidates as required by statute, Section 202.24 clearly creates a specific exception to the general rule. We, therefore, hold under such conditions that any Democrat may file by petition as therein provided.

In answer to your second question, although the auditor of Hennepin County properly accepted the filing under consideration on October 3, 1942, you are advised that as it appears from the facts disclosed by you that neither the petitioners nor the candidate William J. Gallagher have filed certified copies of the petition with any auditor of any county in the Third Congressional District, the law as to the time of filing has not been complied with and said William J. Gallagher is, therefore, not entitled to have his name placed on any general election ballot in Hennepin County, or any other county of the Third Congressional District.

An opinion of our predecessors, dated October 15, 1934, holds:

> "We have heretofore held that it is the duty of such petitioner by nomination to prepare such 'certified copies' and to file the same **'within**

the proper time' with the auditor of each such county. In other words, the duty of so preparing such certified copies and of filing the same is on the petitioner and not on the county auditor. We have also heretofore held that the clause, in said Section 346, 'one of which certified copies shall be filed **within the proper time with the auditor of each such county,'** contemplates that such certified copy must be filed with the County Auditor of each such county in such congressional district at least thirty days before the time of holding the general election.

"We are of the opinion, therefore, that such nomination petitions of candidates for congressional office must be filed not only with the County Auditor of the county where the candidate resides not later than thirty days preceding the day of election, but that certified copies of such petition must also be filed with the County Auditor of each of the other counties within such congressional district not later than thirty days preceding the day of election in order to entitle such candidate by nomination petition to have his name placed by the County Auditor on the blue ballots in each of such counties, including the county of residence of such candidate by nomination petition."

On October 14, 1938, 235-1938 report, the author of the above quoted opinion came to the conclusion contained in the following quotation from his opinion of that date:

"The time within which such a certificate of nomination must be filed to be placed on the now so-called India tint ballot is governed by Section 348, Mason's Minnesota Statutes of 1927, as reenacted in Chapter 270, Laws of 1937, rather than by Section 508. Prior to the enactment of said Chapter 270, Laws of 1937, we had held that Section 508 was controlling. This because of the fact that prior to the enactment of said Chapter 270 Section 508 was a later enactment. See opinion 386, Attorney General's Biennial Report for 1934. However, as indicated, Section 348 as amended by said Chapter 270, Laws of 1937, is now the last enactment by the legislature and in our opinion said Section 348 as so amended by the 1937 legislature is now controlling. It will be noted that said Section 348, as so amended, expressly provides that certificates of nomination shall be filed with 'the secretary of state, of the names to be placed on the white ballots, on or before the fifth Saturday preceding the day of election; **with the county auditor, to be placed upon the india tint ballots,** on or before the third Tuesday preceding the day **of election.'** "

The legislature in its 1939 session re-enacted both of said provisions, incorporating them in the so-called Election Code. However, if such re-enactment had not occurred, the re-enactment or amendment of said Section 348 (Minnesota Statutes 1941, Section 202.27) in 1937, after the enactment of Section 508 did not, in our opinion, repeal Section 508, for, as held in Nelson v. County of Itasca, 131 Minn. 478, page 481:

"A later law which is merely a re-enactment of a former does not repeal an intermediate act which qualifies or limits the first one, but such

intermediate act will be deemed to remain in force and to qualify or modify the new act in the same manner as it did the first."

See also Minnesota Statutes 1941, Section 645.38.

Your third question is, in effect, answered by what has been heretofore said. As the petitioners did not file the certified copies of their petition with the auditors of the different counties within the proper time required by law, that is on or before October 3, 1942, the auditors of the other counties of the Third Congressional District cannot at this date legally accept certified copies of the petition.

J. A. A. BURNQUIST,
Attorney General.

October 8, 1942. 28-B-3

NOTE. State ex rel. Gallagher v. Erickson, 6 N. W. 2d 43 (decided Oct. 16, 1942, after the foregoing opinion was written), held that the requirement for filing more than 30 days before election under Section 202.26 applies only to the original petition filed in the county of the candidate's residence, and that the certified copies may be filed in the other counties of the district on or before the third Tuesday preceding election under Section 202.27. This overrules the contrary conclusion stated in the foregoing opinion and the previous opinions cited.

80

Party—Vote required—L 39, C 345, Part 3, Art. 3, § 6; (MS41 § 202.24).
Secretary of State.

Opinion

Relative to the status of nominees who may not have received a sufficient number of votes to be nominated by reason of Laws 1939, Chapter 345, Part 3, Art. 3, Section 6, and also if we adhere to former opinions of this office construing the law re-enacted in said section.

The statutory provision relative to the number of votes required for a party nomination was first enacted in Laws of Special Session 1912, Chapter 2, Section 11, retained in the amendment of Election Laws in 1915 and re-enacted in Laws 1939.

The part of the section pertinent to your question reads as follows:

"* * * provided, however, that if the number of votes cast for any candidate of any political party for any office at such primary election shall aggregate the number of votes equal to ten per cent or more of the average vote cast for state officers of that political party at the last general election in the territory within which such candidates are to be voted for, then all candidates of that political party shall be the nominees of such political party; otherwise no candidate of that political party within that territory shall be nominated, and

in such case, such candidates of such political party may be nominated by petition as provided by sections 1 to 4, inclusive, of this chapter, and the candidates of any such political party failing to receive such ten per cent of such vote shall be eligible for nomination under the terms of this provision. The term 'state officers,' as used in this section for the purpose of computing the average vote to determine the ten per cent vote as above provided, is hereby defined to be the governor, lieutenant governor, secretary of state, state treasurer, and attorney general."

On August 26, 1912, former Attorney General Lyndon A. Smith rendered the following opinion relative to the law in question when first enacted:

'The construction of section 11 of the new primary law (§ 314 G.S. 1923) which I have given is that it is any particular party, not any particular candidate, that must get ten per cent of the votes. If the number of votes of the candidate (of any party) receiving the highest number of votes, is less than ten per cent of the party strength, then the candidates of that party are not nominated nor defeated for nomination and may be nominated by petition. If the candidate or candidates receiving the highest number of votes has a number in excess of the ten per cent of party strength, then the candidates of that party having a plurality are nominated, whatever may be their votes."

The following is an excerpt of an opinion rendered by William J. Stevenson, Assistant Attorney General, on September 11, 1912:

"The new primary election law contains a new provision * * * that if the number of votes cast for the highest candidate of any party at a primary do not aggregate ten per cent of the average vote cast by that party for state officers at the last general election within that territory, then none of the candidates of such party is nominated. In other words, the highest must receive ten per cent of such average vote cast for state officers in order to make it a primary election of that party. Therefore, if members of the minority party within a county see fit by one means or another to obtain and vote the ballot of the opposite party, thereby abandoning the support of the candidates of their own party, their own party may find itself without candidates."

There appears to be no change in the law since its original enactment that will justify a reversal of the foregoing opinions of this office. You are therefore advised that no certificate of nomination may be issued legally to candidates who have not received the number of votes in the primary election required by the above quoted statutory provision.

J. A. A. BURNQUIST,
Attorney General.

September 21, 1942. 672-B-8

POLLS

81

Peace Officers—Attending polling place—Compensation—L 1885, C 145, § 41; (MS41 §§ 365.07, 412.13).

Carver County Attorney.

Opinion

Special police officers appointed by the judges of election are to receive 20c for each hour of service rendered by direction of judges. Minnesota Statutes 1941, Section 200.35-5. The regular peace officer who attends to keep quiet and order at a polling place during a general election should be paid such compensation as may be fixed by the village council, pursuant to Minnesota Statutes 1941, Section 412.13. This statute allows village constables for special services to the village such compensation as the council may fix.

The section referred to is a part of the village law of 1905. However, I think it is made applicable to 1885 villages by Laws 1885, Chapter 145, Section 41, which provides that constables of 1885 villages shall receive the same compensation as constables elected elsewhere in the state are allowed under general statutes of the state then (1885) or thereafter in force.

The compensation of township constables attending at an election should be fixed by the town board. Such expense would come under the head of "Contingent expenses necessarily incurred for the use and benefit of the town;" provided for in Section 365.07, Minnesota Statutes 1941.

There is no requirement that the compensation allowed peace officers at election shall be uniform throughout the county.

RALPH A. STONE,
Assistant Attorney General.

December 14, 1942. 185a-5

VOTERS

82

Insane — Discharged from hospital — Right to vote — Minn. Const., Art. VII, § 2.

Winona County Attorney.

Opinion

"Section 2 of Article 7 of the Constitution of the State of Minnesota provides for those persons who are entitled to vote. Assume the situation where 'A' has been committed by Probate Court in the State of Minnesota to a state hospital for the insane on the grounds of mental incompetency. 'A' has been discharged by the superintendent of said

hospital. There has been no guardianship established for his person nor any proceedings instituted for restoration to capacity. May 'A' vote in any election of the state?"

The section and article of the Constitution which you mention renders ineligible to vote any person "who may be non compos mentis or insane." Whether a person is sane or insane is a question of fact.

A person who has been adjudged insane and committed to an insane hospital, though at liberty on parole but not discharged, is presumed to be mentally incompetent to make a will. The presumption is not conclusive and may be rebutted by showing that the derangement of mind was not general, but limited, and had no necessary reference to the subject matter of the will. Woodville v. Morrill, 130 Minn. 92.

> "When insanity of a permanent type is once shown, it is presumed to continue until it appears that the person has again become sane. But this presumption only applies to habitual insanity, which has continued so long as to raise a presumption that it is permanent. Temporary insanity, or temporary delusions or aberrations, are not presumed to continue, and evidence of the same, standing alone, is no evidence that the person is insane at a later period."

State v. Hayward, 62 Minn. 474.

In your statement of facts it is shown that the superintendent discharged the patient. The only reason for discharging him would be that he was no longer of unsound mind. He could be paroled while of unsound mind if under proper supervision. The fact that he was discharged is evidence to be considered in determining his mental condition. The superintendent of the hospital is an expert on the subject of insanity. It is not to be presumed that the superintendent would consent to the discharge of an insane person committed to his keeping because of his insanity. There are circumstances under which an insane person might be released if the person were harmless.

Nevertheless the question is one of fact not to be determined by the determination of a single circumstance. I believe that a person might be insane and not entitled to vote even though he had been discharged from a state hospital. On the other hand he might be entitled to vote if he understood the nature of his act. That is the essential test.

CHARLES E. HOUSTON,
Assistant Attorney General.

October 22, 1942. 490-F

VOTING MACHINES

83

Use of at consolidated city and school district election under facts stated—M40 §§ 601-1(1)j, 601-8(1), 601-1(1)ii, 2807-15; (MS41 §§ 200.02, 200.15, 200.16, 209.01).

Commissioner of Education.

Facts

It appears that Laws 1933, Chapter 117, as amended by Laws 1935, Chapter 236, same being Mason's Supplement 1940, Section 2807-15, et seq., provide that where the boundaries of an independent school district and a city of the first class coincide, the annual school election shall be held on the first Tuesday in April—which is the day of the municipal election in Duluth—and also provide that the cost of the election shall be apportioned between the city and the school district as their respective governing bodies may agree.

In other words, under authority of this act, two different elections, to-wit, the school district election and the city election, may be held at the same place and at the same time. This has worked out satisfactorily in the past.

It further appears that the proper city authorities in Duluth have now provided for the use of voting machines at the municipal election, and the school board of the independent district whose boundaries coincide with those of the city has now directed that voting machines be used at the annual school election.

Question

Whether or not the board of education is correct in this procedure.

Answer

It is clear from a reading of the laws cited that the legislature intended to authorize the holding of the school election and the city election in Duluth at the same places and at the same time. The advantages of such a plan are obvious.

The voting machine act presents difficulties. Mason's Supplement 1940, Section 601-8(1), et seq., found in the election law compilation as Section 209.01, provides that the governing body of "any municipal corporation" may provide for the use of voting machines. "Municipal corporation" is defined by Mason's Supplement 1940, Section 601-1(1)j (Sec. 200.16, M. E. L.), as including any "municipality, county or town," and "municipality" is defined by Mason's Supplement 1940, Section 601-1(1)ii (Section 200.15, M. E. L.), as meaning, "any city, village or borough." It is further provided by Mason's Supplement 1940, Section 601-1(1)a, that "election" shall include any election, "except those held in a school district."

Bearing in mind that all the sections just cited were derived from one act, to-wit, Laws 1939, chapter 345, it seems quite clear the legislature did not intend to permit a school district acting independently to provide for the use of voting machines at school elections.

However, the situation under consideration is different in that a school election is being held coincidentally with a municipal election. To hold under these circumstances the school district was disqualified from making any arrangement with the city authorities to use its voting machines would defeat one of the main purposes of Mason's Supplement 1940, section 2807-15.

Inasmuch as the city has duly provided for the use of voting machines at the city election, and for a further reason that this particular school district is expressly authorized by law to hold its election, "at the same time and place **and in the same manner**" as the election of city officials, it would seem that the legislative purpose would be better carried out by a holding that if the city has provided for the use of voting machines at its election, that the school board in question may make arrangements with the city to use those voting machines. You are so advised.

ROLLIN L. SMITH,
Special Assistant Attorney General.

March 15, 1941. 518

EXTRADITION

INTERSTATE

84

Compact as to parolees—Compact does not cover parolee who has fled from paroling state.

State Prison.

Facts

On September 24, 1937, this state, acting through its then Governor, signed a compact relating to the apprehension of parolees and their return from one state to another. This pact has been signed by some thirty states. This office has heretofore rendered an opinion to the effect that it covers and applies to a parolee who has been allowed to go into another state with consent of both the receiving and sending state.

Question

With reference thereto you now inquire whether this compact covers and applies to a parolee who did not leave the state where he received his parole with the consent of that state, but who has on the contrary fled from the state wherein he was convicted and paroled.

Opinion

Paragraph (1) of the compact reads as follows:

"(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 person's 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."

It will thus be observed that the words "sending state" as used in this compact refer to a state which has **permitted** its parolee to reside in another state, and that "receiving state" within the meaning and definition of this first paragraph is one which receives such a permitted parolee. That these words are used in the sense just mentioned throughout the compact will appear from the reading of the entire document. For instance, in paragraph (2) it is provided

"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 will be governed by the same standards that prevail for its own probationers and parolees."

This paragraph plainly indicates that the "receiving state" therein referred to is only one in which a parolee has been located pursuant to paragraph (1) above quoted.

Paragraph (3) of the compact reads as follows:

"(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."

By the use of the words "duly accredited officers of the sending state" it is intended to refer to the officers of such a state as is referred to in paragraph (1), that is, a state which permitted the parolee to reside in another state; and by the same token the words "receiving state" as used in paragraph (3) refer to states within whose boundaries a parolee from another state has been received pursuant to paragraph (1). All legal requirements necessary to obtain extradition of fugitives from justice are expressly waived "as to such persons"; that is, as to persons who have been permitted to leave the state where the crime was committed and by which the parole was given.

Therefore I hold that it is only parolees who have been permitted by the paroling state to live in another state whom the duly accredited officers of the paroling state may apprehend and retake without extradition.

There is a further reason for this conclusion: A person who is permitted by the paroling state to leave its jurisdiction and reside in another state is not a fugitive from justice when within the latter state he violates the terms of his parole; that is, he is not such a fugitive from justice within the ordinary meaning of the word "fugitive." Therefore, in such cases it has been claimed that such a one is not subject to extradition and can not be returned to the paroling state against his will; but there may be just as valid or greater reason for revoking parole and returning a convict to confinement in the case of a man who leaves the state with permission, and who then in a foreign state violates his parole as there is in the case of a man who violates his parole in the paroling state and then flees therefrom. In the former case extradition might not be obtainable although it is in the latter case. It is not unreasonable to say that it was to take care of such cases where extradition might be denied because the man whose return was sought on extradition was not a fugitive from justice that the compact was adopted.

As I view the matter, any parolee who fled from the state which granted his parole could be returned by extradition proceedings. On the contrary, a parolee who left the state where the crime had been committed

with consent would not be a fugitive from justice, and as to him there might be difficulty in securing his return on extradition. The position might well be maintained that it was to cover these latter cases that the compact was entered into, and that is the reason it applies only to parolees who enter the foreign state by consent.

Of course no opinion can be rendered by this office which would be binding or effective in any other state, and each state has the right and duty to interpret the compact for itself, hence you may find some states which will act in accordance with this opinion and others which will not.

RALPH A. STONE,
Special Assistant Attorney General.

June 15, 1942. 193-a-4

FOOD

ADULTERATION

85

Laws—Constitutionality of act—Constitutionality of regulation—Delegation of authority—Oysters—Liquid content—M27 § 3788, et seq.

Blue Earth County Attorney.

Facts

A case is being prosecuted under the Pure Food Law of this state. The prosecution has to do with the sale of adulterated oysters. It is alleged in the complaint that the oysters contained more than 10% of liquid. This is contrary to a regulation set up by the Dairy and Food Commissioner.

The points raised in the case are the constitutionality of the law itself on the ground that the delegation of authority is too indefinite; also, the regulation is attacked upon the ground that the percentage of moisture fixed by the commissioner is arbitrary and that the words "proper methods" fixed in the regulation are indefinite.

The Constitutionality of the Act.

The point made is that the act (the Minnesota Dairy and Food Act, Mason's Minn. Statutes of 1927, Sections 3788, et seq.) is unconstitutional because the delegation of power to the commissioner is "indefinite."

It would be impossible at this time to brief this point fully but I call attention briefly to some of the rules pronounced by the courts and which must be followed to render constitutional the delegation to an administrative body or officer of power to make rules and regulations. Any discussion of the subject should begin with the case of

Wichita R. & L. Co. v. Public Utilities Commission, 260 U. S. 48, 67 L. Ed. 124.

In that case, Chief Justice Taft, writing for the court, said:

> "The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the State. * * * In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its functions. It is a wholesome principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action."

Two of the leading cases where laws delegating authority were held unconstitutional because of the failure to set up any definite standards limiting and defining the powers of the administrative agency are:

Panama Refining Co. v. Ryan, 293 U. S. 388, 79 L. Ed. 446.

In that case a delegation of power to the President of the United States to prohibit the transportation in interstate and foreign commerce of petroleum and petroleum products was held void because the power sought to be delegated was legislative power and nowhere in the statute was there found any policy or standard to guide or limit the President when acting under such delegation. And in the case of

Schechter Poultry Corp. v. U. S. 295 U. S. 495,

the NRA law was held unconstitutional for the same reason, the court holding the congress may leave to selected instrumentalities the making of subordinate rules within prescribed limits, and the determination of facts as to which the policy, as declared by congress, is to apply; but it must itself lay down the policies and establish standards.

The Supreme Court of the United States has, however, gone a long way in sustaining the delegation of powers to administrative boards, and if a standard is set up in the law, it is proper to delegate to a board or officer the determination of what complies with that standard and to make rules as to what will be a compliance with the standard so set up.

Our statute has set up standards. See Section 3791, Mason's Minnesota Statutes 1927, where the standards for food are prescribed.

So where the standard is set up, there is no constitutional objection to delegating to the board or officer the power to determine what is a sufficient compliance with the standard and to make rules and regulations as to what shall be construed a compliance with the standards.

For example, the law enacts that telephone rates in the State of Minnesota shall be just and reasonable. No other standard whatever is set up. But under this power the Railroad and Warehouse Commission has authority to determine the facts and declare what is a just and reasonable rate.

The Minnesota act is more definite than the federal act. See U. S. C. A., 1941 Pocket Part, Title 21, Section 331 and Section 341. By Section 331 the adulteration of food is prohibited and by Section 341 the administrator is authorized to promulgate and regulate, declaring what is a reasonable standard of quality to constitute non-adulteration.

I call your attention to certain other cases:

Red Sea Oil Manufacturing Co. v. North Carolina Board of Agriculture, 222 U. S. 380, 56 L. Ed. 240.

Legislative power is not unconstitutionally delegated to the Board of Agriculture by the provisions of the North Carolina Oil Inspection Act, which requires that illuminating oils offered for sale in the state "be safe, pure and afford a satisfactory light," leaving it to the board to determine what oils will measure up to these standards.

N. Y. Central Securities Corp. v. U. S. 287 U. S. 12, 77 L. Ed. 138.

This case held that there was no constitutional delegation of power by reason of uncertainty involved in the provisions of Section 5, subd. 2 of the Interstate Commerce Act, empowering the Interstate Commerce Commission to authorize the acquisition of control of one carrier by another if of the opinion that such acquisition of control will be "in the public interest." Here the only standard set up for guidance of the commission was "the public interest" and it was left to the commission to determine what was in the public interest.

U. S. v. Shreveport Grain & Elevator Co. 278 U. S. 77, 77 L. Ed. 175.

While the legislative power of congress cannot be delegated, the congress may declare its will and after fixing a primary standard, devolve upon administrative officers the power to fill up the detail by prescribing administrative rules and regulations.

See note on "Permissible limit of delegation of legislative power" in 79 L. Ed. 474, from which the following excerpts are taken.

In the case of

Butterfield v. Stranahan, 192 U. S. 470, 48 L. Ed. 525, 24 S. C. 349, an act of congress forbidding the importation of inferior teas, which authorized the Secretary of the Treasury to establish standards of purity, quality and fitness for consumption, was held not to be an unconstitutional delegation of legislative power to the Secretary, the court stating:

> "The claim that the statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported and therefore in effect vests that officer with legislative power is without merit. We are of the opinion that the statute expresses the purpose to exclude the lower grades of tea, whether demonstrably of inferior purity or unfit for consumption. This in effect was the fixing of a primary standard and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in

> the statute. Congress legislated upon the subject as far as was reasonably practical, and from the necessities of the case was compelled to leave to executive officers the duty of bringing about the result pointed out in the statute. To deny the power of congress to delegate such a duty would in effect amount to declaring that the primary power vested in congress to regulate foreign commerce could not be efficaciously exerted."

Polinsky v. People, 73 N. Y. 65.

The legislature may constitutionally confer upon boards of health the power to enact ordinances to prevent the sale of adulterated milk, which shall have the force of law within their jurisdiction.

Johnson v. State, 99 Fla. 1311, 128 S. 853.

A Florida act, authorizing the Commissioner of Agriculture to make such rules and regulations as he deemed expedient for carrying out and enforcing the provisions of the statute providing for the inspection of fruit for the purpose of protecting the fruit industry from the sale of unripe and diseased fruit, was held to be a valid and constitutional delegation of legislative power.

I will cite one further case.

Napier v. Atlantic Coast Line, 272 U. S. 605, 71 L. Ed. 432.

This case has to do with the Federal Boiler Inspection Act. That act provides:

> "That it shall be unlawful for any carrier to use * * * any locomotive unless said locomotive, its boiler, tender and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of this Act and are liable to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

It will be noted that the only standards here set up are "proper condition and safe to operate" and "without unnecessary peril to life or limb" and "able to withstand such test or tests as may be prescribed in the rules and regulations" to be adopted by the commission. This was held to be a valid law, which occupied the field to the exclusion of state requirements.

Under the authority of this law, the commission had gone so far as to prescribe by rule the necessity for steam gauges, safety valves, water glass and gauge cocks, lubricator glasses, types of ash pans, sanding apparatus, certain kinds of headlights and cab lights, and various other devices, none of which was specified in the law itself.

I am strongly of the opinion that the law is constitutional as against this particular objection.

The Constitutionality of the Rule.

As I understand your letter, the objection to the constitutionality of the rule is that the words "proper standards" are indefinite as not specifying any particular method for determining the permissible liquid content of oysters. I don't consider that this objection has very much merit in view of the fact that there are only two methods of determining the liquid content. One is by weight and the other is by volume. If the use of either of these methods gives a liquid content of less than 10%, no crime has been committed under this rule. The burden rests upon the state to prove beyond a reasonable doubt that the oysters contain more than 10% liquid according to both of these methods. Nothing is left to the discretion of the inspectors. They must be able to prove that neither one of the "proper methods" would show less than 10% liquid.

I am unable to express an opinion as to the reasonableness of the requirement of not more than 10% liquid because that must depend upon the facts which may be shown upon the trial. The evidence should include a showing as to what is the usual and ordinary liquid content of unadulterated oysters and the other facts that may be pertinent to the question of what would be a reasonable liquid content.

The Federal Laws.

You asked for a citation of the federal laws relating to pure food. The first act was the Food and Drugs Act of 1906, Chapter 3915, 34 Stat. 768, et seq.—also appearing in U. S. C. A., Title 21, Sections 1-15. You will note that the only definitions of adulterated foods contained in this act are found in Section 8, Title 21, U. S. C. A., and in the case of food, they are outlined briefly as follows:

"Injurious mixtures —

First, if any substance has been mixed and packed with it so as to reduce or lower or in reality affect its quality or strength."

"Substitutes —

Second, if any substance has been or is substituted wholly or in part for the article."

"Adulterated constituent abstracted —

Third, if any valuable constituent of the article has been in whole or in part abstracted, damaged or inferiority concealed."

Fourth — * * *"

"Deleterious ingredients —

Fifth — * * *"

The law above cited was repealed on June 25, 1938, by the present act adopted on that date and known as the "Federal Food, Drug and Narcotics Act," being the Act of June 25, 1938, C. 675, Stat. 1040, et seq., appearing in U. S. C. A. 1941 Pocket Part, Title 21, Sections 301, et seq.

In Section 331 of the law last cited above are found the prohibited acts, which includes "the adulteration of any food * * * in interstate commerce."

In Section 341, Title 21, U. S. C. A. Pocket Part 1941 (54 Stat. 1237) are found certain "definitions and standards for food" wherein it is provided "whenever in the judgment of the administrator such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food * * * a reasonable standard of quality."

RALPH A. STONE,
Special Assistant Attorney General.

February 18, 1942. 135-B-1

INSURANCE

MEDICAL AND SURGICAL

86

Domestic employees—Authority to write—M27 §§ 3315, 3316; (MS41 §§ 60.29, 60.31).
Commissioner of Insurance.

Question

As to the authority of the Commissioner of Insurance to accept for filing policy forms of insurance by the terms of which insurance carriers seek to extend "full medical and surgical aid to domestic employees under the public liability coverage * * *." The coverage is to be made available to the buyers of Owner's, Landlord's and Tenant's Bodily Injury Liability insurance, or other Employers' Liability policies. By the terms of the policy the insured is to be reimbursed for expenses incurred in paying the medical and surgical expenses of a domestic servant who is injured through no fault of the employer-assured, and under such circumstances that there is no legal liability upon the assured.

Answer

Mason's Minnesota Statutes of 1927, Section 3315, subdivision 5, authorizes insurance companies

> "To insure against loss or damage by the sickness, bodily injury or death by accident of the assured, or of any other person employed by or for whose injury or death the assured is responsible."

This is the only specific authority under which it would be possible for an insurance company to write the type of coverage sought to be written, and it is not clear whether or not it would authorize the writing of such insurance. The statute has been generally recognized as one authorizing the writing of accident and health insurance, and Workmen's Compensation

insurance. We have also held that this section authorizes the writing of liability insurance — this, because of special facts peculiar to the particular situation. See opinion to Mr. Yetka, September 25, 1940. It is not clear to me that subdivision 5 would authorize the writing of this particular type of insurance.

Your attention is directed to Mason's Minnesota Statutes of 1927, Section 3316, which reads as follows:

> "Any insurance corporation or association heretofore or hereafter licensed to transact within the State of Minnesota any of the kinds or classes of insurance specifically authorized under the laws of this state may, when so authorized, transact within and without the state of Minnesota any lines of insurance not specifically provided for under the laws of this state when such lines or combination of lines of insurance are not in violation of the constitution or laws of the State of Minnesota, and, in the opinion of the Commissioner of Insurance not contrary to public policy, provided such company or association shall first obtain authority of the Commissioner of Insurance and shall meet such requirements as to capital or surplus, or both, as the Commissioner of Insurance shall prescribe."

Under the authority of the above section you are authorized to permit an insurance company which is licensed to transact any of the kinds or classes of insurance specifically authorized under Section 3315 to write additional lines of insurance not specifically authorized by Section 3315, providing such lines are not in violation of the Constitution or laws of this state, and, in your opinion, are not contrary to public policy. You also have authority to establish requirements as to capital and surplus with reference to the writing of such additional lines of insurance.

By authority of this section, and pursuant to it, you may authorize the writing of this type of insurance.

EDWARD J. DEVITT,
Assistant Attorney General.

March 28, 1941. 253-a-7

RETALIATORY STATUTE

87

Interpretation of—M27 § 3721; (MS41 § 71.23).

Commissioner of Insurance.

Question

1. "Is Sec. 3721 a retaliatory law or a reciprocal law?"

Answer

The law reads as follows:

> "When by the laws of any other state or country any taxes, fines, deposits, penalties, licenses, or fees, in addition to or in excess of those imposed by the laws of this state upon foreign insurance companies and their agents doing business in this state, are imposed on insurance companies of this state and their agents doing business in that state or country, or when any conditions precedent to the right to do business in that state are imposed by the laws thereof, beyond those imposed upon these foreign companies by the laws of this state, the same taxes, fines, deposits, penalties, licenses, fees, and conditions precedent shall be imposed upon every similar insurance company of that state or country and their agents doing or applying to do business in this state so long as these foreign laws remain in force."

A reference to the dictionary indicates a difference of meaning in the two words. Retaliatory means "tending to, involving, or in the nature of, retaliation," and retaliation is described as the act of returning like for like or "to make requital; esp. to return evil for evil." Reciprocal, on the other hand, is defined as "mutual; shared, felt, shown or the like, by both sides; as, united in reciprocal affection." It has the implication of an interchange of the same feeling or act.

The object of the statute, as is clearly indicated by a reading of it and of the title under which it was enacted, is to even up or balance any inequalities which might exist as between the laws of other states and of our state pertaining to the regulation of insurance companies. Such being the case, I am of the opinion that it should properly be called a retaliatory law. Our Supreme Court has recognized such an appellation for it. State v. Queen City Fire Insurance Co., 114 Minn. 471, 474.

Question

2. "What is the primary purpose of Sec. 3721 — to raise revenue or to protect Minnesota companies doing business in other states from unreasonable taxes, fees, deposits, penalties, or licenses which might be imposed by the foreign State?"

Answer

In line with the above, it appears that the primary purpose of the law is to protect Minnesota companies doing business in other states from unreasonable taxes, fees, or licenses which might be imposed by such foreign states.

Question

3. "Should the aggregate of all taxes and fees be considered in computing the retaliatory taxes due from a foreign company or should

each tax and fee be offset, item by item, against the taxes and fees charged a Minnesota company by the domiciliary State of the foreign company?"

Answer

This question was made the subject of an opinion of this office, dated April 12, 1941. In that opinion we held that "the taxes of this state should be set off against the taxes of the sister state; licenses should be set off against licenses; and, fees against fees." That opinion confirmed the legality of a long standing practice of your department in the administration of the statute.

The opinion was subsequently challenged by the Minnesota Mutual Life Insurance Company and the American Life Convention, both of whom filed lengthy briefs containing the argument that in the administration of the statute, item should not be set off against item, but the statute should be interpreted and administered in what was called the "aggregate" method, which contemplated that all of the taxes, fees, licenses, etc., should be grouped together and the sum total thereof set off against the sum total of such taxes, fees, licenses, etc., of the sister state.

In a memorandum dated October 20, 1941, addressed to the Minnesota Mutual Life Insurance Company, we fully discussed the arguments presented, and differentiated the cases holding in favor of the aggregate method on the basis of the different wording of the statutes construed in those cases. Copy of that memorandum is enclosed herewith.

In our opinion, the taxes, fees, licenses, etc., should be offset item by item rather than by the aggregate method.

EDWARD J. DEVITT,
Assistant Attorney General.

October 15, 1942. 254-D

LABOR

STRIKES

88

Notice of strike or lockout must be signed in the writing of the person giving or authorizing it—M40 § 4254-26; L 41, C 492, § 44, Par. 13; (MS41 §§ 179.06, 654.44).

Labor Conciliator.

Question

Whether a notice of intention to strike or lock-out must be signed with the signature in handwriting of the person giving the notice or if the name or signature of the person giving the notice may appear thereon by stamp, typewriting, mimeographing, multigraphing, or printed thereon.

Answer

Mason's Supplement 1940, Section 4254-26, provides in part as follows:

> "Notice by the employer shall be **signed** by him or his duly authorized officer or agent; and notice by the employees shall be **signed** by their representative or its officers, or by the committee selected to conduct the strike."

Laws 1941, Chapter 492, Section 44, paragraph 13 provides as follows:

> "Writing — The words 'written' and 'in writing' may include any mode of representing words and letters **except that signatures, when required by law, must be in the handwriting of the person,** or if he be unable to write, his mark, or his name written by some person at his request and in his presence."

When a signature is required by law it must be the handwriting of a person or if he is unable to write, written by some person at his request or in his presence. Dunnell's Digest, 2nd Edition, Volume 5, Section 8769.

The decision in Herrick v. Morrill, 37 Minn. 250, which permitted a summons in a civil action to be subscribed by a printed signature of the plaintiff or his attorney, was based on construction of the statute authorizing issuance of a summons. That decision is inapplicable in the instant case as the labor relations act, aforequoted, specifically requires that the notice be signed by the person giving it.

Webster's New International Dictionary defines the word "sign" as "to affix a signature to; to ratify or attest by hand or seal; to subscribe in one's own handwriting; to write a signature as to sign one's name." Funk and Wagnall's Practical Standard Dictionary defines the word "sign" as "to affix one's signature, initials, seal, or mark to; to write one's name as a signature."

Words and Phrases, Volume 39, page 269, "Ordinarily to 'sign' an instrument indicates the signing with one's own hand, Hanson v. Owen, 64 S. E. 800, 803, 132 Ga. 648."

In the case of City of Muskogee v. Senter, 96 Pac. (2d) 534, it was held that the word "sign" in a charter providing that the mayor shall "sign all contracts" is used in its **natural meaning** and it meant the affixing of his signature.

Undoubtedly the legislature intended that a strike or lock-out notice should contain the actual signature in writing of the employer or the employees or their representatives giving it. Otherwise they would have adhered to the language in the first portion of the provision in the labor relations act relating thereto, which only requires written notice to the employer of a demand for changes in rates of pay, rules, or working conditions, and likewise by the employer of any intended change in any existing agreement. However, when it came to the more important matter of a notice of intention to strike or lock-out, then the legislature used different language and indicated that it attached greater weight or importance to this notice. Some of the courts indicate that the element of intention must be present in the ultimate question of whether an instrument is signed or bears a person's signature. A notice bearing a printed, mimeographed, multigraphed, typewritten, or stamped signature would carry no assurance that it was actually issued by the person whose name was affixed. Such a notice could easily be made or duplicated by some one without authority, and subsequently it might be repudiated by the person whose authority it purported to exercise. There are many instances where printed, mimeographed, multigraphed, or typewritten copies of notices may be used, particularly where there is some authorized repository for the original which bears the actual signature of the person giving the notice, but that is not the situation in the present case.

Signatures by stamps, mimeograph, multigraph, typewriters or other printing devices do not comply with the statute, and a notice of intention to strike or lock-out should be signed in writing by the person giving it.

JOHN A. WEEKS,
Assistant Attorney General.

May 26, 1941. 270-d-9

UNEMPLOYMENT COMPENSATION

89

Benefits—Claim for—Notice of determination to employer—M40 §§ 4337-28, 4337-30; (MS41 §§ 268.10, 268.12).

Division of Employment and Security.

Question

Whether or not the Division of Employment and Security can legally

include information in its notice to an employer of a determination allowing benefits disclosing in such notice the amount of wages earned by the claimant while in the employ of other employers during his base period.

Answer

Section 4337-28 provides that notice of any determination of a claim for benefits, together with the reasons therefor, shall be given claimants and all other interested parties. All employers in the base period, together with claimant's most recent employer, are interested parties. Laws 1941, Chapter 554 (Section 4337-27Z).

Section 4337-30 provides that information obtained from any employing unit pursuant to the administration of this act shall be confidential.

The 1941 Legislature enacted the following rule of construction (Laws 1941, Chapter 492, Section 26-1):

> "When a general provision in a law is in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions be irreconcilable, the special provision shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted at a later session and it shall be the manifest intention of the legislature that the general provision shall prevail."

It must be noted that the special provision prevails over the general provision only in the event that the two provisions cannot be reconciled.

Section 4337-28 is silent as to the degree of generality of the notice, so long as the reasons for determination are given. A notice which did not disclose the wage credits earned from each employer in the base period would not, because of such nondisclosure, be invalid under Section 4337-28.

Consequently, it is my opinion that the director may in his discretion determine the degree of generality or specificness of the notice so long as it is not so specific as to conflict with Section 4337-30. It is also my opinion that a notice to an employer which disclosed the wage credits earned from each other employer in the base period would conflict with Section 4337-30.

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

May 26, 1941. 885 b

90

Contributions—Delinquent—Rates of interest—L 41 C 554, § 13; (MS41 § 268.16).

Division of Employment and Security.

Question

Whether the interest rates on employers' delinquent contributions provided for in Laws 1941, Chapter 554, Section 13, will apply to collections of delinquent contributions made subsequent to the effective date of chapter 554.

Answer

Section 4337-34A, Mason's Supplement 1940, provides that delinquent contributions should bear interest at the rate of one per cent per month until paid. Laws 1941, Chapter 554, Section 13, amended Section 4337-34A, ibid., by adding the following proviso:

> "* * * provided, however, that after any contribution has become delinquent for a period of 12 months thereafter interest thereon shall be computed at the rate of six percentum per annum."

The effect of this amendment is to repeal the power of the division to collect interest at the rate of one per cent per month after the twelve month period of delinquency. See State ex rel. Donovan v. Duluth Street Railway Co., 150 Minn., 364, 185 N. W. 388.

It has been held that an amendment changing the penalties for delinquent taxes applies to all taxes delinquent at the time of such amendment, as well as taxes which may become delinquent subsequent to the amendment. Henry v. McKay (Wash. 1931), 3 P 2, 145; Webster v. Auditor General, 121 Mich. 668, 80 N. W. 705; State v. Western Union Telegraph Co., 111 Minn. 21, 36, 126 N. W. 403. See also League v. Texas, 184 U. S. 156.

Chapter 554, Section 13, became effective from and after April 29, 1941. Mushel v. Benton County, 152 Minn. 266, 188 N. W. 555. Consequently, it is my opinion that delinquent contributions which are collected on or after April 29, 1941, will bear interest at the rate prescribed in section 4337-34A, ibid., as amended by Laws 1941, Chapter 554, Section 13.

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

May 5, 1941. 885 d-1

91

Disqualification—Complete disclosure of facts necessary—(MS41 § 268.12, Subd. 12).

Minnesota Division of Employment and Security.

Question

Whether or not disqualifying issues can be properly determined on the basis of confidential information not disclosed to claimant.

Answer

It is my opinion that such issue may not be decided on the basis of evidence not disclosed to claimant. Minnesota Statutes 1941, Section 268.12, Subdivision 12, specifically provides that any claimant shall be supplied with information from the records of the Division of Employment and Security to the extent necessary for the presentation of his claim. Unless the facts upon which a disqualification is alleged are disclosed, claimant would be denied the opportunity of rebutting those facts. The courts have jealously guarded the right of an individual to a complete disclosure of all facts and evidence that may be used against him in any proceeding, and have severely rebuked administrative agencies which have adopted proceedings impinging upon that right. See Carstens vs. Pillsbury (1916), 172 Cal. 572, 158 Pac. 218; Chew Hoy Quong v. White, 249 Fed. 869, C.C.A. Ninth, 1918; Saltzman vs. Stromberg-Carlson Telephone Manufacturing Company, 60 A. D. 31 (1931); Western Union Telegraph Company vs. Industrial Commission of Minnesota, 24 F. Supp. 370 (D. C. Minnesota 1938).

In view of the specific mandate in Minnesota Statutes 1941, Section 268.12, Subdivision 12, it is my opinion that this Division is compelled to disclose to the claimant prior to a hearing before an appeal tribunal the facts upon which a disqualification is being considered.

KENT C. van den BERG,
Assistant Attorney General.

October 9, 1942. 885-C-2

LICENSES

MARRIAGE

92

Age — Boy under 18 can not secure marriage license even with parents' consent—M27 § 8562 as amended; M27 §§ 8563, 8567, 8568, 8569, 8581; L 27, C 166; L 37, C 407, § 1; M40 §§ 8564, 8569; L41, C 459; (MS41 §§ 517.01, 517.02, 517.03, 517.06, 517.07, 517.08, 518.02).

Kandiyohi County Attorney.

Question

Can a marriage license be issued when the boy is under 18 years of age?

Opinion

It seems to me clear that:

(1) A valid marriage can be consummated only between persons capable in law of contracting.

(2) By Section 8563, Mason's Minnesota Statutes 1927, a male person under 18 years of age is not capable of contracting marriage.

(3) Capacity to contract marriage cannot be conferred by consent of parents or guardian upon one who in law is incapable of contracting.

(4) The statutes contemplate that a license to marry shall be issued only to persons legally capable of contracting marriage. This is indicated by Mason's Supplement 1940, Section 8569, which provides that the clerk, after examining the applicant, shall issue a license "if satisfied that there is no legal impediment thereto." Lack of capacity to contract marriage is certainly a legal impediment.

It is true that in an early case it was held that the marriage of a person incapable of contracting is not void but voidable. State ex rel. v. Lowell, 78 Minn. 166. See also Mason's Minnesota Statutes 1927, Section 8581. However, it does not follow that a clerk of court may knowingly issue a license for such a marriage. The very purpose of the statutory requirement for a license is to provide for a preliminary investigation of the qualifications of the parties and to prevent marriages between persons who are not qualified, as far as possible. The license sets the seal of official approval upon the proposed marriage, so far as legal requirements are concerned. The officiating clergyman or magistrate is forbidden by Sections 8567 and 8568 to solemnize a marriage unless satisfied that there is no legal impediment thereto, and unless the parties have a license. The license informs him that the clerk has made due investigation and has determined, so far as he is able, that there is no legal impediment. The inconsistency of holding that a license, which on its face is a manifest of legal regularity, could be issued to persons legally incapable of entering into a valid marriage contract is clearly apparent.

Moreover, it would be against public policy, which aims at permanency in the marriage relation, to countenance, through issuance of a license, a marriage which would be voidable and subject to dissolution at the suit of a party who at the time of the marriage was incapable of assenting to it.

Further evidence of the legislative intent to limit the issuance of licenses to persons capable of contracting marriage is found in Section 8563. Originally this section (derived from Revised Laws 1905, Section 3553) consisted only of the first sentence, prescribing the minimum age limits of legal capacity as eighteen for males and fifteen for females. By the amendment made in Laws 1927, Chapter 166, the regular age limit for females was raised to sixteen, with a proviso authorizing a female of fifteen to marry with the consent of her parents and her guardian if there be one, and with the approval of the judge. The language of the proviso is significant. It said that such a female "may * * * **receive a license to marry.**" Here is a construction of the law by the legislature itself, indicating that the prescribed ages for males and females respectively were intended as the minimum ages for issuance of licenses, and negativing any contention that a

license could be issued to either a male or female under the stated age of capacity except as expressly authorized by the proviso. This is a clear case for application of the maxim that "the expression of one thing is the exclusion of another." Dunnell's Digest, Section 8980. If the legislature had intended to permit any dispensations from the regular age limit for males, it would have said so in express language.

It has been urged that because Section 8569 requires the consent of parents or guardians to the issuance of a license for the marriage of a male under twenty-one or a female under eighteen, without specifying any lower ages below which such consent would be ineffectual, there is an implication that such consent would be effectual down to the age of fifteen years, in view of the provision of Mason's Supplement 1940, Section 8564, prohibiting marriage between persons one or both of whom are under fifteen years of age. This is untenable. It is true that Section 8569 in its present form is a later enactment than Section 8563, prescribing the ages of capacity to marry at eighteen for males and sixteen for females, but there is nothing in Section 8569 which in any way conflicts with Section 8563 or which could be construed as superseding or modifying that section in any way. The requirement of consent in Section 8569 is additional to the requirement of legal capacity in Section 8563, not a substitute therefor. Both requirements must be observed, so far as applicable. Hence the issuance of a license for the marriage of a male person under the age of legal capacity, eighteen years, is not permissible even though he has his parents' consent.

At first glance it might seem that this conclusion is inconsistent with the fifteen year minimum age provision in Section 8564. That section specifies various cases in which marriage is absolutely prohibited. Formerly it contained no age provision. By Laws 1937, Chapter 407, Section 1, the present provision was inserted, prohibiting marriages between "persons one or both of whom are under 15 years of age." However, this merely imposed a minimum age limit below which any marriage would be absolutely void. Id. Section 2, amending Mason's Minnesota Statutes 1927, Section 8580. At the time that this minimum age provision was enacted, common-law marriages, without license or formal ceremony, were recognized as valid in Minnesota. Dunnell's Digest, Sections 5785, 5795, 5796. At common-law the minimum age limits were fourteen for males and twelve for females. Obviously the purpose of the 1937 amendments to Sections 8564 and 8580 was to raise these limits so that a person under fifteen could no longer become a party to a common-law marriage. By their enactment there was no intention to interfere in any way with the application of the capacity age limits in Section 8563, or to repeal or supersede them by implication. Repeals by implication are not favored, and will not be inferred except in case of manifest inconsistency. Dunnell's Digest, Section 8927. Clearly there is no such inconsistency here.

Again it is pertinent to observe that if the legislature had intended to modify the existing law so as to permit males below the prescribed capacity age of eighteen to obtain marriage licenses with their parents' consent, it would have enacted an express provision to that effect, as it did with respect

to females by the 1927 amendment to Section 8563. In view of the evident policy of the legislature, as expressed in successive acts through the years, to abrogate the common-law rules and to subject marriage more and more to specific statutory regulation, it cannot be assumed that such an important matter would be left to implication.

Recent evidence of this policy is found in Laws 1941, Chapter 459, amending Mason's Minnesota Statutes 1927, Section 8562, so as to prohibit subsequent to the passage of the act common-law marriages altogether. This law, though it does not deal directly with the question under discussion, tends to support the conclusions herein expressed. In view of the new enactment, it is no longer safe, with respect to marriages after passage of the act, to rely upon the holding in State v. Lowell, supra, or upon the provisions of Section 8581, to the effect that, in the absence of subsequent voluntary cohabitation, the marriage of one who is incapable of assenting for want of age is only voidable, not void. We express no opinion on this question either way, but merely call attention to the situation as an additional reason why a license should not be issued for the marriage of a male person under the age of eighteen. Whether such a marriage be voidable or void, it is legally defective, and should not be officially sanctioned by a license.

As before indicated, a license imports legal regularity, and the clerk should never knowingly issue one unless all the requirements of the law have been complied with.

The policy of the law in restricting or prohibiting the marriage of persons under certain ages is a matter for the legislature. We can only interpret the statutes as they read. Our opinion, which of course is subject to the superior authority of the courts, is that the clerk cannot legally issue a marriage license to any male under the age of eighteen with or without the parents' consent.

J. A. A. BURNQUIST,
Attorney General.

August 13, 1942. 300-a

93

Contract—Executed by proxies—Validity doubtful—M27 §§ 8562 to 8579; L41, C 459; (MS41 §§ 517.01 to 517.19).

Stearns County Attorney.

Question

Whether or not a marriage by proxy is valid in this state.

Answer

A brief examination of our marriage laws discloses that while such a marriage might have been sustained prior to the enactment of the Laws of 1941, Chapter 459, now, it is exceedingly doubtful our courts would recognize it as valid.

Here is the situation. Formerly it was provided:

> "Marriage, so far as its validity in law is concerned, is a civil contract to which the consent of the parties capable in law of contracting, is essential."

Certain formalities were, and still are, required for the solemnization of a marriage. A license is necessary. Mason's Minn. St. 1927, Sec. 8569. It can only be issued at the expiration of five days after an application, and then only to persons possessing specified qualifications. The ceremony is required to be performed before third persons. Certain ecclesiastics and public officers are specifically authorized to act. A certificate of marriage must be given each of the parties, specifying the names of the husband and wife and of at least two of the witnesses present. Sec. 8571, id. A record of the marriage is required to be filed with the clerk of the proper court within a month after the marriage. Sec. 8572, id.

It is expressly provided that in the solemnization of marriage

> "No particular form shall be required, except that the parties shall declare in the presence of the judge, minister or magistrate and the attending witnesses that they take each other as man and wife; and in every case there shall be at least two witnesses present besides the person performing the ceremony." Sec. 8570, id.

In Hulett vs. Carey 66 Minn. 327 at 336 (decided in 1896) a marriage by contract was sustained. Our court said:

> "The law views marriage as being merely a civil contract, not differing from any other contract, except that it is not revocable or dissoluble at the will of the parties. The essence of the contract of marriage is the consent of the parties, as in the case of any other contract; and, whenever there is a present, perfect consent to be husband and wife, the contract of marriage is completed. * * * It is mutual, present consent, lawfully expressed, which makes the marriage."

Thus Minnesota, prior to 1941, was one of the states where common-law marriages were recognized.

But even in such states there is some difference of opinion concerning the necessity of the presence of the contracting parties at a marriage ceremony. 35 Am. Jur. p. 194, Sec. 22. In such states it is uniformly held that marriage, like any other contract, may be effected by correspondence. Burdick, Principles of Roman Law, p. 227. On the other hand some cases hold the parties must be in the presence of each other when the agreement is entered into (Orr vs. State, 176 So. 510, Fla.) though not in the presence of a witness. Cartwright vs. McGowan, 12 N. W. 737 (Ill.) Atlantic, etc., vs. Goodin, 45 L.R.A. 671.

An extensive annotation on common-law marriages will be found in Grigsby vs. Reib, L.R.A. 1915E, page 1, at p. 8.

In an article appearing in 32 Harvard Law Review, p. 473, on Marriage by proxy, it is said:

"In some of the states, in which the common-law marriage is no longer recognized, the statutes manifestly require the personal presence of the parties. In other states the statutes are not so clear. In the great majority of states the common-law marriage is still valid, notwithstanding modern statutes relating to the solemnization of marriage. Is not marriage by proxy valid in these states? The answer will depend in the first place upon the question whether marriage by proxy was recognized by the English law at the time our colonies were settled. * * * That marriage by proxy was a part of the English law until the eighteenth century would appear from Swinburne's Treatise on Espousals. * * * In favor of the validity of marriage by proxy the following may be said. The American colonies are deemed to have brought with them the English law of marriage, so far as it was adapted to their environment. * * * Marriages by proxy have doubtless taken place in this country, but no record thereof can be found in the decisions of the courts. That there are serious objections to marriage by proxy is apparent. The uncertainty in regard to the legal existence of such a marriage arising from the fact that the power of attorney is revocable and may have been revoked without knowledge of the other party or the proxy prior to the celebration of the marriage would suggest of itself the expediency of prohibiting such a marriage. In view of the fact, however, that marriage by proxy was permissible in England until the eighteenth century and has been recognized in all countries so long as marriage rested upon mere consent, it must be regarded as valid in those states in which the common-law marriage still exists. Should this view be taken by the courts it would follow logically that marriage might be contracted in such a state by proxy, although neither of the parties was present when the consents were exchanged by the proxies."

During the first world war this office was of the opinion that marriage might be contracted between a soldier abroad and a woman living in this state through interchanging a marriage contract by mail, and to that end it prepared a form of contract for execution by the parties. The judge advocate general of the United States at that time rendered an opinion that soldiers abroad might marry women in the United States through interchanging and executing such a contract, provided such marriage did not contravene state statutes. However, even under the law as it existed prior to 1941 this office never went so far as to hold that a marriage by proxy was valid.

In a broad sense the manner in which consent to a contract is expressed is immaterial. While it may be more difficult to prove consent given by telephone, telegram, over radio, or through a duly appointed attorney in fact, or proxy, or in any other manner than by a personal appearance of the contracting parties before the magistrate or minister, and witnesses, it may be argued that it is nevertheless consent. Marriage being a matter of agreement, it is immaterial how consent is expressed, and that it may be given orally, or in writing, or through an agent.

Regardless of what our courts might have held prior to the enactment of Laws of 1941, Ch. 459, it seems exceedingly doubtful our courts would

approve the use of proxies in marriage ceremonies at this time. That act amends Mason's Minn. St. 1927, Sec. 8562, by adding a provision reading:

> "Lawful marriage hereafter may be contracted only when a license has been obtained therefor as provided by law and when such marriage is contracted in the presence of two witnesses and solemnized by one authorized, or who the parties in good faith believe to be authorized, so to do. Marriages subsequent to the passage of this act not so contracted shall be null and void."

The manifest purpose of this amendment was to abolish common-law marriages in this state.

In view of this amendment it does not seem likely that our courts would recognize a marriage by proxy as valid. There is no supreme court decision squarely in point. However, the only safe course we can pursue is to advise you that a marriage consummated in such a manner is of doubtful validity.

Adequate legislation must be enacted before a man and a woman undertaking to contract a marriage in such a manner can have any assurance that it will be recognized as valid and binding by our courts. Categorically your inquiry is answered in the negative.

ROLLIN L. SMITH,
Special Assistant Attorney General.

April 27, 1942. 300

94

Feebleminded person—Whether a marriage license may be issued after sterilization—M40 § 8564.

Norman County Attorney.

Facts and Question

A person has been adjudged feebleminded by a probate court, committed by that court to the guardianship of the state board of control (whose duties are now placed upon the director of social welfare), and has not been discharged from such guardianship. The feebleminded person has been sterilized. The inquiry is whether a license for the marriage of such person could be issued, with the consent of the director of social welfare, and whether the probate judge may perform the marriage ceremony in such a case.

Answer

A negative answer should be given to these inquiries.

Mason's Supplement 1940, Section 8564, provides:

> "8564. Marriages prohibited. — No marriage shall be contracted while either of the parties has a husband or wife living; * * * nor between persons either one of whom is epileptic, imbecile, feebleminded or insane; * * *."

The statute makes no exception of a feebleminded person who has been sterilized. The legislature alone can change the express wording of the law which is definite and not open to any doubt.

RALPH A. STONE,
Special Assistant Attorney General.

February 9, 1942. 300-J

MUNICIPALITIES

AMUSEMENTS

96

Sabbath—Pool and billiards—Playing of on Sunday in absence of ordinance forbidding—M27 § 10235; L 41, C 336; (MS41 § 614.29).

Village Attorney, Osakis.

Facts

Reference is made to Laws 1941, Chapter 336, amending Mason's Supplement 1940, Section 10235, the "Sunday law," so as to except "horse racing at the annual fairs held by the various county agricultural societies of the state" from acts prohibited on Sunday.

Question

Whether or not this act, or any other law, makes the operation of a billiard or pool table in a village on Sunday illegal. There is no local ordinance against the practice.

Answer

The law cited forbids generally "all gaming and shows" on Sunday. Our Supreme Court has given "shows" a restricted meaning and, in State v. Chamberlain, 112 Minn. 52; 127 N. W. 444; 17 L. R. A. N. S. 1157, held that "shows" as used in predecessor statute R. L. 1905, Section 4981 referred to out-of-door amusements, and that a moving picture exhibition, when conducted in an orderly and proper manner within a building was not within the provision of the statute. The court said:

> "It has never been the legislative policy in this state to strictly enforce the cessation of all kinds of works and amusements on the Sabbath Day. The leading principle all through the different enactments upon the subject is to prevent any serious interruption of the repose and religious liberty of the community. This means that it has not been the intention to intefere with the freedom of the public in the pursuit of amusement and relaxation on the Sabbath Day, when it does not seriously interfere with the rights of other members of the community who desire a quiet and uninterrupted observance of the day."

The statute then read:

"All hunting, shooting, fishing, playing, horse racing, gaming, and other public sports, exercises, and shows; * * * are prohibited on the Sabbath day: * * *"

This phraseology was changed by Laws 1929, Chapter 308 so as to read.

"All horse racing, gaming and shows; * * * are prohibited on the Sabbath day: * * *"

Subsequent amendments have reenacted the part of the statute first quoted.

Thus, your question narrows down to this: Does the operation of a pool or billiard table on Sunday constitute "gaming" or "shows" within the meaning of Laws 1941, Chapter 336? Clearly, unless an exhibition billiard or pool match is being given, such operation would not be included in the term "shows." According to Webster's New International Dictionary, gaming is the "Act or practice of playing games for stakes or wagers; gambling." Your statement of facts does not indicate that, as an incident to the operation of these billiard and pool tables, stakes or wagers are played for. In other words, unless gambling takes place, the operation of a pool or billiard table would not seem to be within the prohibition of the statute.

We are not aware of any other statute which expressly forbids the operation of pool and billiard tables on Sunday.

Categorically, therefore, your inquiry is answered in the negative. The operation of pool or billiard tables on Sunday is not of itself unlawful. If such operation is accompanied by disorderly conduct, or by gambling, then the statute applies.

Osakis, according to the Minnesota Year Book, operates under Laws 1885, Chapter 145. According to Section 21, subsection 15 thereof, the council is empowered to "license and regulate, the keeping of billiard tables, pool tables * * * and all other games * * *." It is quite likely the wishes of your community in this regard can be met by an ordinance under the charter power cited above.

ROLLIN L. SMITH,
Special Assistant Attorney General.

September 2, 1941. 384a

ANNEXATION

97

Petition—"Owner" under M27, Section 1120 includes mortgagor but not mortgagee and vendee but not vendor under contract for deed—M27 § 1120; (MS41 § 413.08).

Appleton Village Attorney.

Facts

A petition has been presented to the village council of Appleton requesting extension of its corporate boundaries to include certain adjacent lands, pursuant to Section 1120, Mason's Minnesota Statutes of 1927. That section reads in part as follows:

"Whenever the owner of land abutting upon any village, or a majority of the owners of platted or unplatted land, * * * shall petition the council . . ."

Question

The statute does not define an "owner." Who would be a proper petitioner pursuant to the statute: (1) the mortgagor or mortgagee of mortgaged premises, or, (2) the vendor or vendee under an executory contract for deed?

Answer

1. In Minnesota a mortgage, although purporting to be a conveyance, passes no title. Until foreclosure the mortgagor continues to hold the full legal title; the mortgagee receives merely a lien by way of security for repayment of the debt. It is accordingly our opinion that a mortgagor, and not his mortgagee, is an owner within the meaning of Section 1120.

2. The relationship of vendor and vendee has frequently been held analogous to that of mortgagor and mortgagee. Keith v. Albrecht, 89 Minn. 247, 94 N. W. 677; Nolan v. Greeley, 150 Minn. 441, 185 N. W. 647.

> "What is the status of the parties to such contract for deed? The vendor holds the legal title merely as security for the payment of the purchase price. He has a lien thereon for his claim. In legal form he has agreed to convey a good title at a future time. But we must look to the substance of the transaction more than to the form. **The vendee is the equitable and substantial owner** subject only to the payment of the balance of the purchase price. Possession is important. He cannot be ousted by the vendor in the absence of default. He pays the taxes. The relation is substantially that of mortgagor and mortgagee. * * * The only difference is a more efficient remedy in case of default. The vendor holds the title in trust for the vendee. * * * He (vendee) is clothed with the indicia of ownership to the same extent as if he had taken a deed and given a purchase-money mortgage." — Summers v. Midland Company, 167 Minn. 453, 209 N. W. 323.

It appears that the incidents of annexation of land to a municipality are primarily of concern to the vendee in possession under the contract for deed: the liability for possibly heavier taxes is his, the availability of public utilities is primarily of interest to him, and it is his voting residence which will probably be affected by the inclusion of the property within village limits. We are therefore of the opinion that the vendee is the real party in interest and that he, rather than his vendor, should be a proper petitioner under Section 1120.

FREDERICK O. ARNESON,
Special Assistant Attorney General.

April 29, 1941. 484-E-1

98

Procedure—Election—Hours of voting—M40 §§ 601-6(8)h, 601-11(1)i, 601-11(2)b; (MS41 §§ 206.09, 212.10, 212.30, 413.12, 413.13).

City Attorney, Mankato.

Facts

It appears that the question of annexing to the City of Mankato certain territory contiguous thereto will shortly be submitted to the voters as provided by Mason's Minnesota Statutes of 1927, Sections 1845 to 1849. Reference is made to Section 1848 idem. which provides that the election in the area affected shall be conducted, "so far as practicable, in accordance with the laws regulating the election of town officers." Reference is also made to Mason's Supplement 1940, Section 601-11(1)i, which provides that at town elections, "The polls shall be opened between 9:00 A. M. and 10:00 A. M., and shall close at 5:00 P. M."

Question

(1) "Does this mean that the polls must be opened some time between 9 and 10 o'clock in the morning and continue open until 5 in the afternoon?"

Answer

Yes.

Question

(2) "Is it necessary to have a closed voting booth for the voters?"

Answer

Yes. The use of the Australian ballot system is now mandatory at all town elections. Mason's Supplement 1940, Section 601-11(2)b. Secret voting is one of the distinctive features of that system. A closed voting booth is indispensable.

Question

(3) "May a special police officer be appointed by the Judges of Election to stay in the room where the Judges are sitting, just so he does not get within six feet of a person voting in the place?"

Answer

Yes. The law applicable to general elections applies to town elections. Mason's Supplement 1940, Section 601-11(2)b. Peace officers may remain in the voting place. Section 601-6(8)h idem.

Question

(4) Can anyone named by the judges be present when the votes are counted and give legal advice in the counting—such as yourself?

Answer

Strictly speaking, there is no authority for this. However, if the judges wish you to be present, and you remain present throughout the counting at their request, it is difficult to see wherein anyone has been prejudiced. Your presence might constitute an irregularity; but standing alone, it would not invalidate the election.

ROLLIN L. SMITH,
Special Assistant Attorney General.

August 19, 1941. 59-A-1

BIDS AND CONTRACTS See op. 10/23/44 to Steele Co. atty file 90 b
99

Officers interested in — Purchase of truck — M27 §§ 990, 10305; (MS41 §§ 382.18, 620.04).

Fillmore County Attorney.

Facts

Fillmore county called for bids on a truck. In response to that call "X" company, a manufacturer of trucks, put in its own bid which apparently was not the low bid, although this particular truck and bid was acceptable to the county board. The local dealer for "X" truck is a member of the county board. It was explained at the meeting that the dealer would not receive anything out of the sale of this particular truck to the county as a commission or stipend, but that the contract with the dealer provides that the manufacturer can come in and sell machinery without preference to the local dealer except trucks.

Question

Whether such sale violates the law regarding officers being interested in a contract.

Section 990, Mason's Minnesota Statutes of 1927, provides in part as follows:

> "No county official, or deputy or clerk of such official, shall be directly or indirectly interested in any contract, work, labor, or business to which the county is a party, or in which it is or may be interested, or in the furnishing of any article to, or the purchase or sale of any property, real or personal, by, the county, or of which the consideration, price, or expense is payable from the county treasury."

We also direct your attention to section 10305, Mason's Minnesota Statutes of 1927, which provides:

> "Every public officer who shall be authorized to sell or lease any property to make any contract in his official capacity, or to take part in

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."

The intent of the legislature in enacting the above section is to prevent public officials from being directly or indirectly interested in contracts in which the county is a party. It is intended to safeguard public interest because of the obvious reasoning that a public officer, being a trustee of the public interests, cannot successfully or properly serve two masters, the public and himself.

Each question of this type must rest primarily on the particular facts and cannot be answered categorically. We concur in the opinion reached by you in that this transaction would be illegal. Undoubtedly the county commissioner in question has the best interest of the county at heart, but it is obvious that he also has an interest in his own private business and wishes to see that business prosper. It would be to his private advantage and interest to have the county operating the type of truck which he sells for reasons too numerous to mention. It would therefore appear that his interest as a public official conflicts with his interest in his private business, and in a situation such as is presented here, the only safe rule to follow is to avoid any possibility of a violation of the sections of the statutes above quoted.

HAYES DANSINGBURG,
Assistant Attorney General.

March 27, 1941. 90-B-8

100

Stripping gravel pit—Plans and specifications—Wages to be paid—Lowest responsible bidder.

Rice County Attorney.

Question

Whether plans, specifications and proposals for loading, screening, crushing and hauling gravel and stripping pit may provide that the contractor must pay haulers a certain specified amount per cubic mile haul, such as 5c or 6c per cubic mile, or provide a graduating scale from short distance hauls to long distance hauls.

Answer

The law requires all work shall be let to the lowest responsible bidder. It is contemplated that the contractor shall be free to do this work in the manner selected by him, doing it as cheaply as possible but still performing such contract in a good workmanlike manner. It would appear that the limitation or restriction proposed by you would be in conflict with the law in that it would not allow the contractor to perform this work in accordance

with the theories expressed above. There is the additional theory, of course, that it is to the advantage of the general public and especially the taxpayer, to have the work done as cheaply as possible.

Question

Could the plans, specifications and proposals further provide that a certain number or all the trucks used for hauling should be owned or operated by residents of Rice County?

Answer

No. Such a clause might prohibit an outside contractor from bidding at all and as previously stated, the theory of the law is that there shall be open competitive bidding so that the work may be accomplished at a minimum of cost without sacrificing good workmanship.

J. A. A. BURNQUIST,
Attorney General.

October 29, 1941. 707-B-7

CIVIL SERVICE

101

Commission—Abolition—Petition for—Necessity of verification by signers—Whether notice of filing required—Determination of sufficiency of petition and fixing of election at special council meeting—Sleepy Eye charter—M40 § 1933-48, et seq.; (MS41 § 419.01, et seq.).

Brown County Attorney.

Facts

It appears that the city of Sleepy Eye has availed itself of the provisions of Mason's Supplement, Sections 1933-48, et seq., and established a civil service commission thereunder. A petition for the discontinuance of that commission presumably under Section 1933-63b is now being circulated.

Question

1. Must the signatures to such a petition be acknowledged or verified before a notary public?

Answer

Said Section 1933-63b provides that such a petition must be signed "by 25 per cent of the number of legal voters voting at the last election." There is no express provision either in that section, or elsewhere, that the signatures be verified.

Manifestly, a petition signed by the requisite number of persons and filed with the council is a prerequisite to action by that body submitting the question to the voters. While it is not expressly provided that signers must

be voters, we feel certain that is what the legislature meant. It would be absurd to permit persons unqualified to vote to sign such a petition and thereby compel an election if all the qualified voters of the village were opposed to the proposition to be submitted. Accordingly, we construe this section as though it provided that such a petition must be signed "by persons qualified to vote at the village election, to a number equal to 25 per cent of the voters who cast ballots at the last village election." That being so, the council must determine that the requisite number of signers to such a petition were qualified to vote at elections in the village before it has any basis on which to act. If it cannot determine this from an examination of the signatures alone, it must resort to such investigation as to it seems sufficient to establish the qualifications of those who signed. In other words, it is not required to recognize a petition containing the required number of signers without any showing they are legal voters.

It would be unreasonable to expect the council to investigate the qualifications of several hundred voters, and we believe a court would sustain it in requiring an affidavit from each signer of the petition as to his qualifications as a voter. Such an affidavit might be made at the time of signing the petition, or afterwards. It might be made a part of the petition.

Question

2. After such a petition is filed must notice of the filing thereof be given so as to permit objections thereto, and withdrawals therefrom?

Answer

Although such a procedure would be proper, there is no express statutory requirement that it be followed. It is merely provided that "when such petition is filed, the governing body of such city or village shall cause said question to be submitted to the voters at the first following general election."

"Such petition" means a properly stated petition signed by the requisite number of qualified persons. If the council in its efforts to determine the qualifications of those signing deems that a hearing after notice is essential, it may adopt a resolution to that effect. Such action is optional on its part. It probably would be good practice for it to adopt such a resolution.

Accordingly, you are advised that the council may lawfully require notice of a hearing on such a petition to be given, and a hearing to be held.

Question

3. Must the sufficiency of the petition be determined and the election be ordered by the council at a special as distinguished from a general meeting of the council?

Answer

The law is silent on this point. Sleepy Eye operates under a home rule charter. Under the provisions of that charter the council may hold "regular

or special meetings at times and places as they, by resolution, may direct." Chapter IV, Section 2, page 21. There does not appear to be any charter limitations on the powers of a special council meeting in Sleepy Eye, and in the absence of such limitations, you are advised that the council may pass on the petition's sufficiency, and if found proper, order the election at either a duly called and held special or regular meeting.

ROLLIN L. SMITH,
Special Assistant Attorney General.

February 24, 1942. 785-E-1

CHARTER 102 Art. IV, Sec. 36 (State Const.) amendment adopted 11/3/42 L. 1941 Ch. 555

Amendments—Publication of—Requirements of Minn. Constitution—Minn. Cons., Art. IV, § 36.

City Attorney, Willmar.

Facts

The city of Willmar, operating under a home rule charter, is about to submit certain amendments to the electors. The Constitution of Minnesota, Article IV, Section 36, provides that

> "* * * Such charter so deposited may be amended by proposal therefor made by a board of fifteen commissioners aforesaid, published for at least thirty days in three newspapers of general circulation in such city or village, * * *"

There are three newspapers published in the City of Willmar—one is a daily, and two are weeklies.

Question

As to interpretation of the requirements that the proposed charter amendments be published "for at least thirty days in three newspapers of general circulation.

Answer

The constitutional requirement is complied with if the proposed amendments are published in the daily paper each day for at least thirty days, and in the two weekly papers in each edition for at least thirty days. See Wolfe v. City of Moorhead, 98 Minn. 113. There the court, in construing the constitutional amendment, said:

> "The requirements of the constitutional amendment are satisfied by the publication of the charter amendment, begun in three newspapers conforming to the statutory standard on a particular day and continued in every issue of such newspapers from the date of first publication until the time of holding the election, provided that the charter amendment be published for a period of at least thirty days. * * *"

EDWARD J. DEVITT,
Assistant Attorney General.

October 21, 1941. 58-M

103

Home Rule—Charter—Validity of provision retaining unseparated status of village from township for election and assessment purposes—Constitution, Art. IV, § 36; M27 §§ 1099, 1126, 1268, et seq.; (MS41, §§ 365.44, 410.04, et seq.; 413.05).

Village Attorney, Biwabik.

Facts

A home rule charter proposed for adoption or rejection by the voters of the Village of Biwabik (organized under R.L. 1905) contains this provision:

> "Section 7(d). Nothing in this charter shall be construed as having the effect of separating the city of Biwabik from the town of Biwabik for assessment and election purposes; and such city and town shall constitute a single election and assessment district in the same manner as provided by law for towns and villages which have not by proper legal procedure become separated for election and assessment purposes."

Question

Whether or not if adopted, it will be valid.

Answer

Authority to adopt a home rule charter "consistent with and subject to the laws of this state" is conferred by Article IV, Section 36 of the Constitution. The legislature is empowered thereby to "prescribe by law the general limits within which such charter shall be framed." Pursuant thereto, legislation has been enacted which now appears in Mason's Minnesota Statutes of 1927, Sections 1268, et seq. Neither the Constitution, nor the sections cited, expressly prohibit a home rule charter from providing that a city organized thereunder and the town in which it is situate shall constitute a single election and assessment district.

The Constitution does not provide what shall constitute an election or assessment district; neither does it limit the authority of the legislature in this regard. Consequently, the field is left open for the legislature. It may establish an election and assessment district of such size as it wishes.

Under our statutory system, with a few exceptions, each township, including all villages situated therein, constitutes a single assessment and election district. Incorporation of an area within a township as a village does not automatically effect a separation of such village from the township for either of those purposes. Ops. Atty. Gen. May 19, 1931, June 22, 1936 (440h).

For many years our laws have provided that a township may separate from a village for election and assessment purposes (Mason's Minnesota Statutes of 1927, Section 1099, Op. 504 Atty. Gen. Report 1940); also that a

village may separate from a township for such purposes (Mason's Minnesota Statutes of 1927, Section 1126, Op. Atty. Gen. 798, Report 1910 and 693, Report 1912). In other words, it has been the recognized legislative policy to leave the question of separation for local determination.

The authority of the voters of a municipality to adopt a home rule charter is a broad authority and is subject to only a few restrictions. These are stated in the Constitution and the statutes.

The adoption of a home rule charter in Minnesota is legislation. The authority it furnishes to city officers is legislative authority. A constitutional charter, therefore, has all the force and effect of an act of the legislature. McQuillin, Mun. Corp. Section 152 (2d ed.); Park v. Duluth, 134 Minn. 296; Freeman v. Zimmerman, 86 Minn. 353. The power conferred by the Constitution upon cities to frame their own charters extends to all subjects and matters properly belonging to the government of municipalities, and includes every subject appropriate to the ordinary conduct of municipal affairs. Grant v. Berrisford, 94 Minn. 45; State ex rel. v. District Court, 90 Minn. 457.

Summing up the Minnesota decisions dealing with municipal home rule in 7 Minn. L. Rev. 306, 313, Professor William Anderson says:

> "Upon reading these cases . . . one gets the impression that the supreme court has been no less liberal than the legislature toward the principle of local self-government. Within the field of true municipal functions, which is a rapidly growing domain, cities are given substantially the same power to confer authority upon themselves by home rule charters as the legislature formerly exercised. The fact that the cities charter themselves instead of receiving their powers directly from the legislature is a distinction without a real difference."

It is elementary that a home rule charter must not contravene any public policy of the state. However, the provision in question appears to conform to rather than to contravene the recognized legislative policy on this subject; namely, to leave the question of separation for election and assessment purposes for local determination.

If there were any statutory provision which required home rule charter cities to be separated from their respective towns for election and assessment purposes, a different question would be presented. Clearly the legislature has power to pass such a law. If one was in effect, it would necessarily prevent a city, by home rule charter, from doing what Biwabik proposes to do. However, as stated before, there is no such provision. Consequently the electors are free to act as they please in this respect.

Accordingly, your inquiry is answered in the affirmative. Under the proposed Biwabik charter, the City of Biwabik and the Town of Biwabik remain a single election and assessment district.

ROLLIN L. SMITH,
Special Assistant Attorney General.

August 14, 1941. 58-O

COMMISSIONER DISTRICTS

104

County—Redistricting—Publishing Notice—City ward boundaries changed—(MS41 § 375.02).

Clay County Attorney.

Facts

The county board of Clay County redistricted the county into commissioners' districts after the last federal census. Certain districts were bounded by ward lines in the city of Moorhead. Thereafter the city of Moorhead changed the boundaries of those wards.

Question

Whether the county board can at this time pass a resolution defining the boundaries of the districts affected so as to coincide with the ward lines as changed, or whether it is necessary to give notice and comply with the statutes as to redistricting.

Answer

Minnesota Statutes 1941, Section 375.02, provides that the county board shall not have authority or jurisdiction to redistrict a county unless the board shall cause at least three weeks' published notice to be given of its purpose to do so. Even though only a slight change is made in the boundaries of two or more districts, nevertheless the changes constitute a redistricting in our opinion. So that such changes should not be made without the giving of notice as required by the statute.

RALPH A. STONE,
Assistant Attorney General.

November 12, 1942. 798-B

DEPOSITORIES

105

Commodity Stamp Fund—Where deposited—M27 §§ 846, 848; M40 § 4463; (MS41 §§ 256.89, 261.201 to 261.208, 385.07, 385.09).

Public Examiner.

Facts

Laws 1941, Chapter 98, Section 7, provides:

"All stamps, cash and property in the possession of any governmental subdivision of the state or any agency thereof shall be insured against loss **or deposited with a depository of public funds in the manner provided by law.**"

Question

Whether or not the stamp-issuing officer in a county designated under that statute should deposit the commodity stamp fund in the depository designated by the board of auditors of the county, as provided by Mason's Minnesota Statutes of 1927, Section 846; or in the depository designated by the board of county commissioners, as provided in Section 848, idem; or in the depository designated by the county welfare board, as provided by Mason's Supplement 1940, Section 4463.

Answer

It is not clear just what the legislature intended. State depositories, town depositories, city and village depositories, county depositories, and depositories of a county social welfare fund are, literally speaking, each depositories of public funds. However, it scarcely seems likely that the legislature intended to give the stamp-issuing officer the option of selecting some depository out of the classes described above. A reading of Laws 1941, Chapter 98, indicates a legislative intent to keep these funds distinct from other funds. For example, Section 2 thereof, at the middle of page 122, contains this provision:

> "Such commodity stamp funds shall remain inviolate during the operation of said stamp plan program, and that no part thereof shall be used to defray administration or any other expenses whatsoever."

Furthermore, the county welfare board is vested with the administration of the act and it is given power to designate the stamp-issuing officer. It would seem a more logical arrangement to deposit money in the commodity stamp fund in the depository designated by the county welfare board, pursuant to Mason's Supplement 1940, Section 4463, than in the depository of regular county funds designated under Mason's Minnesota Statutes of 1927, Section 848.

What a court is required to do in a problem of statutory construction, such as is here presented, is not determined by what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind if the point had been present. Dunnell's Digest, Section 8940.

Accordingly, you are advised that money in the commodity stamp fund created by Laws 1941, Chapter 98, should be deposited by the stamp-issuing officer with the depository designated by the county welfare board pursuant to Mason's Supplement 1940, Section 4463. Said section provides that the social welfare fund shall be deposited in "a local bank carrying federal deposit insurance, designated by the county welfare board for this purpose" and does not provide for the furnishing of collateral security by the bank.

ROLLIN L. SMITH,
Special Assistant Attorney General.

August 8, 1941. 140-a-7

DRAINAGE

106

Ditches—Assessment for repairs—Not covered in original assessment for construction of county ditch—M27 §§ 6840-54, 6840-61; (MS41 §§ 106.49, 106.55).

Renville County Attorney.

Facts

A county ditch was constructed in Renville county about 33 years ago. This ditch drained old Stockade Lake and is about a mile and a quarter in length, ending in a natural ravine. At the time the ditch was constructed it was adequate and carried off surface water naturally draining into it. The natural ravine connects the first ditch with a second drainage ditch. At the time the first ditch was constructed, the parties owning land around the lake were assessed for benefits. Since that time people owning property beyond the lake have constructed open ditches across the lands that were assessed for benefits, with consent of the owners of such benefited land and without the knowledge or authority of the county board. The result is that in the spring and fall the ditch is unable to carry the water that was intended to be drained by it because of additional waters added by these 15 additional private ditches. These private ditches, however, do not run into the lake bed or the county ditch and the water that runs into the lake bed from these 15 private ditches and from those lands that were not assessed is surface water that would eventually reach the lake, less that part thereof that is lost by being absorbed.

A petition has now been filed with the county board under Mason's Minnesota Statutes of 1927, Section 6840-54, for cleaning out and repairing this first ditch, which petition is opposed by several of the landowners at the lower end of the ditch on the ground that the cleaning out and repairing of the ditch will cause their land at the lower end of the ditch and along the natural ravine to be flooded.

Question

1. "What authority has the county board, if it proceeds to clean out and repair this ditch, to assess part of the cost against the lands which were not originally assessed, but receiving the benefits by having their lands drained across the assessed lands into the lake by these open and tile ditches?"

Answer

There is no authority which would permit the assessing of the lands not originally assessed for the cleaning and repairing of the ditch.

Question

2. "Has the Board the power and authority by injunction or otherwise, to stop these nonassessed landowners from artificially pouring the surface waters into this lake through these open and tile ditches?"

Answer

We call your attention to Mason's Minnesota Statutes of 1927, Section 6840-61, which prohibits a public or private lateral to be constructed so as to use an existing system. However, if this statute is applicable, it would be a question of fact whether these private ditches would constitute a "lateral" as apparently they do not connect with the ditch itself. On the other hand, the law of surface waters might be used to enjoin the use of these private ditches. However, this is largely a question of fact upon which this office cannot pass.

Question

3. "What liability is there on the part of the county, if the County Board proceeds to clean and repair this ditch and places it back in its original state, and the owners of land along the lower end of this ditch and the natural ravine suffer damage?"

Answer

It is difficult to see how liability would rest on the county for doing that which the law authorizes it to do. On the other hand, this might in turn rest upon what interest in the land was taken at the time of the original proceeding and whether or not an easement was taken for flooding or recovery of damages in the order by which the ditch was constructed.

It would seem that the thing to do in this particular matter would be to commence a proceeding to construct a new ditch, over and including the old ditch, in such a manner that the ditch would properly handle the drainage problem and if this is done, all lands benefited could be assessed.

HAYES DANSINGBURG,
Assistant Attorney General.

October 14, 1941. 602-J

107

Ditches—Construction of tile drain to connect with established drainage ditch —Consent of owners of land assessed for original ditch required—L 19, C471, § 12.

Brown County Attorney.

Facts

On July 25, 1919, a petition was filed with the town board in Cottonwood Township, this County, for the establishment of a town ditch. The ditch was duly established, and the town of Cottonwood was assessed for certain road benefits in those proceedings. The town now desires to use the ditch as an outlet for a tile drain along a part of the town road which was

not assessed for benefits in the proceedings. There are some farm owners whose lands were not assessed for the original cost of the ditch who will also benefit by this tile drain. It seems that there is some opposition on the part of some of the farmers who were originally assessed, to the use of the ditch as an outlet by the farmers not assessed, and by the town board, so apparently it will be impossible to reach an agreement among them.

Question

Whether this ditch can be used within reasonable limits to embrace a larger area, and if so, by what procedure.

The law in effect at the time the ditch was originally established was Chapter 471, Laws of 1919, Section 12.

Answer

When a drainage system is established under Minnesota law it is in effect the establishment of a community for the specific purpose of affording drainage to that area. Persons who are not in sympathy with the drainage project are made parties. Their lands may be damaged and some of their lands taken from them without their consent. They are assessed for benefits whether or not they want the drainage system. Once the drainage system is established, whatever benefits accrue to the lands of the owners within the area become appurtenant to the lands. Without the consent of the owners, they cannot be deprived of these benefits except by due process of law.

Under the facts as you have stated them, certain lands have become entitled to the benefits which were calculated to accrue to these lands at the time of the establishment of the drainage system. I assume that the plans and specifications for the drainage ditch specified the point of the source of the ditch, its course, its terminus, specified the depth, the width at the bottom, the width at the top and the slope of the banks. These specifications entitled persons assessed for benefits to the maintenance of the ditch in substantially the condition in which it was constructed and for which they were required to pay. It is now proposed that persons not originally assessed for this ditch will construct a tile drain which will discharge ditch waters into the ditch originally established.

It is a well-known principle of engineering that engineers provide for what they call a factor of safety when they construct a bridge, a road, a ditch, or any other structure. We have a right to assume that when this ditch was planned and built that the engineers provided that it would carry not only the quantity of water which they computed would be ordinarily carried in times of high water, but undoubtedly they computed a factor of safety in connection therewith. Thus if the ordinary stage of water in the ditch at times of excessive moisture was two feet, the engineers undoubtedly would figure that the ditch should be sufficient to carry one or two feet more than might ordinarily be expected. If the proposed tile ditch is constructed, the burden upon the original ditch will be increased by the waters that are

cast therein through the tile. The factor of safety is thereby reduced. This factor of safety is a property right in the lands assessed for the construction of the original ditch. Without the consent of the owners of such lands so assessed, the efficiency of the original ditch cannot be decreased except by due process of law. The outlet for the tile ditch is an important part thereof. Without adequate outlet, the ditch is worthless.

It is, therefore, my conclusion that unless the consent of the owners of each tract of land assessed for benefits in the original proceeding is obtained, the tile ditch may not be discharged into the original ditch unless such proceedings are taken pursuant to law as will obtain this right of outlet for the tile. The proper proceeding would be the establishment of a new ditch upon the exact route of the old ditch, having as a branch the proposed tile ditch. The tile ditch would then be assessed and the assessment spread over the area benefited by the tile ditch for that just portion of the cost of the original cost of the construction of the old ditch which the viewers determine to be the share of the burden justly imposed upon lands benefited by the tile drain.

Without such a new proceeding, it is my opinion that the promoters of the tile drain could be restrained from discharging the waters from the tile into the old ditch.

You will find interesting reading on this subject in Lupkes v. Town of Clifton, 157 Minn. 493, 196 N. W. 666, and In Re Elysian High-water Level, 208 Minn. 158, 293 N. W. 140.

CHARLES E. HOUSTON,
Assistant Attorney General.

December 9, 1942. 602-B

108

Ditches—Repairs—Cleaning—Hearing for—Cost—M27 § 6840-54; (MS41 §§ 106.49, 106.51).

Polk County Attorney.

Questions

1. Is it necessary to have a final hearing when a ditch has been repaired?

You say that most of the repairs in your county consist of cleaning out brush and dirt to make the ditch conform to the original depth and width.

2. If it is necessary to have a final hearing on repair of a ditch, is the same procedure followed as when the ditch was originally constructed?

Answer

Minnesota Statutes 1941, Section 106.49, Mason's Minnesota Statutes 1927, Section 6840-54, relates to county ditches and judicial ditches. This

section is confined to cases where the cost of the repair does not exceed 30% of the original cost of construction of the ditch. In proceedings had under that section, you will observe that the requirements of Minnesota Statutes 1941, Section 106.51, Laws 1941, Chapter 211, Section 1, are that when the cost of the repair has been ascertained "to apportion the total cost and expense connected with the repairs among these counties in the same proportion as the original cost of construction of the system, and thereupon it shall become the duty of the county board of the county to provide for the payment of this expense; and, if there are not sufficient funds to the credit of the system in any county to make these repairs, it shall be the duty of the board of that county to order the county auditor to make and file, in his office, and to file for record, in the office of the register of deeds, a summary statement and lien, as provided in (Minnesota Statutes 1941) Sections 106.41 and 106.42, as in the case of county drainage systems, and it shall be the duty of the auditor to make and file this statement, and to assess the costs of the repairs against the property benefited in the original drainage proceeding in the same proportion as in the construction of the original system."

When the improvement consists of deepening, widening, or extending, then the procedure is under Minnesota Statutes 1941, Section 106.52. In that event a hearing is had upon the report of the engineer and viewers in the same manner as provided in Minnesota Statutes 1941, Section 106.24, in the case of construction of a county or judicial ditch system.

The distinction is made for the apparent reason that where the specifications of the original ditch are changed it cannot be said that the benefits should be assessed in the same proportion as originally, but where the specifications are not changed the clean-out is a mere maintenance job.

From the foregoing you will see that in case the specifications of the ditch are changed by the repair or clean-out that it is necessary to have a final hearing upon the engineer's and viewers' reports after they have been filed, as in the case of an original ditch proceeding. When the specifications are unchanged, no hearing is required.

Question

3. Whether it is necessary, where a ditch has been repaired to its original depth and width, to have a hearing after the engineer has filed his certificate and report that the improvement has been completed.

Answer

Where there is a change in the ditch system after its original completion, the cost of the change may not be assessed against lands affected without first having a report from the engineer and the viewers, with a hearing upon such report and a determination of the benefits. Where there is no change in the depth or width, or other specifications of the ditch, but the work consists merely of cleaning out the ditch so as to make it conform to the original specification, then no hearing is necessary. When the cost of

the repairs has been ascertained, they are spread against the land affected in the same proportions as the original assessment. Of course if there is money in the ditch fund the entire cost does not need to be assessed against the land but only such proportion of the total cost as is not available in the ditch fund.

I think that we agree with you in your views as you have stated them.

CHARLES E. HOUSTON,
Assistant Attorney General.

October 2, 1942. 602-J

109

Ditches—Repair—Cleaning—Original record lost—Proceedings should be conducted as a new project.

Murray County Attorney.

Facts

A petition is pending in Murray county before the county board for the repair of county ditch No. 76A and that portion of county ditch No. 18 below the outlet of county ditch No. 76A. County ditch No. 76A discharges into county ditch No. 18.

It further appears from your letter that a part of the original records relating to county ditch No. 18 have disappeared from the files. I take it from your letter that they cannot be found. As I understand the facts to be, it is very difficult to ascertain what were the specifications on county ditch No. 18. I understand that you are unable to say just what its depth was at various positions in the ditch. You are unable to say what was the original slope of the banks according to the specifications and as it was actually dug. You are unable to say what was the width at the top and the width at the bottom throughout this ditch from its source to its terminus as shown by the plans and as actually constructed. Without this information, we would be unable to say whether the plans for a cleanout contemplated widening the ditch or deepening it, or changing the slope of the banks. As we understand the law, a repair or cleanout job contemplates restoring the ditch to the specifications upon which it was built. Any change in those specifications would require a change in the procedure.

Now as I understand it what the people interested really want is to have a job which will clean out county ditch No. 76A from the county road at the north end to the point of junction with county ditch No. 18 and from that point following the route of county ditch No. 18 to Beaver Creek.

Opinion

In view of the facts as stated, it appears to me that the only practical solution of the problem is to present a new petition treating it as a new drainage project, beginning at the north end of county ditch No. 76A, thence

following the route of county ditch No. 76A to its outlet and from its outlet following county ditch No. 18 to the outlet of No. 18 in Beaver Creek, thus making an entire new project out of it. This will not increase the amount of the work to be done, but it will be in accordance with the wishes of the persons interested.

In such a proceeding, all of the persons who were originally assessed for benefits on county ditch No. 18 and on No. 76A should have notice of all proceedings at all times. The entire proceedings should be conducted as a new project. It should have a new ditch number.

The proceedings will require the appointment of an engineer and viewers. All of the proceedings required in a new ditch will be required.

On the other hand, if you are able to ascertain the plans and specifications of the two old ditches, cleanout jobs could be provided separately on No. 76A and on No. 18, but I am unable to see how you can make a cleanout job without knowing the original plans and specifications.

Another thing that might be considered in making a new job of it is that in the years since the original construction of this drainage system experience has taught the people some things that they did not know in the beginning. For example, they have learned that when the slope of the banks of a ditch are quite gradual that erosion is less and grass will grow upon the banks. There will not be the likelihood of caveins, and the cost of maintenance is less.

We have to conduct our proceedings within the law. This is naturally one drainage system but they were established and conducted as two systems.

CHARLES E. HOUSTON,
Assistant Attorney General.

December 3, 1942. 602-J

110

Ditches—Repairs—Cleaning—Petition for extension of system—Notice—(MS41 § 106.49).

Blue Earth County Attorney.

Opinion

Minnesota Statutes 1941, Section 106.49, contemplates not only a clean-out job but also an improvement or extension of the original drainage scheme. If only a clean-out is contemplated, under subdivision (3) of that section, the county board is authorized to proceed to clean out the ditch. No notice is required to be given under the terms of the statute before the work is done.

But if any widening, deepening, or extensions are contemplated, then it is not merely to be cleaned so as to conform to the original specifications and, in our opinion, notice is required to be given to all persons whose lands are affected as in the case of a new ditch proceeding.

CHARLES E. HOUSTON,
Assistant Attorney General.

September 2, 1942. 602-J

111

Ditches—Repair—Improvement—County board's duty to keep tile free from obstruction—(MS41 § 106.48).

Renville County Attorney.

Question

What authority and right has the County Board of Commissioners to go out on to land through which a county tile ditch runs, and cut down and grub out cottonwood trees which are growing along and beside the ditch, and which threaten to plug up and stop the drainage of water through the tile, by reason of roots of the trees following along and growing into the tile?

Answer

Minnesota Statutes 1941, Section 106.48, reads in part:

> "The county board of any county in this state within which is constructed or may hereafter be constructed any state, county, or judicial drainage system lying wholly or partly within the county shall keep the same or such part thereof as lies within the county in proper repair and free from obstruction in the manner specified in this chapter so as to answer its purpose, * * *."

The duty is imposed upon the county board to keep the ditch free from obstruction. In order to keep the tile free from obstruction it may be necessary to remove trees in the close proximity to the tile, the roots of which would otherwise enter the joints of the tile and in time completely obstruct drainage through the tile. Whether or not such danger exists and whether or not it is necessary to cut the trees is a question of fact which the county board will decide, but the duty upon the board is plain to keep the tile free from obstruction. It will use such means therefor as the circumstances of the case may require.

CHARLES E. HOUSTON,
Assistant Attorney General.

September 29, 1942. 602-J

148a-19

112

Ditches—Repair—Telephone poles—Cost of moving—Legitimate charge to ditch district assessment.

Wilkin County Attorney.

Facts

County Ditch No. 20 in Wilkin County is being repaired. The engineer's report and the specifications for the repair, and the contract for the doing of the work under the plans and specifications are silent on the matter of moving a telephone line which parallels the ditch. In order to do the work in a workmanlike manner, in accordance with the plans and specifications, it will be necessary that the telephone line be moved. It may be replaced after the work is finished. This telephone line passes over an easement held by the telephone company and is not on a public road.

You state it is your opinion that the cost of moving the telephone line so as to enable the work to be done should be paid to the contractor as additional work not provided for in the contract, and the cost of such moving assessed to the ditch district.

Question

Whether we concur with you in your opinion.

Answer

We agree with you that, if the telephone company should be required to move the telephone line and then replace it after the construction work has been done, this is an item of damage to be paid to the telephone company, the same as any other item of damage. If it is necessary in order that the work be done that the telephone line be moved, it is the part of the cost of the doing of the work.

It is our opinion that when the county entered into the contract with the contractor for the doing of the work, the county made an implied representation that the place in which the work was to be done was free from artificial obstruction to the doing of the work. The telephone company had a right to maintain this line on the easement over private property. Therefore, if the telephone company moved the line it is entitled to be paid the reasonable cost of the removal, and if the contractor agreed to move the line without such moving being contemplated in his contract, he is entitled to additional compensation for such moving, such compensation to be in a reasonable amount.

CHARLES E. HOUSTON,
Assistant Attorney General.

October 28, 1942. 602-J

98a-12

EMPLOYEES

113

Mileage—For use of borrowed or rented car—M27 § 254-47; (MS41 § 350.11). Winona County Attorney.

Facts and Question

Mason's Minnesota Statutes, Section 254-47, provides for mileage for county, city . . . and other employees. Can a county office employee who receives mileage pursuant to this section legally charge said mileage at five cents per mile when such employee either borrows or rents a car for official business? Under the stress of modern times, some officers of the county find their tires in bad condition and find further that their cars are temporarily laid up; consequently, the importance of either renting or borrowing a car to carry on the functions of their office

Answer

Mason's Minnesota Statutes 1927, Section 254-47, reads as follows:

> "Auto hire for municipal employes.—The maximum amount which shall be paid by the State, any department or bureau thereof, or any county, city, village, town or school district, to any officer or employe except sheriffs or deputy sheriffs, as compensation or reimbursement for the use by such officer or employe of his own automobile in the performance of his duties, shall not exceed five cents per mile. In case of sheriffs and deputy sheriffs the maximum amount so to be paid shall not exceed seven cents per mile."

This section applies only to the use by the public officer of his own automobile. It does not apply where such officer borrows or rents a car. The intent of the law is to reimburse the public officer for the expense which he incurs in using his own car. There are certain officers who, under the statutes pertaining to the compensation of their offices, are entitled to livery hire and expenses. In the case of such officers, depending upon the language of the controlling statute, an allowance for rent of an automobile, for use on official business, or "livery hire" might be proper.

In the case of a borrowed car where a controlling statute allows an officer his expenses incurred in performing his official duties, such officer might be allowed the expense to which he is put for gasoline and oil.

RALPH A. STONE,
Special Assistant Attorney General.

March 3, 1942. 104-A-8

114

County Welfare Board—Salaries—Not entitled to in lieu of vacation not taken.

Koochiching County Attorney.

Facts and Question

"The Welfare Board as well as the County Board has adopted the policy of allowing vacations with pay to its employees, on the basis of one day for each month of employment preceding the date of the vacation—not to exceed 12 vacation days, exclusive of Sundays and holidays. The philosophy of the vacation is that the employees will do more and better work for the board if they are given the rest such a vacation affords.

"The question here arises out of the following facts: an employee of the Welfare Board was entitled to two weeks vacation. She as yet has not received a vacation or taken it, but instead resigned from the Welfare Board to accept employment in one of the county offices where she is on regular pay. She now asks for the pay for the two weeks vacation to which she is entitled. She will at the same time be receiving regular pay as an employee of other departments of the county. The question seems to be whether it is legal for the Welfare Board to pay her for 12 days vacation when as a matter of fact she is working at the time and receiving pay of another department in the county.

"The desire of course is to give her the vacation to which she is entitled. On the other hand, we do not want any expenditure to be made which is not entirely legal."

Answer

The employee is not entitled to payment for two weeks in lieu of vacation to which she was entitled but did not take.

The purpose of a vacation is for the rehabilitation of the employee. If the employee needs a rest so that she may better perform her duties, two weeks' extra pay will not give her the rest she needs. Vacations are not granted as an increase in salary. If an employee is entitled to a vacation which she does not see fit to take, she is not entitled to substitute something else in place of that to which she is entitled. The right to a vacation is not the equivalent of a right to a vacation or an option to take the money in lieu thereof. The vacation was a right incident to the employment. When the employment ceased, the right incident thereto also ceased.

Since she is working for the same employer, the employer might consider whether it will now grant her a vacation, but that is not the question submitted to us for consideration.

CHARLES E. HOUSTON,
Assistant Attorney General.

October 8, 1942. 104-A-9

115

Retirement Associations—Persons eligible to other pension associations may not waive their rights and thereby become eligible to the Public Employees Association—M40 § 254-24; L 41, C 285 § 1; (MS41 §§ 353.01, 353.03).

Ely City Attorney.

Question

Whether employees of the Ely Fire Department, which is composed of both full time and voluntary firemen, may waive their pension rights as members of the Firemen's Relief Association and become members of the Public Employees Retirement Association.

Answer

Mason's Supp. 1940, Sec. 254-23 as amended by Laws of 1941, Chap. 285, Sec. 1 thereof, defines public employees who are eligible to membership in the Public Employees Retirement Association. Among those excluded is:

> "(c) Any employee of any governmental subdivision who by virtue of his present employment is required to contribute to, or is eligible for membership in, or to be designated as a future beneficiary of, any retirement, relief or pension system established and maintained by authority of and pursuant to any one or more of the following sections of the 1940 Supplement to Mason's Minnesota Statutes for 1927, to-wit: * * * relating to firemen's relief associations * * * etc."

The privilege of membership in the Public Employees Retirement Association is not dependent upon the exercise of the right to belong to other pension systems, but is dependent upon whether the person is eligible for membership in other pension systems. The Ely firemen are eligible for membership in a pension system other than that of the Public Employees Retirement Association, and would therefore not be eligible for membership in the latter association.

This opinion would be the same in respect to full time firemen, voluntary firemen who are otherwise employed by the city, and voluntary firemen not otherwise employed by the city.

JOHN A. WEEKS,
Assistant Attorney General.

April 30, 1942. 331-B-1

116

Retirement Association—Public employees defined—M40 §§ 254-23, 1499-1; (MS41 §§ 353.01, 447.17).

Public Employees Retirement Association.

Question

Whether persons in the employ of any hospital established and maintained by a board of directors of trusts in cities of the first class as author-

ized by Laws of 1931, Chapter 56, also known as Mason's Supplement 1940, Sections 1499-1 to 1499-3 inclusive, are included within the definition of a public employee under their retirement act.

Answer

The Public Employes Retirement Act, Mason's Supplement 1940, Section 254-23, so far as pertinent to this opinion, defines public employe as follows:

> " 'Public Employe' shall mean any person holding a position, either by election, appointment or contract in and for any of the several counties, cities, villages or school districts which are now or hereafter may be affected by the provisions of this act, whose salary is paid, in whole or in part, through taxation, or by fees, assessments or revenue from any one or more of the governmental subdivisions hereinbefore enumerated, irrespective of whether or not such person is directly employed by the authority of, or is under the control and supervision of the governing body of any such county, city, village or school district."

The funds contemplated by Mason's Supplement 1940, Section 1499-1, are donated in trust to the city for the establishment or maintenance of a hospital. The money or property belongs to the city notwithstanding the fact that its use is limited for a certain definite purpose, to-wit: The operation of a public hospital, which is a recognized public use and a permissible activity for a municipality. While the management and operation of the hospital is not in the hands of the governing body of the municipality, but in a specially created board of public officials called directors of trust, who appoint and remove employees of such institutions and control their activities, there is nothing in such fact to militate against their being public employees. The provision in the public employee's retirement act which is controlling, concerns the derivation of their salary "whose salary is paid in whole or in part through taxation or by fees, assessments, or revenue from any one or more of the governmental subdivisions," which includes cities — the question is, does the revenue from the trust fund hereinbefore mentioned come within the definition of the public employees act? Is the income from the trust fund revenue from the city? The money or the income therefrom belongs to the city even though its use may be limited. Therefore, if the money from said fund is used to pay salaries in whole or in part, the employees come within the definition and are eligible for membership in the public employees retirement association, if other required action is taken or has been taken in accordance with the provisions of the act.

It is our opinion that persons employed under the authorization of Laws of 1931, Chapter 56, are public employees within the definition of Mason's Supplement 1940, Section 254-23.

JOHN A. WEEKS,
Assistant Attorney General.

March 27, 1941. 331-B-1

117

Retirement Association—Salary—Welfare Board—Deductions for retirement purposes—L 31, C 307;(MS41 § 353.01, Subds. 2, 11, §§ 353.02, 353.04, 353.20).

Itasca County Attorney.

Facts

The Itasca County Welfare Board is composed of lay members who make their own levies and certify same to the County Auditor without the approval of the board of county commissioners. It is my understanding that this is a separate legal body which controls all of the activities of the old Poor and Hospital Commission and therefore they should be the ones to accept membership in the retirement association.

Changes in the staff are quite frequent and in a great many cases very few deductions are made until it is necessary that they request the retirement association to refund the amount deducted. There are some members of the staff that, even though it is not compulsory, will want to continue having deductions made for the retirement fund.

You state that a study of the minutes of the proceedings of the Itasca County Welfare Board does not show any action by the board to set up such a retirement association among their employees.

Questions

1. Whether it is compulsory for the employees of the Itasca County Welfare Board (Poor and Hospital Commission) to have deductions made from their salaries for retirement purposes.

2. Whether the Itasca County Welfare Board, as a separate legal entity, can refrain from membership in this retirement association.

Answer

Laws 1931, Chapter 307, is "an act to establish a public employees retirement fund, to authorize deductions from salaries therefor and the payment of annuities and benefits therefrom, to provide for the management of said fund by a retirement board, and to define the powers and duties of such board."

This act has been amended. It is now found in Minnesota Statutes 1941, Chapter 353. The act took effect April 24, 1931.

It is our opinion that members of the county welfare board are public employees within the definition thereof found in Minnesota Statutes 1941, Section 353.01, Subdivision 2.

All such members who became employees of the county after April 24, 1931, automatically became members of the Public Employees Retirement Association by acceptance of public employment. Minnesota Statutes 1941,

Section 353.02. By authority of the same section, it is optional on the part of persons who were employed by the county before the effective date of that act whether they shall be members of the association.

The assistant secretary of the Public Employees Retirement Association has informed me that Itasca County qualified for the benefits under this act on December 2, 1931.

Present public employees are defined by Minnesota Statutes 1941, Section 353.01, Subdivision 11, as "any public employee receiving salary from any county * * * on the date of the acceptance of the terms of this chapter by the governing body * * *."

According to Section 353.20, the provisions of this chapter apply to such counties as "shall have duly approved, by a majority vote and by a resolution in writing, of salary deductions for public employees, as contemplated by Section 353.04, and filed a duly certified copy of such resolution of approval with the proper officials of the county * * * whose duty it is to pay or authorize the payment of salaries, and one such certified copy with the secretary of the retirement board. * * *"

It is our opinion that the power to pass this resolution and determine whether the county employees shall be members of the board resides in the county board and not the county welfare board.

In our opinion the county welfare board has no power of determination in the matter.

CHARLES E. HOUSTON,
Assistant Attorney General.

November 25, 1942. 331-B-1

118

Soldiers' Preference—Discharge of city employe—Right to notice and hearing—Discontinuance of position—Distinction between two positions as to nature and qualifications—Effect of seniority rights—Waiver or laches —M40 §§ 4368, 4369; (MS41 §§ 197.45, 197.46).

City Attorney, Owatonna.

Facts

Plans for construction of the plant took shape during the years 1938 and 1939, when the city obtained a P.W.A. grant for the project. The plant was completed about January 1, 1940, and was then put in operation. The city engineer has been in general charge of the operation of the plant at all times. For several years previously a city employe called "P," who was not a war veteran, had acted as a general handy man, assisting the city engineer in any duties he might require. "P" was employed as assistant inspector of construction of the plant, apparently assisting the city engineer and representing him when he was not personally on the job.

In December, 1938, after the disposal plant project had been instituted, but more than a year before the plant was completed, the war veteran in question, one "S," applied to the city council for the position of "operator" of the plant. Whether he had in mind being placed in responsible charge of the plant or merely getting a subordinate job therein does not appear. Apparently the city council has never formally created or recognized any such distinctive position as "operator" of the plant, in the sense of a superintendent or foreman in complete charge. On the contrary, as above stated, the plant has always been operated under the direction of the city engineer. Hence, when reference is hereinafter made to men employed in operating the plant, it is understood that this merely describes the nature of the work, irrespective of any authority or responsibility that may have attached.

The plant is of a type requiring somewhat more skill on the part of operators than the average plant. The construction contract specified that a competent operator be employed by the city. Accordingly, when the plant was opened in January, 1940, the city employed temporarily a skilled operator, one "B," to run the plant and train the other help. "P," the old non-veteran employe, who had worked on the construction of the plant and presumably had gained some knowledge of its operation, was assigned to work in the plant when it was first put into service, aiding "B" in its operation and receiving instruction from him, under the general direction of the city engineer. "P" has worked in the plant as an operator ever since.

"S" was not given a job in the plant when it was opened. Whether he was employed by the city in any other capacity at that time does not appear. No direct question is here presented as to his rights under his previous application, which was still pending when the plant was opened. Nevertheless, the circumstances in that connection may be pertinent to the questions now to be considered. When the plant was opened in January, 1940, the city council at least owed "S" the duty, under Section 4368, of making an investigation of his qualifications and considering whether he could perform the duties of any position within the scope of his application which might be open in connection with the operation of the plant. Of course, if the application by its terms requested immediate appointment as responsible head of the plant, and if, as we assume, "S" was wholly without training or experience in such matters at the time, he was clearly not qualified for the position which he sought, and the council was justified in refusing to employ him therefor. However, if the application was broad enough to cover any position in connection with the operation of the plant, and if the problem was to hire someone to learn to operate the plant under the instruction of an expert, amounting, in effect, to an apprenticeship, "S" would have at least been entitled to consideration for that position. In such a situation, if "S" was reasonably capable of learning to operate the plant, he would have been entitled to preference over "P" or any other non-veteran applicant, even though the latter might have been better qualified.

It appears from your letter that the city council at the time the plant was opened actually considered the employment of "S" as operator of the plant if he could learn to run it. However, on the basis of their own obser-

vations and the recommendations of the city engineer, the consulting engineer, and the associate designer of the plant, all of whom felt that "S" was not competent, the members of the council were unanimously of the opinion that "S" did not have the requisite ability. Whether the council then gave "S's" application the degree of consideration required under Section 4368, or whether they had sufficient grounds for their refusal or failure to employ him, are questions not now at issue. "S," as will be seen, accepted employment in the plant later, and is therefore in no position to contest the disposition which was made of his application when the plant was opened. We do not understand that he is attempting to do so. His present grievance is not over his original employment, but over his discharge without a hearing some time later, raising an issue under the provisions of Section 4369. However, the terms of his previous application for employment and the circumstances of its consideration and disposition are matters which may have a material bearing on the status of the position which "S" was given later and which he held at the time of his discharge, and they should be examined and analyzed in that light. Without more complete information as to the facts we are unable to say just what significance these matters may have, but we suggest that you review them carefully and give them whatever weight you think they deserve.

Returning to the chronological history of the case as set forth in your letter, on July 2, 1940, some six months after the plant went into operation, the city engineer, under authority from the city council, hired "S," the war veteran, and put him to work in the plant under the instruction of "B," the expert, together with "P," the non-veteran city employe, who had been there since the plant was opened. Presumably "S" was employed at this time in contemplation of the departure of "B," who left sometime later in the fall of the same year. After "B" left, "P" and "S" continued to work in the plant together under the direction of the city engineer until sometime in July, 1941. Then, with the approval of the city council, the city engineer discharged "S" without a hearing, giving him ten days leave with pay in which to find another job. "P" has continued to operate the plant under the direction of the city engineer ever since, being the only man on duty there at all times. No new man has been hired to take the place of "S."

During all the times in question "P" and "S" received the same wages, at the regular rate paid to men working under the direction of the city engineer.

Question

"S" now demands that he be reinstated as operator of the plant, with back pay from the time of his discharge, and threatens a mandamus action if this demand is not complied with. You ask our opinion as to the legality of his discharge and as to what action the council should now take.

Opinion

As you will appreciate, this office has no power to render a binding decision in such a case, where final determination in case of dispute can be made only by the courts, nor can we ever give a yes or no answer where issues

of fact are involved. As you will see upon reading the various veterans' preference cases which have gone to the Supreme Court, such cases often turn on some close question of fact, perhaps depending on some circumstance which was not apprehended by the responsible officials when the case arose. Furthermore, in a case where litigation is pending or threatened, it would be an act of presumption on the part of the attorney general to attempt to prejudge the issues. Hence the best we can do is to analyze the situation as we get it from your statement and give you the benefit of our ideas as to the issues and the applicable rules of law, hoping that this may aid you and the city authorities in determining your course of action.

This case presents some interesting and doubtful questions, and it has been given careful consideration by several of our staff members who have had experience with veterans' preference cases.

In passing we take occasion to observe, for the guidance of your city council and other public employing authorities in the future, that in any case where the discharge of a war veteran from a position coming under the preference law is contemplated, and where there is any doubt as to the right of the authorities to discharge him without a hearing, it is advisable to give him notice and an opportunity to be heard, unless he waives his right thereto and accepts his discharge voluntarily. Only in this way can the public authorities be sure of according full protection to the rights of war veterans and giving to the preference law the effect which the legislature intended. Moreover, it is usually much less trouble and expense to hold a hearing than to defend a lawsuit over a demand for reinstatement and back pay.

However, in your case the city authorities evidently determined that a hearing was unnecessary, and the issue is now raised as to the correctness of that decision. It seems to us that the case hinges on the following points:

1. Whether the job held by "S," the war veteran, at the time of his discharge, was the same kind of a job as that held by "P," or was distinguishable therefrom with respect to the duties and the necessary qualifications of the respective incumbents;

2. If the two jobs were of substantially the same nature whether "P," the non-veteran city employe, had seniority rights in his position in the plant which would give him precedence over "S";

3. Whether "S's" rights under the veterans' preference law have been barred by waiver or laches.

1. With respect to actual duties and qualifications, it could hardly be said that when "S," the veteran, was first employed in July, 1940, he personally was on a par with "P," because "B" was then wholly without knowledge or training in the operation of the plant, whereas "P" had acquired some experience. However, that is not the determining factor in this case, which turns upon the situation which existed at the time of "S's" discharge. At that time he had been working in the plant for over a year, and presumably had acquired some usefulness there, or he would not have been kept so long. The fact that he was paid the same wages as "P" indicates that

there could not have been a great deal of difference in the standing of the two positions in the minds of the city authorities.

Nevertheless there may have been distinctions which would set one job apart from the other—for example, as to which of the two men was in general charge of the plant during the absence of the city engineer, or which was to handle certain more difficult operations, or which was to take the lead in case it should become necessary for one to assume direction when both were working together. If there was a material distinction between the positions, based upon any substantial ground, that alone might possibly be sufficient to dispose of the case, on the ground that "S's" position was a separate one which was simply discontinued.

State ex rel. Evens v. City of Duluth, 195 Minn. 563, 262 N. W. 681, 263 N. W. 912, 266 N. W. 736.

See also:

State ex rel. Boyd v. Matson, 155 Minn. 137, 193 N. W. 30.
State ex rel. Castel v. Village of Chisholm, 173 Minn. 485, 217 N. W. 681.

State ex rel. Tamminen v. City of Eveleth, 189 Minn. 229, 249 N. W. 184.

However, your statement of facts is not very explicit as to the nature of the work done by the two men and their relationship to each other at the time of "S's" discharge, so we are unable to say whether there are sufficient grounds for holding that the two positions are distinguishable.

2. If the postiions held by "S" and "P" are not distinguishable as to nature of work or qualifications, the question of seniority enters the picture. If "P," by reason of his past service, had acquired seniority rights or privileges in the position which he held at the time of "S's" discharge, either by express rule or by custom recognized by the city authorities, "P's" position was thereby distinguished from that of "S" so that when occasion arose for suspending or discontinuing one of the two positions, the authorities were within their rights in terminating the position of "S," the junior employe.

State ex rel. Evens v. Duluth, above cited.

Here again your statement of facts does not furnish a basis for a definite conclusion, there being no information as to whether the rule of seniority has been established or recognized by the city authorities so as to apply to the positions in question.

Consideration should be given to the possible effect of the pendency of "S's" application for employment on the question of seniority rights. It may have a material bearing, though how much we cannot say, in the absence of more complete information as to the circumstances.

If seniority rights are not established, you should give consideration to the possible application of the rule laid down in the case of Johnson v. Pugh, 152 Minn. 437, 189 N. W. 257, in which the court held that relator, having

held a position as policeman in the City of Duluth for about eighteen months under a custom which dispensed to some extent with civil service rules, could not be discharged without a hearing when others similarly situated were retained.

3. Questions of waiver or laches which might bar the application of the veterans' preference law appear at different stages of the case. In the first place, if, as you say, "S" accepted ten days leave with pay upon the termination of his employment with the city to enable him to look for a new job, that might furnish a possible basis for the contention that he thereby acquiesced in his discharge and estopped himself from invoking the preference law. In the second place, if he waited an unreasonable time after his discharge before demanding reinstatement, that might constitute laches which would bar relief under the law.

Dawes v. City of Grand Forks (N. D.), 243 N. W. 802.

Roche v. Fisk, 228 N. Y. S. 411.

Williams v. Pyrke, 252 N. Y. S. 801.

However, questions of waiver or laches are always difficult to determine, depending as they do on various facts and circumstances, so we cannot predict with any degree of certainty what the outcome would be should these issues be raised in court. We are simply calling attention to these points as deserving consideration.

CHESTER S. WILSON,
Deputy Attorney General.

February 3, 1942. 85a

119

Soldiers' Preference—Discharge—Hearing—Right to subpoena witnesses— M27 §§ 6968, 9809; M40 §§ 4368, 4369; (MS41 §§ 197.45, 197.46, 358.10, 596.01).

Nicollet County Attorney.

Question

Mason's Supplement 1940, Section 4369, which is the Veterans' Preference Act, apparently entitles a veteran to a hearing. Could you kindly advise me at your earliest convenience what, if any, power the County Board has to subpoena witnesses for the hearing?

Answer

The facts underlying your request for an opinion are not stated. From the wording of your question it may be assumed that the county board has for consideration the matter of releasing an employee who claims soldiers'

preference rights under Mason's Supplement 1940, Sections 4368, 4369; that a hearing on the question is to be had before the county board; and that the county board wishes to compel the attendance of a witness or witnesses for that hearing.

The right to a fair hearing implies the right to compel the attendance of witnesses. That right might become a mockery if the soldier were not entitled to compel the attendance of witnesses in his favor necessary to establish his defense and his right to hold the position. If he has that right, of course the county board should have a corresponding right.

Mason's Minnesota Statutes 1927, Section 9809, provides as follows:

> "9809. Subpoena, by whom issued—Every clerk of a court of record, and every justice of the peace, may issue subpoenas for witnesses in all civil cases pending before the court or justice, or before any magistrate, arbitrator, board, committee, or other person authorized to examine witnesses, and in all contests concerning lands before the register and receiver of any land office in this state."

This provision in the law has been on our statute books for a long time, and has been traced back as far as General Statutes 1866, Chapter 73, Section 1.

You will note that the section quoted authorizes the issuance of a subpoena in all **civil cases** pending before any board authorized to **examine witnesses.**

That the county board has the right to "examine witnesses" is implied from the power to conduct the hearing.

That the words "civil cases" includes such a proceeding as the one in question is indicated by the decisions of our court.

> State v. Peterson, 50 Minn. 239, 52 N. W. 655.

The court had under consideration a case involving proceedings before the governor to suspend the county treasurer. It was held that the treasurer was entitled to subpoenas to compel the attendance of witnesses under this section.

> Wolf v. State Board of Medical Examiners, 109 Minn. 360, 123 N. W. 1074.

This related to the revocation of a doctor's license to practice medicine. The hearing was before the state board of medical examiners. The section quoted was held applicable to a hearing on that matter before that board. It was further held that under it the board could compel by subpoena the production of documentary evidence.

> State ex rel. Peers v. Fitzgerald, 131 Minn. 116, 154 N. W. 750.

It appeared in this case that the council of the City of Virginia was conducting an investigation to determine whether to establish a municipal

slaughter house; whether meat dealers should be licensed, and whether there was an illegal combination with respect to meat prices. The court said:

> "Where any body, board or officer of a village or city has the right to hear testimony, the right may be enforced under Sections 8370 and 8373, G. S. 1913." (Mason's Minnesota Statutes 1927, Sections 9809-9812.)

But it was further held that the right to punish for contempt was not vested in the city council.

Considering these cases, it is my opinion that a hearing before the county board on the question of a removal of a person having or claiming a soldier's preference is within the purview of the words "civil cases" as used in the section cited.

It might be suggested that there is no right to compel witnesses to attend if the county board is not authorized to administer oaths to witnesses in such a matter. But Mason's Minnesota Statutes 1927, Section 6968, authorizes members of county boards to administer such oaths as they may deem necessary to the proper discharge of their duties. Hence they have authority to administer an oath to a witness at such a hearing.

Consequently, it is my opinion that either the honorably discharged soldier employee or the municipal body which is conducting the hearing may secure the issuance of subpoenas pursuant to the provisions of Mason's Minnesota Statutes 1927, Section 9809.

RALPH A. STONE,
Special Assistant Attorney General.

March 6, 1942. 85-E

120

Soldiers' Preference—Rights of veterans to preference in two or three part-time jobs with public agencies—M40 § 4368; (MS41 § 197.45).

Attorney, Village of Kinney.

Opinion

A World War veteran under Mason's Supplement 1940, Section 4368, is entitled to a preference in employment by any public agency, subject, however, to the applicable provision of the Civil Service Act insofar as the state is concerned.

The fact that a veteran has had a preference in a public agency does not impair his right to claim preference in another public agency. In other words, the veteran does not exhaust his right to a soldier's preference under the statute by claiming in two instances.

He might have a preference in two part-time jobs with different public agencies provided the duties of these jobs do not conflict. If they do conflict, he must of course make a choice.

ROLLIN L. SMITH,
Special Assistant Attorney General.

April 16, 1942. 85-I

FINANCES

121

City—Appropriation—City funds—To assist in support and maintenance of private airport—M40 §§ 5494-36½, et seq., 5494-37, et seq.; (MS41 §§ 360.01, et seq., 360.20, et seq.).

Mankato City Attorney.

Facts

Mankato has a privately owned Airport just outside the City limits.

Question

May the City of Mankato legally appropriate money to the support or maintenance of the same; such as paying for a beacon light or just an outright donation from the City Treasury for its maintenance? That is, may the City Council legally vote and pay money to said privately owned airport for its maintenance from money received by the City from general taxation?

Answer

We answer this question in the negative and rest our conclusion on the proposition that Municipal funds may not be expended for private purposes. 44 Corpus Juris, pp. 1108 and 4030. Dunnell's Digest, Section 6551, McQuillan Mun. Corp. (2d ed.) Sections 376 and 2338; Burns v. Essling, 156 Minn. 171. What constitutes a public purpose must be determined in each case by its own peculiar circumstances. Green v. Frazier, 253 U. S. 233. Nothing in your letter indicates any public purpose in your case.

Cities are empowered to acquire airports and to regulate them. Mason's Minn. Supp. 1940, Sections 5494-37, et seq. Furthermore, the Minnesota Aeronautics Commission has some regulatory power over airports. Mason's Minn. Supp. 1940, Sections 5494-36½, et seq.

However, there is no statutory law or charter provision expressly authorizing donations by your city to a private airport, and it is doubtful whether such provision would be upheld by a court.

ROLLIN L. SMITH,
Special Assistant Attorney General.

May 20, 1942. 59-a-3

122

City—Authority of city council to donate city funds to 4-H Club—M27 § 7889; (MS41 § 38.12).

City Attorney, Mankato.

Question

Whether or not the city council of Mankato may lawfully donate $150.00 to the 4-H Club, an organization composed of farm boys and girls, which

is arranging an exhibit, or fair, to be held in Mankato, and at which premiums will be awarded. The promoters are local business men and claim that such an exhibition will help business in Mankato.

Answer

This office has held that a county board may not make such a donation. Opinion June 6, 1935. Also that municipalities may not contribute to the Red Cross. Opinion October 24, 1939. In line with those opinions, your inquiry is answered in the negative.

The rule is that a city may appropriate public funds only when authorized by charter or statutory provision, and not prohibited by the constitution. 44 C. J., Secs. 4042, 4030. It cannot give its funds to charitable, or educational institutions not under its control. Hitchcock v. St. Louis, 49 Mo. 484 at 488. The only statutory provision which might apply is Mason's Minnesota Statutes of 1927, Section 7889. This empowers councils of cities to appropriate money to county agricultural societies. A 4-H Club is not a county agricultural society within the meaning of this statute.

ROLLIN L. SMITH,
Special Assistant Attorney General.

August 19, 1941. 59-a-3

123

City—Bonds—Construction of trunk sewers—Special elections—Third class cities—Whether electors may require holding of—South St. Paul charter construed—M27 §§ 1941, 1962; (MS41 §§ 475.13, 476.05).

City Attorney South St. Paul.

Facts

"The City of South St. Paul is a city of the third class, operating under a home rule charter. Section 4, of Chapter 2, provides as follows:

'Special elections for any purpose shall be held and conducted in all respects as general elections under this charter upon notice of not less than 20 days, given as provided herein for general elections, which notice shall distinctly specify the object of said election.'

"The charter is silent as to any other provisions providing for regulating special elections. Some of the citizens of South St. Paul are anxious that a special election be held to vote on the question of issuing bonds for the construction of certain trunk sewers."

Question

1. "Assuming the council does not see fit to call a special election, is there any law whereby the electors can compel the council to call a special election for the purpose of voting upon the question of issuing bonds to finance the construction of trunk sewers?"

Answer

Unless it is proposed to sell the bonds in question to the state, the answer to this inquiry is in the negative. 1940 Mason's Minnesota Supplement, Sections 601-11(3) and 601-11(3)k relates to special elections in third class cities in certain cases but we find nothing therein making it compulsory for the council to call a special election after a petition by the electors to that effect has been filed. Mason's Minnesota 1940 Supplement, Section 601-11(2)i, provides for the calling of special elections in villages upon motion of the council or upon petition of the voters, and this section has been construed by us as making an election mandatory after the proper petition has been filed. Op. (476B-15) May 10, 1938. There does not seem to be any similar statutory provision applicable to third class cities operating under the home rule charter. Where the bonds are to be sold to the state a petition by the electors is expressly authorized. Mason's Minnesota Statutes 1927, Section 1962.

Question

2. "Assuming the council determined by resolution to hold a special election, is there any law determining how soon the election must be held after the adoption of the resolution calling the same?"

Answer

We find no provision to that effect in the public indebtedness chapter of our code. Mason's Minnesota Statutes 1927, Chapter 10. It is merely provided that no bonds of any municipality, other than those issued for funding or refunding purposes, shall be issued without first obtaining the approval of the voters as specified therein. Mason's Minn. Statutes 1927, Section 1941. If the bonds are to be sold to the state, then the election must be held not more than thirty days after the adoption of the resolution providing for it. Mason's Minn. Statutes 1927, Section 1962.

As you are aware, there are many special acts authorizing elections upon bond issues for various purposes, and in some instances these laws make specific provisions for the holding of elections. We are uncertain from your letter whether you contemplate proceeding under the general authority of your charter or under some statutory law applicable to a city of your class. We assume that you are proceeding under the general authority of your charter. If that assumption is correct and the bonds are not to be sold to the state, then both your inquiries are answered in the negative.

ROLLIN L. SMITH,
Special Assistant Attorney General.

May 13, 1942. 36-B

124

City—Bonds—Issuance of to pay indebtedness—Surplus—Use of.

Eveleth City Attorney.

Facts

In the years 1933 and 1937 the City of Eveleth issued bonds to the State of Minnesota to fund and pay indebtedness outstanding against the city. With monies derived from the issuance of such bonds, the city did pay in full all of such indebtedness outstanding and there now remains a balance of approximately $10,000 of such monies in the city treasury. The bonds issued have not been paid. We are desirous of knowing definitely whether such $10,000 must be paid to retire such bonds or can be used for some other municipal purpose.

The funding applications under which the bonds were purchased by the state provide: "and that the proceeds arising from the sale thereof be used for the purpose of refunding said bonds, and no other." The bonds were issued under Sections 1959 to 1968, Mason's Minnesota Statutes of 1927, as amended.

You add that in your opinion the balance mentioned may be used solely to retire outstanding bonds and you ask our views.

Answer

It is, of course, elementary that the proceeds of bonds issued for a designated purpose must be used for that purpose and may not be diverted to something else. 44 C. J. P. p. 1161, Section 4116, p. 1165, Section 4123; 5 McQuillin Mun. Corp. (2d ed.), p. 971, Section 2337. It is well settled that money raised for a special municipal purpose under express limitation to a particular use cannot be used for another purpose. Weik v. Wausau, 143 Wis. 645, 128 N. W. 429; 5 McQuillan Mun. Corp. (2d ed.) p. 990, Section 2350.

Manifestly if the surplus in question could be diverted to general municipal purposes, a way would be opened to circumvent this limitation. By the simple device of borrowing more than was needed to retire outstanding bonds, the city would secure funds for general purposes in defiance of the principle described.

Our opinion coincides with yours. The balance mentioned must be used solely to retire outstanding bonds.

ROLLIN L. SMITH,
Special Assistant Attorney General.

May 15, 1942. 86

125

County — Appropriation — Advertising and developing agricultural resources—5c per capita appropriation—M40 § 739; (MS41 § 395.08).

Red Lake County Attorney.

Question

Whether the County Board of Red Lake County can appropriate a sum of money under the provisions of Section 739, Mason's Minnesota Statutes of 1927, 1940 Supplement, to be paid to an incorporated development society, which society is organized primarily for the purpose of developing and restoring a lake which is located within the boundaries of an adjoining county? The development society is undertaking a project for the restoration of this particular lake and in so doing is providing drainage for a portion of this county and it is felt that the society will use the money appropriated for the best interest of this county.

Answer

The section of the statute to which you refer, namely Mason's Supplement 1940, Section 739, reads as follows:

> "The board of county commissioners of any county in this state having less than 225,000 inhabitants, may appropriate annually out of the general revenue fund of such county, a sum of money not exceeding a sum equal to five cents per capita of the population of such county according to the last census, either federal or state, of such county. Such sum so appropriated shall be paid to any incorporated development society or organization of this state which in the opinion of the board of county commissioners will use such money for the best interests of such county in advertising, improving or developing the agricultural resources of such county, and such other matter as may tend to a development of the county; provided that in any such county having an assessed valuation of over two hundred million ($200,000,000) dollars, the county board of said county may appropriate a sum not exceeding a sum equal to ten cents per capita of the population of such county for the carrying on of said work in said county."

Two conditions must be present to justify such an appropriation:

First: The donee of the appropriation must be an incorporated development society or organization of this state. The organization for which the appropriation is proposed is, according to your letter, an incorporated development society, and, therefore, this condition is complied with.

Second: It must be the opinion of the members of the county board that the donee of the appropriation is the incorporated organization or society which will use the money for the best interests of the county in advertising, improving, or developing the agricultural resources of the county. If the county board fairly arrived at this conclusion, and there are reasonable

grounds supporting that opinion, then this condition has been complied with, and the appropriation would be lawful.

I might suggest that your resolution making the appropriation recite a compliance with these two conditions.

RALPH A. STONE,
Special Assistant Attorney General.

May 29, 1942. 125-B-1

126

County—Bonds—Poor relief—For administrative expenses—Welfare Board—Salary increase for employees—Not provided by budget—M40 § 3164-1, et seq.; L 41, C403; (MS41 § 261.15, et seq.).

Ramsey County Attorney.

Facts

An increase in pay for the County Welfare Board employees is contemplated but our proposed budget does not provide for such an increase. Therefore, any increase will have to be with a view to Section 1-D and Section 4 of Chapter 403 of the Laws of 1941.

Question

We would like to know whether bonds contemplated in Chapter 403 of the Laws of 1941 may be used for the payment of salaries.

1. a) At Ancker Hospital, a hospital for the poor, the Ramsey County Home, a home for the poor, and the Administration Department of the Welfare Board;

b) In the Division of Old Age Assistance, Child Welfare Department and Aid to Dependent Children Department.

2. May such bond funds be expended in these institutions and divisions for equipment, such as a cafeteria at Ancker Hospital?

Answer

Section 1, subdivisions (b), (d), Section 2 and Section 4 of the above chapter read as follows:

> "(b) The words 'support or relief of the poor' shall have the same meaning as the words are given by Chapter 15, Mason's Minnesota Statutes, 1927, and the words 'poor persons' shall mean such person for whom a legal liability is imposed under that chapter."
>
> "(d) The words 'direct relief' shall mean relief to individuals or families incidental to the care of the poor, such as food, clothing, shelter, medical care and supplies, and other necessities of life; provided that nothing in this law shall be interpreted as enlarging the responsibility for relief as now imposed by the laws of Minnesota."

"Sec. 2. Municipalities may borrow money for poor relief.—Each political subdivision of the state charged by law with responsibility for the support or relief of poor persons having a legal settlement therein is hereby granted authority to borrow funds and pledge the credit of such political subdivision to meet the expense thereof and to make such loans either from the State of Minnesota, the federal government, or from private sources when necessary for the support or relief of said persons; provided, however, that this act shall not be construed as increasing the limit of debt, if any, prescribed by the special law or home-rule charter or general law under which any political subdivision is organized."

"Sec. 4. Disposition of moneys.—All moneys borrowed hereunder shall be expended only for the support or relief of the poor, through direct relief, work relief, placement service, or other service contributing to the support or relief of the poor, including the expense of administration and supervision."

The above statutory provisions authorize Ramsey County to borrow funds for the support and relief of poor persons within the meaning of Mason's Minnesota Statutes of 1927, Chapter 15, including the expense of administration and supervision. Compensation to employees comes fairly within the term of administration expense, and, consequently, the answer to your question numbered 1 depends upon whether Ancker Hospital, the Ramsey County Home, and the other named departments and divisions of your welfare board were established and are now administered for the support and relief of the poor as defined in said Chapter 15. The Ancker Hospital and the Ramsey County Home were first established pursuant to provisions of the 1872 Laws, printed in Chapter 99 of the 1902 Extra Session Laws of Minnesota. Section 2 provides that the County of Ramsey and City of St. Paul shall jointly bear the expense of keeping and supporting the persons, patients, and inmates of the "almshouse and hospital." Section 3 provides for control by a board of three directors. Section 4 provides that:

"It shall be the duty of said board of directors to do and perform all the duties now enjoined upon the overseers of the poor by the General Statutes of the state."

Mention is made in Mason's Minnesota Statutes of 1927, Chapter 15, Sections 3165 and 3167, of county and town poor houses. Section 4 of Chapter 99 further provides for the appointment of a physician to furnish all necessary medicines "for patients without extra charge," who "shall possess all the powers and perform all the duties of county and city physician." Mason's Minnesota Statutes of 1927, Chapter 15, Section 3174, provides for the appointment of county physicians. Other statutes pertaining to Ancker Hospital or to the Ramsey County Home are Special Laws 1873, Chapter 45; Special Laws 1876, Chapter 77; Special Laws 1878, Chapter 226; Special Laws 1883, Chapters 51 and 54; Special Laws 1885, Chapters 78 and 139; Special Laws 1887, Chapter 381; Special Laws 1889, Chapters 266 and 417; Laws 1929, Chapter 371; and Laws 1937, Chapter 343. Section 8 of this last law (Mason's Supplement 1940, Section 974-18), provides in paragraph

three, relating to Ramsey County, that the "cost of all such relief, including the maintenance of any almshouse, sanatorium or hospital" shall be paid 72½% by the county and 27½% by the city.

Your county welfare board was not established pursuant to Mason's Minnesota Statutes of 1927, Chapter 15. It was established pursuant to Laws 1937, Chapter 343, as amended (Mason's Supplements 1940 and 1941, Section 974-11, et seq.). Under the provisions of these laws your county welfare board is responsible for the administration of all forms of public assistance and public welfare, including, among others, direct relief, child welfare, old age assistance, and aid to dependent children. Section 974-16, ibid., provides for salaries of employees. Compensation is thus a matter of the sound discretion of your county welfare board, subject, of course, to budgetary approval, as provided in Section 974-18, ibid. Thus there is power vested in your welfare board to fix compensation, but your question concerns the issuing of bonds to raise money for this purpose. As stated above, this depends upon whether the various divisions and departments to which you refer were established and administered for the support and relief of the poor, as defined in said Chapter 15.

There is no mention made in Mason's Minnesota Statutes of 1927, Chapter 15, of old age assistance or aid to dependent children. Provision for the raising of funds for the administering of old age assistance is made in Mason's Supplement 1940, Section 3199-34, and, with respect to aid to dependent children, in Section 8688-14. The first paragraph of Section 974-18 ibid., of general application to county welfare boards, provides that the county board shall levy a tax to cover administrative expenses of county welfare boards. However, paragraph three, applicable to Ramsey County, omits such a provision.

The extent, if any, to which bonds may be issued under Chapter 403 for the payment of salaries in the administration and child welfare departments of your welfare board depends in a broad way on the extent, if any, to which these departments are engaged in relief activities as defined in Mason's Minnesota Statutes of 1927, Chapter 15. We do not know to what degree the activities of these two departments are devoted to such relief, nor do we know whether there are employees in either of them who devote their entire time to this type of relief. Therefore, we do not know whether it is possible or practicable to make any allocation. These are factual matters which are not within the province of the attorney general to determine.

Answering then, your question 1, it is our opinion that bonds may be issued pursuant to the provisions of Laws 1941, Chapter 403, for the purpose of securing funds for the payment of salaries at Ancker Hospital and the Ramsey County Home, provided other requisites of that chapter have been met. This chapter does not authorize a similar bond issue for the purpose of paying salaries in the division of old age assistance and the department of aid to dependent children. Whether or not bonds may be issued under Chapter 403, for paying salaries in the administration and child welfare departments of the county welfare board, is a question of fact not decided here.

Under your question 2, mention is made of expenditures for equipment, such as a cafeteria at Ancker Hospital. Generally the cost of the installation of a cafeteria would constitute a capital expenditure and not an "administrative expense" as that phrase is used in the statute. However, it is conceivable that in certain factual situations such an expenditure could be correctly considered an expense. The final answer to this question depends upon the consideration of further facts not before us.

WILLIAM W. WATSON,
Special Assistant Attorney General.

September 17, 1941. 37-B-6

127

County—Claims—Payment of within fifteen days of allowance in order to secure the benefit of discount—M27 § 646; (MS41 § 373.09).

Wilkin County Attorney.

Facts

The county highway department frequently receives bills for materials purchased by it subject to a 10% discount if paid within ten days.

The statutory provision requires a period of fifteen days to elapse before any allowed claim can be paid.

Question

Whether or not the auditor and treasurer of the county may pay such bills prior to the fifteen-day period? If this is possible, the county will be saved several hundreds of dollars per year.

Answer

The pertinent statute is found in Mason's Minnesota Statutes of 1927, Section 626. It reads in part:

> "* * * When any claim against a county shall be allowed in whole or in part by such board, no order shall be issued in payment of the same or any part thereof until after fifteen days from date of the decision; and the county attorney may, on behalf and in the name of such county, appeal from such decision to the district court, by causing a written notice of such appeal to be filed in the office of the auditor within fifteen days after the date of the decision appealed from; or any seven taxpayers of the county may in their own names appeal from such decision, to the district court by causing a written notice of appeal stating the grounds thereof to be filed in the office of the auditor within fifteen days after the date of the decision appealed from, * * *."

This provision is clear and leaves no room for construction. The reasons for prohibiting payment of an allowed claim for fifteen days apply just as strongly in the case of bills subject to discount as to bills not subject to discount. Your inquiry is, therefore, answered in the negative.

ROLLIN L. SMITH,
Special Assistant Attorney General.

November 24, 1941. 107-B-4

128

County—Livestock indemnity fund—Licensed dogs—Claims payable only when damage occurred within county which adopted such law—L 39, C 410; (MS41 § 347.08, et seq.).

Lyon County Attorney.

Facts

Lyon County has accepted the provisions of Chapter 410, Laws 1939, regulating the running at large of dogs and creating a livestock and poultry indemnity fund. You then state that a resident of Lyon County living near the county line paid the prescribed fee on his dog; that his dog went into Lincoln County and while therein killed certain livestock in such county. The Lincoln County farmer has now made a demand for settlement on Lyon County.

Question

If the livestock indemnity fund of Lyon County is liable for the payment of damages to livestock in an adjoining county when such damages were caused by a licensed dog of Lyon County.

Answer

From the mechanics as set up in the law it would appear that it was the intention of the legislature to have such claims paid only when the damage occurs in a county in which such act is operative. Section 8(1) thereof states that:

> "The owner of any domestic animals attacked, * * * file a written claim for damages with the clerk of the town, village or city in which the damage occurred. The form of such claim may be prescribed by the county auditors. Upon presentation of such claim the supervisors of the town, * * * shall promptly investigate said claim and may subpoena witnesses, administer oaths and take testimony relative thereto and shall within 30 days after the filing of said claim make, certify and return to the county auditor said claim, a report of the investigation, the testimony taken and the amount of damages, if any, suffered by the owners of said animals."

If a county has not adopted this act, that county auditor would have no prescribed form for filing claims with a town board and it would seem idle to file a claim with such town board which did not have the authority to conduct an investigation or hearing, subpoena witnesses, etc., and where there would not be funds available to pay witness fees if subpoenas were issued. In short, this act did not set up the necessary machinery to govern those cases where damages occurred in a county not adopting Chapter 410. We consequently believe that the livestock indemnity fund is established for the benefit only of the residents of counties adopting Chapter 410, Laws 1939, for damages occurring from the loss of livestock within such county.

HAYES DANSINGBURG,
Assistant Attorney General.

October 30, 1941. 293-B-14

129

County — Road and Bridge Fund — General — Expenditure of to purchase garage to house road equipment.

Anoka County Attorney.

Question

Can the county board of commissioners of the County of Anoka vote county funds to be used for the purpose of constructing a garage building to house county trucks and other county equipment?

Answer

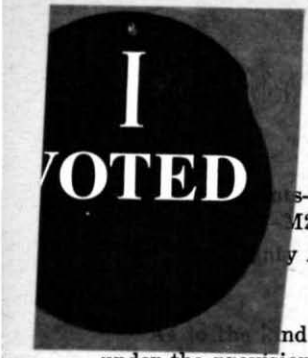
Previous opinions of the attorney general dated June 5, 1935, June 5, 1939, June 12, 1939, and December 21, 1940, have not been in complete uniformity. After a conference with the writers of these opinions and in reconciliation of all past expressions of this office, we advise you as follows:

1. Road and bridge fund moneys may be used to construct a garage building to house road machinery providing such garage, in the judgment of the county commissioners, is necessary and the expenditure is reasonable.

2. Generally speaking, general revenue funds may not be used for the purpose of constructing such a garage. However, under special circumstances, the facts in each case controlling, it is probable that, if no road and bridge funds were available and it was made to appear that the construction of a garage to house road machinery was necessary in a particular case, a court, if called upon to pass upon the question, would sustain the validity of such an expenditure.

EDWARD J. DEVITT,
Assistant Attorney General.

June 6, 1941. 107-B-16



...s—Payable—Notice to holder by registered mail—Payment ...27 § 869; (MS41 § 385.30).

...y Attorney.

Facts and Question

...nd of notice required to be given by the County Treasurer under the provisions of Section 869, 1927 Mason's Statutes, as amended. A portion of this statute provides as follows:

> "The treasurer, as soon as there is sufficient money in the treasury, shall appropriate and set apart a sum sufficient for the payment of the orders so presented and registered, and, if entitled to interest, he shall issue to the original holder a notice that interest will cease in thirty days from the date of such notice."

It has been the custom of our treasurers in the past to publish the notice in a newspaper and also mail post cards to the original holders with the notice printed on the cards. Our treasurer is now confronted with a problem where the holder of a large registered warrant or order presents it several months after such notice has been given and insists that interest must be paid up to the date of presentation because not actual notice was received. Was the notice given by the treasurer sufficient so that the interest ceased 30 days from the date of the notice? If not, what notice should be given under this section?

Answer

Said Section 869 does not specify the form of notice. Under general rules your practice should be sufficient if you can prove that the notice was actually received by the holder of the warrant. To avoid the difficulty in making proof of receipt of such notice, it might be better practice to send a notice to the holders of such warrants by registered mail, requiring a return receipt.

M. TEDD EVANS,
Assistant Attorney General.

December 26, 1941. 107-a-10

131

State or municipal subdivision thereof—Apportionment—Proceeds from sale of tax-forfeited lands—How used and apportioned by municipal subdivisions—(MS41 §§ 282.05, 282.08).

Public Examiner.

Facts

Minn. Stat. 1941, Section 282.05, reads as follows:

> "The net proceeds received from the sale or rental of forfeited lands shall be apportioned to the general funds of the state or municipal sub-

division thereof, in the manner hereinafter provided, and be first used by the municipal subdivision to retire any indebtedness then existing."

This section applies to all funds apportioned to the taxing districts arising from the sale or rental of forfeited lands, and should be read in connection with said Section 282.08 under which the proceeds from the sale or rental of any parcel of forfeited land is disposed of thus:

Under subdivision (1) of said section,

"Such portion as may be required to pay any amounts included in the appraised value under Section 282.01, subdivision 3, as representing increased value due to any public improvement made after forfeiture of such parcel to the state, but not exceeding the amount certified by the clerk of the municipality, shall be apportioned to the municipal subdivision entitled thereto;

Under subdivision (2) of said section,

"Such portion of the remainder as may be required to discharge any special assessment chargeable against such parcel for drainage or other purpose, whether due or deferred at the time of forfeiture, shall be apportioned to the municipal subdivision entitled thereto;
Under subdivision (3) of said section,

"Such portion of the remainder as may have been theretofore levied on the parcel of land for any bond issue of the school district, town, city, village, or county, wherein the parcel of land is situated shall be apportioned to the municipal subdivisions in the proportions of their respective interest; and"

The subdivision of the statute to which your inquiries exclusively relate is that identified as (4) and which reads as follows:

"Any balance remaining shall be apportioned as follows: state, ten per cent; county, 30 per cent; town, village, or city, 20 per cent; and school district, 40 per cent."

It is to be noted further that special assessments against such a parcel for drainage or other purposes must first be paid in full before there will be any money for distribution under subdivision (4).

Question

1. "Must the amount apportioned by the county auditor in accordance with Minnesota Statutes 1941, Section 282.08(4), (4 Mason's Supplement 1941, Section 2139-22(d)) be credited by the municipal subdivision to its general funds or must it be used to retire indebtedness outstanding at the time such apportionment is received?"

Answer

It is my opinion that it is the intent of the law that the money must be used to pay indebtedness and cannot be used for any other purpose as long

as such outstanding indebtedness exists. The word "indebtedness," as here used, refers to general obligations of the municipality. It would also include indebtedness payable primarily out of a special fund if, after the special fund is exhausted, the same would have to be met out of the general funds of the municipality.

Question

2. "If the apportionment must be used to retire existing indebtedness, is it discretionary with the municipality whether it is used to retire floating or bonded indebtedness?"

Answer

In my opinion it is a matter that is discretionary with the municipality, subject to any priority as between debts, which must be recognized.

Question

3. "If the municipality has bonded indebtedness but no floating indebtedness and its outstanding bonds are not then due, should the money so received be credited to the municipal subdivision's bond or sinking fund and kept there for the payment of bonds when they become due, or may the funds be credited to the municipality's general funds?"

Answer

It is my opinion that under such circumstances the money should ordinarily be placed in the sinking fund, if to do so would have or might have a tendency to reduce the amount of taxes which would otherwise have to be levied to liquidate the outstanding bonds.

Question

4. "Do the words 'general funds' found in Minnesota Statutes 1941, Section 282.05, quoted supra (being Mason's Minnesota Supplement 1940, Section 2139-19), mean the general revenue fund of the municipal subdivision, or other general funds such as Road and Bridge, Welfare, Poor, etc.?"

Answer

It is my belief that it was the intent that the money should be paid into the general revenue fund.

RALPH A. STONE,
Assistant Attorney General.

September 2, 1942. 8-B

132

Town — General fund — Tax forfeited land fund — Transfer from general fund to road and bridge fund—M27 § 1053; M40 § 2139-19; (MS41 §§ 282.05, 366.04).

Koochiching County Attorney.

Facts

A certain town has received about $1200.00 from the tax forfeited land fund. This town has no outstanding indebtedness, either bonds or warrants.

Question

The town board wants to know whether it can transfer any part of this fund to the road and bridge fund and use it for road and bridge purposes. There is no deficiency in the road and bridge fund at the present time.

Opinion

Moneys received from the tax forfeited land fund go into the general fund of the town (Mason's Minnesota Statutes 1940, Section 2139-19) and must first be used for the payment of indebtedness. This town has no existing indebtedness.

Section 1053, Mason's Minnesota Statutes 1927, reads as follows:

> "The town board of any township in this state, by unanimous vote thereof, may transfer any surplus beyond the needs of the current year in any town fund to any other town fund to supply a deficiency therein."

The meaning of this section is plain. The town may transfer from the general fund to the road and bridge fund by unanimous vote to supply a deficiency in the latter fund. Although there may be actually no deficiency in the road and bridge fund at the present time, if the town board contracts obligations payable out of that fund, and if the payment of such obligations would create a deficiency therein, then there would arise the right to transfer moneys from the general fund to the road and bridge fund to meet that deficiency.

RALPH A. STONE,
Special Assistant Attorney General.

June 6, 1942. 442a-23

133

Towns—Road and bridge fund—Expenditure of to construct building for storage of snow plows, tractors, and other road equipment—Emergency of—M27 §§ 2573b, 2573c; (MS41 § 163.05).

Morrison County Attorney.

Facts and Question

The people of Township "A" at its March, 1941, annual meeting voted the levy of 5 mills additional road and bridge tax as provided for under

Section 2573(c) and also made the maximum levy of 15 mills under subdivision (b) of said laws. This emergency levy was made for the purpose of covering the cost of construction of a building to be used as storage purposes for snow plows, tractors and other road equipment owned by "A." The building to be constructed on real estate owned by "A." This levy, as extended, has now been certified to the County Auditor of this county and said auditor is uncertain as to whether or not he should allow the levy to stand as made.

Mason's Minnesota Statutes of 1927, Section 2573, provides in part as follows:

> "(b) The electors of each town shall have power at their annual town meeting to determine the amount of money which shall be raised by taxation for road and bridge purposes, not exceeding, however, fifteen (15) mills per dollar on the taxable property of the town. The tax so voted shall be extended, collected and payment thereof enforced in the same manner and at the same time as is provided by law for the extension, collection and enforcement of other town taxes.
>
> "(c) After the annual town meeting, in case of emergency, the town board may levy a tax on the property in its town for road and bridge purposes in addition to the tax, if any, voted at the annual town meeting for road and bridge purposes, in an amount not to exceed five (5) mills on the dollar of the assessed value of the property in the town, and any tax so levied by the town shall forthwith be certified to the county auditor for extension and collection."

Answer

In our opinion, it seems apparent that the tax levy made at your annual meeting under Sections 2573, subdivision (c), is void for two reasons:

1. From the facts as given to us, the people of Township "A" voted the levy of 5 mills additional road and bridge tax at their annual meeting. The statute states specifically that such a levy may be made "after the annual town meeting, in case of emergency."

2. We do not believe the need for the construction of a building to be used for storing and housing snow plows, tractors, and other road equipment constitutes an "emergency" under the above statute. The following is an excerpt from a former opinion of this office construing this statute under date of October 21, 1937:

> "It is difficult to attempt to give any general definition of the word "emergency" as used in Subdivision (c), Section 2573, Mason's Minnesota Statutes of 1927, which would be applicable to all situations. The word, undoubtedly, is used in its ordinary sense.
>
> "Speaking generally, we may say that an 'emergency' has been defined by the courts as,

"An event or occasional combination of circumstances calling for immediate action, pressing necessity, a sudden or unexpected happening, exigency."

See Colfax County v. Butler County, 120 N. W. 444, 447 (Nebraska).

"In our opinion an emergency under the above statute would arise and exist when an urgent necessity for additional funds arose in a town after the annual town meeting and after the voters had determined the amount of money to be raised for road and bridge purposes, and the necessity could not have been foreseen at the time of the annual town meeting."

Question No. 2

"May funds be levied under statute 2573 on road and bridge fund for the purpose of constructing a building to be used for the storage and care of road machinery owned by a township or must such levy be made out of general revenue purposes or some other source?"

This office has previously held that a county board has power to purchase a garage to be used for the storage of county road machinery out of either general revenue or road and bridge funds. Your township should, therefore, have power to authorize the construction of a building to be used for the storage of snow plows, tractors, and other road equipment owned by the township to be paid out of the road and bridge fund.

EDWARD J. DEVITT,
Assistant Attorney General.

April 9, 1941. 382-a

134

Town—Orders—When statute of limitations begins to run on.

Koochiching County Attorney.

Facts

"Town warrants seem to have been issued about ten or twelve years ago and there is still no funds with which they are payable. Up to now they have paid them as they become due but they are wondering if they are obliged to pay these warrants that are more than six years old? There have never been any funds on hand with which to pay these warrants."

Question

When does the statute of limitations begin to run against town orders?

Answer

The decisions of the courts of the various states as to when the statute of limitations begins to run against actions on municipal warrants are

conflicting. They are of course based upon differently worded statutes. They cannot be reconciled. You will find the decisions on this question annotated as to each state where the question has arisen in the note found in 56 A. L. R., page 830. No Minnesota cases are therein cited.

A recognized authority, McQuillin's Municipal Corporations, Revised Edition, Vol. 6, Section 2419, reads as follows:

> "Actions on municipal warrants are generally barred in the number of years which bar an unsealed instrument. However, if warrants are required by statute to be sealed, the period of limitations for actions on sealed instruments governs. But if a warrant is sealed without authority of law, the time to sue is fixed by the statute relating to unsealed rather than sealed instruments.
>
> "The cause of action accrues when the warrants are due and payable, **and a fund is in existence to pay such warrants.** Until a fund is provided by the municipality to pay warrants, limitations do not ordinarily begin to run. Thus, where warrants do not draw interest **until presented** for payment, and payment refused for want of funds, and interest does not cease until notice given of the existence of funds to pay the warrants, limitations do not begin to run until there is a fund in the treasury from which to pay the warrants. So limitations do not commence to run against warrants payable out of a special fund to be created, until such fund has in fact been created, and there is sufficient money in the fund with which to pay the warrants.
>
> "A warrant issued to pay a valid indebtedness is such a written acknowledgment of the debt and a promise to pay it that it arrests the running of limitations."

A case arose in South Dakota dealing with county warrants. The statute was substantially similar to our own statute with reference to township orders. The conclusion was reached by the Supreme Court of South Dakota that the statute did not begin to run until there was or should have been money in the fund on which drawn properly applicable to the payment of the warrant. That court said:

> "Assuming that the six-year statute governed, manifestly the statute would not begin to run at any earlier date than an enforceable cause of action (not subject to be abated as hereinbefore discussed) accrued upon the registered warrant, which, as previously indicated, would be the time when there was or ought to be, if the county officers had performed their duties, money in the fund to retire the warrant. Appellant therefore does not maintain its affirmative defense of limitations (even assuming the applicability of the six-year statute), unless the findings in this case affirmatively show that six years before the institution of the action (that is, on or before April 4, 1925) there was or should have been money in the general fund of Mellette county properly applicable to the Warrant Exhibit 1 in the order of its registration. No such facts are found or arise as a necessary inference from found facts, and consequently the defense of limitations is not made out upon this record."

The foregoing is quoted from Western Surety Co. v. Mellette County, 257 N. W. 461.

I am inclined to the opinion that the statute of limitations does not begin to run against these township warrants until there have been or should have been funds in the fund against which they are drawn available for the payment thereof. I take this position because the township warrant is payable only in the order of its registration from the fund against which drawn. It would hardly seem to be the law that when a town order is presented to the treasurer for payment and registered "not paid for want of funds," the owner could immediately bring suit thereon against the town. If that could be done, then suit could be maintained, even though there might be money coming into the fund at the time of the next apportionment within a few weeks sufficient to pay the order. It would not seem right that the town could be thus subjected to the payment of costs and expenses when it intended to and would pay the order at the earliest time permissible under the law.

It would seem to me more fair and reasonable to say that the holder of the town order could not bring suit until either the moneys were available in the proper fund to pay the same or should have been available therein, if the town officers had done their duty.

I also am inclined to this opinion by reason of what was said by our court in the case of McKinney v. Town of Great Scott, 160 Minn. 437.

That was an action brought to recover on township orders. The complaint did not allege that at the time payment was demanded or at any time thereafter, or at the present time, there have been or are in the treasury of defendant township funds out of which payment could have been or should be made. The complaint was held good as against a demurrer based on the grounds of insufficient facts. It was held that the absence of funds in the treasury constitutes an affirmative defense which would probably be set out by answer, but in discussing the case, the court said this:

> "It may be necessary in order to avoid the statute of limitations and a demurrer on that ground, for a plaintiff to allege that no funds have ever been available for the payment of an old warrant, one which but for that fact would be barred by the statute. Forbes v. Grand County, 23 Colo. 344, 47 Pac. 388. In much the same way it might be necessary for the holder of a promissory note, in suing upon it, to allege in his complaint that the defendant maker had been absent from the jurisdiction for a certain number of years, such an allegation being necessary in order to avoid an attack by demurrer upon the ground that the statute of limitations appeared to have run against the note."

This language indicates to me that our court is of the opinion that the statute does not begin to run until funds are or should have been available for the payment of the orders sued on.

In view of this decision and of the authorities above cited, it is my opinion that the town warrants which you mentioned would not outlaw

until six years after the time that funds were available or should have been available in the treasury for the payment thereof.

I do not believe that the provisions of Section 1106, Mason's Minnesota Statutes 1927, would have the effect of authorizing a suit on a town order after the lapse of thirty days from the time payment was demanded.

RALPH A. STONE,
Assistant Attorney General.

August 13, 1942. 442-B-9

135

Village—Appropriations—Parks and playgrounds—Skating rink and warming house on land owned by school district—M40 §§ 1933-9a, 1933-9b; (MS41 §§ 471.15, 471.16).

Village Attorney, Farmington.

Facts

The Village Council of Farmington and the School Board of Independent School District No. 40, whose lands are within the village limits, wish to cooperate in the construction of a skating rink and the erection of a warming house in connection therewith, the warming house to be of permanent construction. In this connection the following questions have arisen:

Questions

1. May village funds be used for the purpose of erecting a permanent building in the nature of a warming house on real estate owned by the school district?

2. May village funds be used for that purpose if the warming house is erected on land leased from the school district?

Answer

Both of these questions are answered in the affirmative, if you proceed pursuant to Sections 1933-9a or 1933-9b, Mason's Supplement 1940.

Question

3. May village funds be donated to the school district to enable it to erect such a warming house on its own property?

Answer

No.

M. TEDD EVANS,
Assistant Attorney General.

August 19, 1941. 476-B-10

136

Village—Bonds—Issuance for ornamental street lights under facts stated— M27 § 1942-1; (MS41 § 475.14).

Village Attorney, Osakis.

Facts

The electors of Osakis, organized under the 1885 village incorporation act, recently voted favorably on a proposal to issue bonds "for the purpose of street improvements in the Village of Osakis, under W.P.A. program, to include installation of storm sewer, surfacing and re-surfacing streets and alleys, construction of sidewalks, curbs and gutters and such other work incidental and pertinent thereto."

Question

Whether or not under this wording, a part of the proceeds of the bond issue may be used for the purchase and erection of ornamental street lights along some of the streets being improved.

Answer

The right of the village to use the bonds, or their proceeds, for such a purpose is open to such serious doubt, we feel the only safe course is to answer your inquiry in the negative.

Implied power in a municipal corporation to issue bonds does not exist. 4 Dunnell's Digest, Section 6723. Rogers v. LeSeur, 57 Minn. 434, 6 McQuillin Municipal Corporations, Section 2437. Municipal corporations have no power to issue bonds unless expressly authorized to do so. Brenham vs. German American Bank, 144 U. S. 173.

We assume the bonds in question were issued under authority of Mason's Minnesota Statutes of 1927, Section 1942, subsection 1, which states the purposes for which villages may issue bonds thus:

> "* * * for the acquisition, construction, maintenance, or improvement of any of the public conveniences mentioned in Sec. 1848, subd. 4; for the purposes of a permanent improvement revolving fund; for the purchase or erection of needful public buildings; for establishing and maintaining garbage crematories, or other means of garbage disposal, hospitals, schools, libraries, museums, and art galleries; for the construction of sewers, subways, streets, sidewalks, pavements, culverts, and parks and parkways; and for changing, controlling, or bridging streams and other waterways within the corporate limits, and constructing and repairing bridges and roads within two miles of the corporate limits thereof."

You will observe no express authority is contained therein for issuing bonds for purposes of erecting lamp posts. Attorney General's opinion, November 12, 1932 (44-B-16). We doubt that our court would hold orna-

mental lamp posts to be "street improvements" or "work incidental and pertinent thereto." Strictly speaking they are not. Should an attempt be made to use the bonds or their proceeds for other than the purpose they were voted for, any interested party has a remedy. Perry v. Panama City, 67 Fla. 285, 65 So. 6.

Your village, of course, has power to light its streets and to meet the cost thereof out of its general funds. Dunnell's Digest, Section 6828.

Several years ago power was conferred on villages to issue bonds for erection of a white way by Laws 1921, Chapter 92. This law was the basis of Attorney General's opinion No. 79, 1920 report. However, that act has expired by its own terms. Unless there is some other similar act, it would seem that your village is without authority to issue bonds for a "white way" lighting system, under any circumstances.

ROLLIN L. SMITH,
Special Assistant Attorney General.

August 21, 1941. 44-B-16

137

Village—Official bonds—Premiums on discharge of payment by local authorities—M40 § 9693 (MS41 § 574.19).

Edina Village Attorney.

Question

As to the right of the village of Edina (organized under Laws 1905) to discharge payment of premiums on official bonds of said village officers including those of policemen, justices of the peace, clerk or recorder and building inspector.

Answer

There is no authorization for the payment out of village funds of premiums on official bonds of village officers, except the village treasurer. Mason's Supplement 1940, Sec. 9693 (opinion Attorney General 469-b October 16, 1934). In other words, it is the duty of each of these officers to execute and file a surety bond as a part of his act of qualifying for office. If the treasurer gives a corporate surety bond he may be reimbursed out of village funds within the limit specified by law. When a bonded village officer vacates his office, liability for any act of his after the date of such vacation terminates. This is so by operation of law. It does not lie within any village officer's authority to sign a cancellation of liability on the bond.

ROLLIN L. SMITH,
Special Assistant Attorney General.

June 16, 1941. 476-B-4

138

Village—Financial statements—Preparation of—Publication of—L 41, C 70, § 1, subd. 23; L 41, C 244; (MS41 §§ 412.19, 426.06, 426.07).

Village Attorney, Maple Plain.

Question

As to the apparent discrepancy between Laws 1941, Chapter 70, Section 1, Subdivision 23, and Laws 1941, Chapter 244, relating to the prepartion and publication of village financial statements.

Answer

Prior to this session of the legislature, the applicable law stood as follows:

The village councils of villages operating under the 1905 law were required by Mason's Minnesota Statutes of 1927, Section 1186, Subdivision 21, to prepare a complete financial statement and to cause it to be publicly read at the annual village election, and then to record such statement in the minutes and file it in the recorder's office. This requirement was not changed by the enactment of Laws 1941, Chapter 70, except that the subdivision was re-numbered as subdivision 23.

By Mason's Minnesota Statutes 1927, Section 1174, the village treasurer of 1905 villages was required to make out and file a detailed account of his receipts and disbursements at least two weeks prior to the annual election (held the first Tuesday after the first Monday in December in each year), and by Mason's Minnesota Statutes 1927, Section 1175, the village clerk of 1905 villages was required to prepare a detailed financial statement for the village, file it in his office, and publish it at least one week prior to the village election in a newspaper published in the village. In the event that no newspaper was published in the village the clerk was to post copies of such financial statement in three of the most public places in the village.

As above noted, the 1941 legislature did not change the requirements that the village council prepare a financial statement but by Laws 1941, Chapter 244, Sections 1174 and 1175 were amended so as to require the treasurer in office at the close of the calendar year to make out his detailed account of receipts and disbursements immediately after December 31st and file it with the clerk. Then the clerk in office at the close of the calendar year is to prepare his financial statement which must be presented to the council not later than January 15th. It must then be published not later than January 31st. No change is made in the character of the statement required or in the publication requirements. The apparent object of the law is to change the date for preparation and publication of this statement so that the reporting year will correspond with the fiscal year. When the village election date was changed in 1929 from March to December the

calendar year was made the fiscal year but the appropriate changes in the laws relating to financial statements were not included in the 1929 act. Laws 1941, Chapter 244, presumably, is intended to eliminate this inconsistency.

So far as we have knowledge most of the villages in the state have practically ignored the requirements of what is now Laws 1941, Chapter 70, Section 1, Subdivision 23. This for the reason that villages have no annual meetings like towns and did not have when this provision was inserted in the law. Obviously a report cannot be read at an election when no voter is present any more than a few minutes during the several hour period when the polls are open. Moreover, the provision refers to the "village recorder," an officer who is non-existent in 1905 villages under that name.

Many villages of the state in an attempt to comply with this law have adopted the financial reports of the treasurers and clerks submitted pursuant to Sections 1174 and 1175 as their own and have ordered them spread upon the minutes and filed with the clerk.

You are advised, therefore, that there is no discrepancy between Laws 1941, Chapter 70, Section 1, Subdivision 23, and Laws 1941, Chapter 244. The only change made by the enactment of these laws is to change the date for the preparation and publication of the annual financial statement in villages from November to January.

EDWARD J. DEVITT,
Assistant Attorney General.

June 4, 1941. 277-B-2

140

Method of—Town board alone determines—Electors may authorize board to provide—May not direct specific method—Appropriations—Notices—Annual meeting—Must include notice of fire appropriation—Must be by ballot—M40 § 601-11(1)p; (MS41 §§ 212.17, 365.15).

Lac qui Parle County Attorney.

Pursuant to the authority contained in Sections 1919, et seq., Mason's Supplement 1940, the city of Madison is about to enter into contracts with a number of adjacent towns to furnish fire protection to such towns. The town boards have presented a number of inquiries to you:

Question No. 1

Must a town board have authorization from the electors at the annual town meeting to enter into such a contract?

Answer

The power of the electors at the annual meeting is set forth in Section 1027-1, Mason's Minn. St. 1927:

"The electors of each town shall have power at their annual town meeting to authorize the town board to provide for fire protection and/or for apparatus therefor, and to determine by ballot the amount of money to be raised for either or both of such purposes."

Authority to determine in what manner general fire protection shall be provided is vested solely in the town board. The power of the electors at the annual meeting extends only to authorizing the town board to provide fire protection. Section 1027-4, Mason's Minn. St. 1927, relates to contracts for such protection by adjacent cities or villages:

"Whenever the electors of any town shall have authorized the providing of fire protection and/or for apparatus therefor and determined the amount of money to be raised for that purpose, **the town board . . . may enter into a contract** with any adjacent city or village for the furnishing of such fire protection within the limits of town . . . on such terms and conditions as mutually may be agreed upon."

If the electors should nevertheless vote on a proposal for specific fire protection, their action would be, at most, no more than merely advisory. It could not bind the town board, which could disregard it completely.

Question No. 2

In order that the annual town meeting may legally consider the question, should the notice of annual town meeting make mention that the proposal will be considered at the meeting concerned?

Answer

The proposal to authorize the board to provide general fire protection is not required by Section 1027-1 to be determined by ballot and therefore need not be specified in the notice. Section 601-11(1)p. Mason's Supplement 1940, provides in this regard:

"Every proposition to be voted upon by ballot at a town meeting, other than the election of officers, shall be specified in the notice of such meeting."

In view of the explicit provisions of the quoted section, the notice of your annual meeting should properly include notice that the amount of money to be raised for fire protection will be determined by ballot at that meeting, since Section 1027-1 requires that such determination be made by ballot.

In view of our answer to the first question, your third question does not require answer.

Question No. 4

Would the appropriation of a stated amount of money for compensation for such service be all the action necessary for the town meeting to take?

Answer

The electors at the annual meeting have the power to do, and if they wish fire protection must do two things with respect to providing general fire protection for the town: (1) authorize the town board to provide general fire protection for the town and/or apparatus, and, (2) determine by ballot the amount of money to be raised for such purpose. Section 1027-1, supra.

Question No. 5

Is it necessary that ballots be used on the question of the proposed fire protection service?

Answer

Our answer is in the negative. Section 1027-1 does, however, require that the amount of money to be raised for such purpose be determined by ballot.

FREDERICK O. ARNESON,
Special Assistant Attorney General.

February 10, 1941. 688-K

141

Purchase of water service or installing a well for—M27 §§ 1027-1, 1027-2, 1027-4; (MS41 §§ 365.15, 365.16, 365.18).

Town Attorney, Coleraine.

Facts

A township has been organized (1895) under and in pursuance of the provisions of Section 1 of Chapter 10 of the Minnesota revised statutes of 1878.

Questions

May the township:

a) Purchase water service for fire protection purposes (and incidentally so that water may be furnished to the residents) of a portion of the town that is platted?

Or

b) Install and operate a well for water for such purposes, or either of them?

Answer

The measure of the powers of the town board is found, not in the law as it existed at the time the town was organized, but in the law as it is at this time. Towns differ from villages and cities in this respect. A municipal

corporation is governed by its charter or by the provisions of the act under which it was formed, and also by the provisions of such statutes as are applicable thereto.

Consequently, the fact that the town you have in mind was organized in 1895 under Section 1 of Chapter 10 of the Revised Laws of 1878 is immaterial. Said Section 1 prescribes the procedure for organizing a township, and, in slightly modified form, it became Section 914 of the General Statutes of 1894, and later Section 451 of the Revised Laws of 1905. It now appears as Mason's Minnesota Statutes of 1927, Section 787. The present laws relating to towns is found in Chapter 8 of Mason's Minnesota Statutes of 1927.

The electors of a town at the annual meeting may authorize the town board to, "provide for fire protection and/or for apparatus therefor." Mason's Minnesota Statutes of 1927, Section 1027-1. After such authorization the board may levy a tax for such purpose. Section 1027-2 idem. It may also contract with an adjacent municipality to furnish it fire protection. Section 1027-4 idem.

We have heretofore held that after authorization, as prescribed above, a town board may install water mains and hydrants providing it finds so doing necessary to provide adequate fire protection. Op. September 20, 1937 (916-b). In line with that opinion, both your inquiries are answered in the affirmative, subject to this qualification. Fire protection must be the real primary purpose of purchasing water service or installing a well, and this purpose must be borne out by the actual circumstances.

ROLLIN L. SMITH,
Special Assistant Attorney General.

November 28, 1941. 916-B

HIGHWAYS

142

Loads—Restriction on load weights on highways during spring break-up—Violation of duly enacted resolution is a misdemeanor—Resolution specifying prohibition must be adopted—M40 §§ 2720-269, 2720-279; (MS41 §§ 169.80, 169.87).

Mower County Attorney.

Facts

The Mower County engineer has posted a number of state aid and county roads in the county restricting, according to the notices that he has posted, any vehicle with a total weight, including load, in excess of 8,000 pounds. There have been a number of violations of this weight restriction.

Questions

1. Whether a prosecution can be maintained against a person who drives a vehicle upon a road so restricted, the weight of which vehicle and load exceed the prohibited weight. You ask if the violation of the posted notices is a crime.

2. You also inquire whether it would be necessary that a resolution should have been adopted by the county board (the road in question being a county road) restricting the weights on these roads in order to successfully prosecute a person for driving thereon with a loaded vehicle exceeding the weight specified, or if it is sufficient if the county engineer posted the roads at the request of the county board, given orally.

Answers

1. I advise you that the violation of the weight restriction, properly imposed and followed by the posting of proper notices, as specified in the act, would in my opinion constitute a misdemeanor. A similar ruling was made by this office in 1928 under the statute as it then stood. (Mason's Minnesota Statutes 1927 Section 2720-40). I can see no reason for departing from that ruling. The only changes made by the later law (Mason's Supplement 1940, Section 2720-279) were to clarify the provisions of the old law and make it more definite. I think Mason's Supplement 1940, Section 2720-269, clearly makes it a misdemeanor to violate road restrictions if the same have been properly authorized and adopted, and notices posted.

2. It is my opinion that the weight restriction must be adopted by the county board, and cannot be left to the discretion of the county engineer, either as to weight limit or as to the roads to be posted. The law confers upon the county board (in this instance) the power to "* * * impose restrictions as to the weight of vehicles upon any such highway * * *." (Mason's Supplement 1940, Section 2720-279(a).) The next section provides that "The local authority enacting any such prohibition or restriction shall erect or cause to be erected * * * signs plainly indicating * * *."

The phrase, "enacting any such prohibition or restriction" plainly indicates that action must be taken by the county board in the manner in which official acts of like nature are taken and recorded. The resolution adopting the restriction should be adopted at a legal meeting of the county board and duly entered in the minutes. The resolution so adopted should specify the roads or portions of roads on which weight restrictions are imposed, and also the prohibited weights. Otherwise there would be no way of knowing what the restriction was or what action was taken, other than by the recollection of those present at the meeting of the county board. I think that a proper resolution restricting the weight limits on the several roads in question is

a prerequisite to the prosecution of a person driving an over-weight vehicle on such a road. There can be no criminal prosecution under a regulation which is nowhere officially recorded and which cannot be found or referred to in order to ascertain what the prohibited act is.

I think that the mere posting is insufficient. Such posting must be preceded by the adoption of a valid ordinance or resolution.

RALPH A. STONE,
Special Assistant Attorney General.

April 22, 1942. 229-A-8

143

Maintenance of—Public road located on a line between a city and adjoining town—M27 § 2587, subd. 5; (MS41 § 163.17).

City Attorney, Cannon Falls.

Question

Whether the city may compel the adjoining town to assist in repairing and maintaining a road located on the line between your city and such town.

Answer

The only pertinent statute is Mason's Minnesota Statutes of 1927, Section 2587, subdivision 5, which provides:

> "Whenever such a petition is presented to the council of a city or village, and the town board of a town, praying for the location, alteration or vacation of a road on the line between such town and the city or village, such board and council, or a majority of each, acting together as one board, shall determine said petition in the same manner in all respects as provided in the preceding section and the provisions of the preceding section shall apply to the town board and city or village council."

On the assumption that the road was established in the first instance by virtue of Section 2587, then subdivision 3 thereof becomes applicable as to the maintenance of such road. It provides that the city and town are to determine by agreement which of such parts of the road are to be maintained by each. If the two groups cannot agree, the matter is to be determined by lot.

EDWARD J. DEVITT,
Assistant Attorney General.

October 2, 1941 379-C-8-c

144

Snow removal—Rural highway—M27 § 2617; L 41, C 276; (MS41 § 160.37). Todd County Attorney.

Question

An interpretation is requested of Section 2617, Mason's Minnesota Statutes 1927, as amended by Laws 1941, Chapter 276, in order to ascertain just how far the county board may go in the matter of snow removal and which of the roads come under the heading of rural highways.

Answer

Chapter 276, Laws 1941, amends Section 2617, Mason's Minnesota Statutes of 1927, only by adding subdivision 3, which states:

> "The county board may by resolution adopted at a regular meeting thereof, authorize the use of county snow removal equipment and operators thereof, for the removal of snow upon either public or private property within the county, upon such terms and conditions as the county board shall determine, not less, however, than the actual cost of the use of such equipment and operators to the county."

Thus it appears that the only limitation upon the county in regard to the use of its equipment for snow removal is it must secure the actual costs of the use of such equipment and operators.

Under Section 2617, Mason's Minnesota Statutes of 1927 and as now amended, it is the duty of the town board, as far as funds are available, to keep town, county, and judicial roads within the township in a passable condition by the removal of snow therefrom. Likewise, it is the duty of the county board so far as funds are available, to keep all state aid roads and state rural highways in passable condition by the removal of snow therefrom.

It is our opinion that the term "state rural highways," in establishing the duty of county boards to remove snow, means county aid roads and does not refer to township cartways, township roads, or state trunk highways. Of course, under Section 3 of Chapter 276, the only limitation on the use of county equipment for snow removal is that the county secure the actual cost thereof for such use.

HAYES DANSINGBURG,
Assistant Attorney General.

May 29, 1941. 377-A-11

145

Vacation—Closing old road prior to construction of new road—M27 § 2592; (MS41 § 160.21).

Martin County Attorney.

Facts

About two years ago a petition was filed with one of our Township Boards in this county, requesting the establishment of a new road and vacating an old one. The petition was acted upon favorably and an order was filed with the Clerk of the Township granting the petition.

It seems that time passed and they did not get started with the construction of the new road and later they were unable to get their contractor and now two years have elapsed or will elapse shortly since the filing of this order granting the petition. No new road has yet been constructed and the old road is of course open to public travel. The original petition was filed by virtue of Section 2583 of Mason's Minnesota Statutes for 1927. One farmer owns all the land affected by the old road which was vacated by this order but which still remains open to public travel.

Question

Can the owner of this land affected by the old road to be vacated demand that this old road be now closed, or close it himself, inasmuch as two years have elapsed since the filing of the order by the Township Board establishing a new road and vacating this old road even though the new road has not yet been constructed?

Answer

See opinion No. 217, 1928 report, rendered November 10, 1927, in which we find this statement:

> "The alteration operated as a vacation of the old road. The vacation took effect two years after the date of the order. G. S. 1923, Section 2592; Nelson v. Nicollet County, 154 Minn. 358."

The statute in question is Mason's Minnesota Statutes 1927, Section 2592, which reads:

> "Whenever a road shall be changed by order of a county or town board, the road as it existed before the change shall remain open to public travel for two years from the date of the order; but the board may vacate such road within said two years when it deems the new road to be fit for public travel at all times of the year."

The language as applied to your facts is significant. The language is "Whenever **a road shall be changed** by order of a county or town board." Now, as I understand it, your road has not been changed. The section does not say that whenever an order has been made requiring a change that the old road **shall remain open two years.**

The Nelson case cited, on page 361 says:

"The right of the public to use the old course of this road, between the two termini of the new part, ceases with the expiration of two years from the date of the order granting the petition."

This being the law, the rights of the public having ceased, it follows that the rights of the owner of the fee come into being again. Having the right of ownership therein, he may treat it as though no road had theretofore existed.

Attention is called to the fact that in the Nelson case the facts were not precisely the same as you state, but the language that the court used in its decision is very definite.

CHARLES E. HOUSTON,
Assistant Attorney General.

September 1, 1942. 377-A-15

146

Weeds—Removal of—Town roads—At expense of abutting owners—L 41, C 246; (MS41 § 366.015).

Yellow Medicine County Attorney.

Question

Whether Laws 1941, Chapter 246, and the provision for assessing against abutting property owners who fail to properly cut the weeds on public highways in front of their places is constitutional?

Answer

Laws 1941, Chapter 246 (Mason's Supplement 1941, Section 1002a), authorizes the town board to submit to the voters the question of whether or not owners of land abutting on town roads, and not a part of any incorporated municipality, shall be required to cut and remove all weeds and grass growing on the town road adjacent to their land. The act further provides that in the event of a favorable vote it shall be the duty of such owners to remove such weeds and grass and to do so upon ten days' notice. If the owner fails or neglects to do so, the act authorizes the work to be done by designated public officials and the expense to be charged to the owner, and such charge may be made a lien upon the land and certified to the county auditor to be included in taxes and collected therewith.

So far as the act relates to weeds, the law in this state is settled by State v. Boehm, 92 Minn. 374. The legislative policy and the legal reasons therefor are expressed by the court in that case at page 378. See also Miller v. Schoene, 276 U. S. 272, and note 12 Minn. Law Rev. 655.

So far as the act refers to grass, it should be noted that the language of the act is in the conjunctive — weeds and grass — so that the foregoing authorities are applicable. However, even grass alone, if neglected, may, in the locality proscribed, namely, on the town road, itself constitute a nuisance as an obstruction and, therefore, a danger to travel on public highways. The legislature may properly declare such a condition to constitute a public nuisance and may provide for its removal or abatement in the public interest.

In previous opinions the Supreme Court has held valid Mason's Minnesota Statutes of 1927, Section 2609, which authorizes town boards to determine the necessity of cutting down and removing trees and hedges on town roads and to require abutting owners to remove the same upon notice, and upon failure to so remove, to have the same removed by public authorities and charge the expense to the owners. It is further held that the courts may not interfere with the exercise of such discretion by the town board. Powell v. Township of Carlos, 177 Minn. 772; Wagner v. Township of Carlos, 182 Minn. 571.

Additional authorities from other jurisdictions may be found in 58 A. L. R. 215, annotating the case of Commonwealth of Kentucky v. Watson, 223 Ky. 427, 3 S. W. (2d) 1077, which involved a statute requiring owners or occupants of land bordering on public highways to remove weeds, brush or other obstructions from the highway adjoining their premises. That statute was held a valid exercise of the police power and constitutional.

In our opinion, Laws 1941, Chapter 246, is a valid exercise of the police power and, therefore, constitutional.

ALFRED W. BOWEN,
Special Assistant Attorney General.

November 12, 1941. 322-G

INSURANCE

147

Liability—Authority of county to purchase under facts stated.

Clearwater County Attorney.

Question

As to the authority of your county board to purchase liability insurance to insure the county against any liability incident to the maintenance of its court house and court house grounds.

Answer

A political subdivision of the state is ordinarily not liable for the negligent acts of its employees when performing governmental functions. A county would, therefore, be without authority to pay premiums for insurance against a nonexistent liability.

You state, however, that "offices in the court house are nowadays used for many activities which might not be constituted as being strictly pursuant to governmental functions." In such instance it is possible, you suggest, that a liability might arise on the part of the county because of injuries suffered by some person who would use the court house facilities for business other than that related to governmental functions.

It seems to me that the court house is ordinarily used only for governmental purposes and I would have some difficulty in visualizing a situation where the county would be liable for the negligent maintenance of its property. Be that as it may, I think we can conclude that in the event the county would in any way be liable for the negligent maintenance of its property, then the county board would be authorized to purchase and pay for insurance against such liability.

EDWARD J. DEVITT,
Assistant Attorney General.

October 10, 1941. 125-A-28

148

Liability—Purchase of by county in reciprocal or inter-insurance exchange— M27 § 3587; (MS41 § 71.07).

Mower County Attorney.

You are advised that one of our District Judges has held that a school district is without authority to become a member of a reciprocal or inter-insurance exchange operating under the provisions of Mason's Minnesota Statutes of 1927, Section 3587, et seq., and that, accordingly, the trustee of a bankrupt insurance exchange could not recover assessments for contributions levied against the school district. J. T. Miller, as Trustee in Bankruptcy of the Minnesota Insurance Underwriters, Bankrupt, v. Ivar Williams, John Mannik, Edward Konsti, Frank V. Niemi, Victor J. Maki and Andrew Newman, individually and as Trustees of School District No. 16, Carlton County. (Decision filed in Carlton County July 19, 1933, by District Judge Edward Freeman.) In a memorandum attached to the order sustaining a demurrer to the complaint, the court in referring to Section 3587, which authorizes individuals, partnerships, and corporations to exchange inter-insurance contracts as subscribers, states:

> "It seems clear to the Court that this section (3587) clearly indicates that municipal or quasi municipal corporations are not intended to be included as subscribers. * * *
>
> "We have a code of laws covering private corporations and other codes and statutes covering various municipal or quasi municipal corporations. In common parlance, 'corporation' is used to mean private corporations only. There is nothing in the reciprocal insurance act that indicates that it is used in any other sense, while as before indicated, there are several good reasons to believe that it is used in that sense only."

This office adheres to the opinion of Judge Freeman. The position of a county is no different from that of a school district; a county is also a municipal corporation. We, therefore, advise you that in our opinion your county is without authority to become a member of a reciprocal or inter-insurance exchange.

It is well settled in this state that a reciprocal is not a mutual insurance company. For a good explanation of a reciprocal or inter-insurance exchange organized under our laws, see In re Minnesota Insurance Underwriters, 36 Fed. 2nd 371.

EDWARD J. DEVITT,
Assistant Attorney General.

March 28, 1941. 249-B-16

149

Malpractice—Premiums for—Authority of state and county to pay premiums —Doctors employed in state and county sanatoriums.

Division of Social Welfare.

Question

As to the authority of a county sanatorium commission or board of county commissioners to pay the premium for malpractice insurance covering the professional activities of the superintendent of a county sanatorium.

Answer

The establishment and maintenance of a county sanatorium is a governmental function of the county. McQuillin Municipal Corporations, 2nd Ed. Revised, Volume 6, Section 2796. Such being the case, the county is not liable for the negligent acts of the superintendent of such a sanatorium, or of any of the employees thereof. McQuillin Municipal Corporations, 2nd Ed. Revised, Volume 6, Section 2771. See also Bryant v. City of St. Paul, 33 Minn. 289. It follows that in the absence of a specific statute authorizing it, the county is without authority to pay the premium for insurance against a nonexistent liability. There is no statute authorizing a county to pay for such insurance.

The same conclusion is true with reference to the right of the state to purchase malpractice insurance for the superintendent and employees of a state sanatorium.

EDWARD J. DEVITT,
Assistant Attorney General.

September 30, 1941. 844-C-3

JAILS

150

County—Board empowered to erect and furnish—(MS41 § 375.18).

Crow Wing County Attorney.

Question

Whether the law permits the county board to buy and furnish as a part of the equipment and fixtures of the jail a commercial electric refrigerator for the preservation and storage of meats and other perishable foods to be used in feeding prisoners.

Answer

Minnesota Statutes 1941, Section 375.18, empowers the county board to erect and furnish a jail. Whether the equipment proposed is suitable furniture is a question of fact for the county board to decide.

CHARLES E. HOUSTON,
Assistant Attorney General.

September 28, 1942. 390-A-17

151

County—Matron—Female prisoners committed from other counties—Expense of employing matron to care for—M27 § 923; M40 § 10859; (MS41 §§ 387.27, 641.13).

Stearns County Attorney.

Question

Whether or not the expense of employing a matron to care for female prisoners sent to the Stearns County jail by neighboring counties may be collected from those counties.

Answer

Mason's Supplement 1940, Section 10859, fixes the amount of board which shall be paid for its prisoners by the sending county, and contains this provision:

> "In addition thereto such sum as shall have been necessarily expended for clothing, bedding and medical aid for such prisoner."

It is silent as to the expense of employing a matron.

Mason's Minnesota Statutes of 1927, Section 923, contains this provision:

> "When prisoners are committed to the jail from a county other than that in which the jail is situated, such judge shall by order apportion the amount to be paid by such order for jailer's fees."

This provision would appear to authorize the committing judge, upon a proper showing, to require the sending county to pay all or a part of the cost of employing a matron to look after the female prisoners.

ROLLIN L. SMITH,
Special Assistant Attorney General.

November 6, 1941. 127-a

LIABILITY

152

Negligence of road foreman causing damage to third party—County not liable.

Douglas County Attorney.

Facts

The W.P.A. was putting in a cattle pass on a county road, under the county's supervision to a certain extent. They had just completed the construction and fixed the approaches when a truck owned by a farmer living in the vicinity came along. The foreman told the driver that it was a little soft on the approach to the pass but that if he would put his truck in low gear and give it a good start, he could easily get through. The driver did this, with the result that his truck sank down, he hit the cattle pass, broke the axle and shaft of his car, blew out a tire and caused damages to the extent of approximately $50.00.

The foreman is, of course, unable to pay any damages. The county feels that this man is entitled to it inasmuch as it was the direct negligence of the foreman that caused the damages complained of.

Question

Are we authorized under Chapter 330, 1931 Session Laws, or any other law, to pay this claim?

Opinion

The county is under no liability and the claim should be disallowed. This is in accordance with the general rule that a county is not liable for the negligent acts of its officers which do not amount to a positive trespass.

Chapter 330, Laws 1931—being Mason's Supplement 1940, Sections 672-1, 2 and 3—does not apply to this case. A reading of sub-section 1 will

disclose that it applies only to claims against officers or employees of the county "for bodily injuries, death or property damage made upon such officers or employees **by reason of their operation of motor vehicles while in the performance of their official duties.**"

This law would not apply to a set of circumstances such as those related by you as set out above. The damage claimed did not result from the operation by a county employee of a motor vehicle and the claim therefor is not, therefore, within the scope of the law.

There is considerable doubt whether the statement made by the foreman constitutes negligence as a matter of law, but it is unnecessary to pass upon that question in view of the holding that the county is not liable even if there had been negligence on the part of its foreman. See Opinion No. 125, 1930 Attorney General's Report, and 14 Am. Jurisprudence, pages 215 and 216.

RALPH A. STONE,
Special Assistant Attorney General.

July 1, 1942. 844-C-5

LICENSES

153

Auctioneers—Non-residents—M40 § 7322; L 41, C 170; (MS41 § 330.01). Pennington County Attorney.

Facts and Question

As to constitutionality of Laws 1941, Chapter 170.

During the month of April a non-resident of the State of Minnesota applied to the County Auditor for an auctioneer's license, pursuant to Section 7322 of Mason's Minnesota Statutes, and paid therefor the non-resident license fee of $25.00, and furnished a bond pursuant to Section 7322.

After the 1941 Supplement was published, the Auditor discovered that Section 7322 had been repealed so far as the same authorized the issuance of an auctioneer's license to a non-resident by Chapter 170, Laws of 1941. The Auditor now tenders the return of the license fee and requests the licensee to return the license. He refuses to do so, contending that Chapter 170, Laws of 1941, so far as the same prohibits the issuance of a license to a non-resident, is unconstitutional and therefore not the law.

Answer

That the business of an auctioneer in Minnesota is one liable to abuse and therefore subject to legislative regulations was declared by the Supreme Court of this state in the case of Wright v. May, 127 Minn. 150; this decision rendered in 1914 and construing Section 6083, G. S. 1913 (now Section 7322, M. M. S. 1927 as amended), establishes that such regulation extends to licens-

ing with substantial fee therefor, accounting, and limiting the number of persons who may engage in such occupation. The court held that the limitation of licenses to voters within the county and the resulting exclusion of a resident of South Dakota did not violate the latter's constitutional rights under either the state or federal constitution.

At that time the statute did not contain the "reciprocal" provisions subsequently added and as amended now contained in Section 7322 (Mason's Supplement 1940 as amended by Laws 1941, Chapter 170). Nor did it then contain the provision (Laws 1937, Chapter 213) authorizing licenses for non-residents who paid a fee of $25.00. The latter provision, as you state, has been repealed by said Chapter 170. But the "reciprocal" provision although slightly modified in a respect not now material remains in effect.

Therefore it does not follow that because the 1941 law repeals the prior express authority to license non-residents who pay a $25.00 fee, that all non-residents are prevented from obtaining a license to do business in this state. If the non-resident you have in mind is a resident of a state granting "reciprocal" licenses to residents of this state, and he meets all the other requirements he may obtain a license under the present law. If on the other hand, he is not a resident of such a state, a license to him may lawfully be refused under the authority of the case above mentioned.

The controlling question of residence is obviously one of fact for you to determine, and therefore no opinion is now expressed as to the constitutionality of Chapter 170.

For your information the following authorities are mentioned: Starr, Reciprocal and Retaliatory Legislation in American States, 21 Minn. Law Review 371, 374, 383, 386-7, 403; Licenses — Discrimination — Non-residents, 61 A.L.R. 337, 346; 112 A.L.R. 63, 68.

ALFRED W. BOWEN,
Special Assistant Attorney General.

June 16, 1941. 16-B

154

Bowling Alleys—Council—Authority of to restrict number.

City Attorney, Mankato.

Facts

We have two good bowling alleys in Mankato, and the City Council thinks that is all the town can support with sufficient patronage to make it a paying investment. Now a third man is asking for a license for a bowling alley that he is installing.

Question

Can the City Council legally deny the license to the third man on the ground that the field is already filled? Liquor licenses, of course, are limited in number depending on the size of the town.

Answer

According to the Minnesota year book, Mankato operates under a home rule charter which, we assume, confers the usual power on the council to regulate and license bowling alleys. You do not quote your local ordinance on this subject, so we take it that no question of the construction of that ordinance is involved.

Generally speaking, in the exercise of the power to regulate, a city may exercise all reasonable forms of restraint over the thing regulated so long as it stops short of actual prohibition. 2 Dillon Mun. Corp., Section 665, at page 1001. Bowling alleys are an appropriate subject for municipal regulation. 3 McQuillin Mun. Corp., Section 1057, at page 382. However, power to license a lawful business does not give the city power to create a monopoly. Logan v. Pyne, 43 Ia. 524; Gale v. Kalamazoo, 23 Mich. 344 (Cooley J.). If an ordinance enacted avowedly for the protection of the public safety, health and welfare has a real and substantial relation to these objects, it will, in all probability, be sustained. 2 Dillon Mun. Corp. (5th ed.), Section 666, p. 1006. Such an ordinance must have a sufficient fact basis. Zalk, etc. v. Stuyvesant, 191 Minn. 60.

Although the act of granting or refusing a license is in a large measure discretionary, the acting authorities are not vested with personal, or arbitrary power, but are subject to the control of the courts when it appears that they have acted arbitrarily in the premises, and have abused the public trust reposed in them. 3 McQuillin Mun. Corp. (2d ed.), Section 1105, p. 491, citing a number of United States Supreme Court cases, among them Yick Wo v. Hopkins, 188 U. S. 356.

In other words, the municipal authorities cannot grant licenses and privileges to certain individuals, and arbitrarily deny them to others under like circumstances. Kenny v. Dorchester, 163 N. W. 762 (Neb.). Stated in other words, the council may not withhold a license from caprice or whim. St. Louis v. Meyrose, etc., 41 S. W. 244 (Mo.).

Concerning discrimination, the test to be applied is to ascertain whether all of the class are treated alike under like circumstances and conditions. Milwaukee v. Rissling, 199 N. W. 61 (Wis.); II McQuillin Mun. Corp. (2d), Section 1101, p. 477. Generally, on this subject, see 4 Dec. Dig. Mun. Corp., Section 621 (d). Cases which might interest you are Kramer v. Mayor, 171 A. 70 (Md.), which was a mandatory injunction to compel the granting of an application for a filling station license which had been denied, among other reasons, because of the number of stations in the same locality. There was no imputation of bad faith in that case. In the course of its opinion, the court said:

> "The number (of filling stations) already allowed in that locality may have reached the limit of safety. The multiplication of such stations may in itself be a menace."

It quoted this statement from Pocomoke v. Standard Oil, 159 A. 902 (Md.):

> "The right to restrain the number permitted to operate in a given

territory within reasonable limits is a necessary incident of the police power to be exercised with a due regard both of private right and the public welfare."

Also, Hudson v. Mayor, 160 A. 218 (N.J.), where the denial of a dance license was sustained. In Standard Oil v. Minneapolis, 163 Minn. 418, our Supreme Court sustained a city council's action in denying a permit to operate a filling station, saying:

> "The discretion committed to the council should not be exercised with discrimination in favor of one party and against another, but we have no difficulty here in this regard. The mere fact that a like station is permitted within a block of the site in question, does not, of itself, indicate discrimination."

On the other hand, in Gabrielson v. Glen Ridge, 176 A. 676 (N.J.), the issuance of a filling station license was compelled where there was no evidence it would work any inconvenience, injury or annoyance to the community and where it was shown that such a limitation on the use of the property would work a hardship on the landowners. The rule seems to be that in the absence of bad faith or an abuse of discretion, the determination of the council in such a case is rarely disturbed. Van Anken v. Kimmey, 252 N.Y.S. 329. As stated in Standard Oil v. Minneapolis, supra:

> "The application should not be denied without some good substantial reason therefor, but where, as in this case, a council, as the trial court found, after considering the matter and acting upon a reasonable basis, refused such an application, its act will not be interfered with by the courts."

Whether or not an ordinance limiting the number of bowling alley licenses to be issued in a city, or the denial of an application for such a license by the council solely on the ground that there are two licensed bowling alleys in the city, would be sustained, presents a close question. It is true that there has been a long-established legislative policy to restrict the number of intoxicating liquor licenses in municipalities. Mason's Supplement 1940, Section 3200-25. There is a limitation as to the number of boxing club licenses which may be issued in a city. Mason's Supplement 1940, Section 3260-10. There is no law expressly limiting the number of bowling alleys which may be licensed in a municipality. We have been unable to find any opinion of our Supreme Court on this precise point involved.

It is impossible to answer your question positively. Much depends on what facts might be established in court in case of an appeal by the applicant. If it was shown that the real motivating influence behind the council's action was to favor existing licensees, and to suppress competition, and not to maintain the peace and order in the community, or to contribute to the welfare of its citizens — in other words, if there was bad faith — then that court might compel the granting of the application.

On the other hand, if it appeared that the council, after considering the matter and acting upon a reasonable basis, refused the application, then and in such case a court would not be likely to interfere with the council's action.

We assume the council has good reasons for wishing to limit the number of bowling alley licenses in Mankato to two, and further, that in case of an appeal from the contemplated action, the city will be prepared to show the court good reasons why the number of such licenses should not exceed two. On such assumptions, and subject to the qualifications of this opinion, you are advised that the council's act in denying the application in question would be sustained.

ROLLIN L. SMITH,
Special Assistant Attorney General.

August 15, 1941. 802-B

155

Cigarette—Refusal to issue—M41 § 3250-3; (MS41 § 20.25).

Ramsey County Attorney.

Question

Whether the County Board has the right to refuse to issue a cigarette license to an applicant who operates a so-called "all night spot," which is a night club that does not have any license to sell beverages other than the restaurant or refreshment license issued by the State Hotel Inspector. The applicant also is one who has been convicted of violating the liquor laws and is not considered a person of good repute.

Whether the authority to issue such licenses is so far discretionary that on the one hand the board may refuse to issue a license in the first instance to such an applicant as is above described or to cancel or revoke a license in the event a licensee is convicted of violating laws relating to liquor, gambling, etc., in the operation of his place of business.

Answer

The pertinent statutory provision is found in Mason's Supplement 1941, Section 3250-3 (L. 1941, C. 405, S. 3), and reads in part:

> "The governing body of each village * * * may * * * license and regulate the sale at retail of cigarettes * * * and provide for the punishment of any violation of such regulations, and may make such other provisions for the regulation of the sale of cigarettes within its jurisdiction as are permitted by law. **The county board may make like provisions for licensing and regulating the sale of cigarettes outside the limits of any municipality,** provided no license shall be issued for the conduct of such business in any town, unless the consent of the governing body of such town, if organized, is filed with the application for such license."

The right of the legislature to delegate the power of requiring licenses of certain occupations to counties and other political subdivisions of the state is established. 37 C. J., page 175. Licensing ordinances must be reasonable in their terms and conditions, and must not be arbitrary or oppressive.

The burden of proving a licensing ordinance unreasonable is on the one who asserts it. 37 C. J., pages 186 and 187. The regulations must not be prohibitory and must tend to accomplish the object for which the licensing power was granted. State v. Schoenig, 72 Minn. 528, 75 N. W. 711.

Power vested in a board to grant licenses carries with it the power of exercising a reasonable discretion in granting or refusing licenses. But this discretion must be exercised reasonably and not arbitrarily. The board should consider all the circumstances against as well as in favor of granting the license and act in accordance with what they believe to be in the interest of the public safety or welfare. 37 C. J., pages 240, 241.

On the basis of these authorities, you are advised that the commissioners would not be acting arbitrarily in denying a license to sell cigarettes at retail to the applicant mentioned. It would seem advisable for that body to adopt by-laws definitely providing on what conditions it will issue such licenses, and its judgment should be so exercised as to negative any charge of discrimination.

Answering your second inquiry, no express provision is made by the statute for the revocation of a license once it has been issued. Ordinarily licensing statutes expressly provide that power to revoke a license shall vest in the authorities which granted it. 37 C. J., page 247. Even in such cases the courts may interfere if the power to revoke is exercised arbitrarily.

While there does not appear to be an authority squarely in point, our view is that delegation of power to issue such a license implies a delegation of power to revoke it for cause, and accordingly you are advised that the commissioners may adopt a by-law providing that any such license issued by them may be revoked for cause after notice and hearing. If this is done, and a license reciting it is subject to revocation for cause is issued, and thereafter revoked for proper cause, after notice and hearing, it is our opinion that a court would sustain the commissioners' action. Each case must, of course, be decided on its own facts.

ROLLIN L. SMITH,
Special Assistant Attorney General.

February 25, 1942. 829-C-1

156

Cigarettes—Sale of—Authority to provide for punishment of violation of cigarette licensing law—L 41, C 405; (MS41 § 461.12).

Hubbard County Attorney.

Facts

Section 3 of Laws 1941, Chapter 405, which authorizes the governing body of each village, borough and city in this state to license and regulate the sale of cigarettes, and to "* * * provide for the punishment of any violation of such regulations. * * *"

Attention is directed to the provision that authorizes "The County Board (to) make like provision for licensing and regulating the sale of cigarettes." Also to the fact that the provision giving authority to each village, borough and city to provide for the punishment of any violation of such regulations is omitted from that part of the section giving authority to the county board to make like provision for licensing and regulating.

Question

If the county board, in the absence of express authority, has implied authority to provide for the punishment of violations of its regulations governing cigarette sales.

Answer

In our opinion the county board has the implied power to provide for the punishment of any violation of its regulations governing the sale of cigarettes. The power can be reasonably implied from the express power to regulate. The power to regulate would be ineffectual did it not carry with it the power to punish for violation of such regulations.

EDWARD J. DEVITT,
Assistant Attorney General.

November 19, 1941. 829-C-1

157

Cigarettes—Sale of—Method—L 41, C 405; (MS41 §§ 17.34, 461.12, 461.13, 461.14).

Koochiching County Attorney.

Question

You ask as to our interpretation of the new cigarette licensing law.

Answer

The new law, Laws 1941, Chapter 405, is effective January 1, 1942, and authorizes the governing body of each village, borough and city to license and regulate the sale at retail of cigarettes, cigarette papers or cigarette wrappers, and to fix the license fee therefor at a sum of not to exceed $12.00 per year. The county board of each county is authorized to "make like provisions" for licensing and regulating the sale of cigarettes in areas outside the limits of any municipality. It is provided that no license is to be issued for the conduct of any such business in any town unless the consent of the governing body thereof is filed with the application for such license.

You are, therefore, right in concluding that the county board is authorized to issue licenses in areas outside of cities, villages and boroughs.

Cities, villages and boroughs customarily enact licensing laws by means of ordinances. Since the county board is authorized to "make like provisions"

for licensing and regulating the sale of cigarettes, I advise that the county board may likewise enact an ordinance licensing and regulating the sale. However, there is no material difference between an ordinance and a resolution except that a little more formality is attached to the enactment of an ordinance. In the last analysis, I don't think it makes any difference whether the county board takes the action by means of an ordinance or by means of a resolution.

EDWARD J. DEVITT,
Assistant Attorney General.

September 25, 1941. 829-C-1

158

Cigarettes—Sale of—Wholesale—No provision empowering city council to license—M41 § 3250-3; (MS41 § 20.25).

City Attorney, Luverne.

Facts

The City of Luverne adopted an ordinance reading in part as follows:

"No person shall keep for retail sale, sell at retail, or otherwise dispose of any cigarette at any place in the City of Luverne unless a license therefore shall first have been obtained as provided in this ordinance."

A local wholesale grocery sells cigarettes to dealers only and not to the public.

Question

Whether or not such a company is required to obtain a license under the ordinance mentioned.

Answer

No. By its terms, the ordinance is limited to the retail sale of cigarettes. It has no application to the wholesaling thereof.

Question

Whether or not there is any state law which requires a wholesaler to obtain a license before selling cigarettes at wholesale.

Answer

No. Laws 1941, Chapter 405 (Mason's Supplement 1941, Section 3250-3), empowers municipalities to license the sale of cigarettes at retail. It makes no provision whatever for the licensing of the sale of cigarettes either at wholesale or at retail by any state authority. Formerly the law was otherwise, but it was changed at the 1941 session of the legislature.

ROLLIN L. SMITH,
Special Assistant Attorney General.

February 20, 1942. 829-C-1

159

Cigarettes—Wholesale—Power of council to license—M41 § 3250-3; (MS41 § 20.25).

City Attorney, New Ulm.

Questions

1. Is any state department still authorized to regulate the sale of cigarettes and cigarette papers at wholesale?

2. If not, would the governing body of the City of New Ulm have authority to regulate and require the licensing of wholesale dealers in cigarettes and cigarette wrappers?

3. Does the municipality in question have authority under its general powers to regulate the wholesaling of cigarettes and to require the licensing thereof?

Answers

Under Laws 1941, Chapter 405 (Mason's Supplement 1941, Section 3250-3), municipalities are empowered thereby to license the sale of cigarettes at retail but not at wholesale. Thus, if power to require a wholesale license in such a case exists at all, it must be found in the charter or in the incorporation act under which the municipality operates. Your questions, therefore, are primarily questions of charter construction.

Where a charter confers power to license the wholesaling of cigarettes in express terms, there would not seem to be any doubt about the council's authority.

Where the charter is silent on the subject and the power to license at wholesale must be implied, it is our opinion that a court would hold it nonexistent. It is difficult to understand just how the selling of cigarettes at wholesale could be regarded as detrimental to public welfare.

However, if the legislature, or the electors of a municipality in the case of a home rule charter city, should decide that power to license the wholesaling of cigarettes should be conferred on a city council, that would be equivalent to a political determination that licensing the wholesaling of cigarettes in municipalities was essential to the public welfare, and it is not likely any court would disturb such a determination. In other words, a law or a charter amendment conferring such power would, in our opinion, be sustained.

Your letter does not indicate that your charter contains any express authority to license wholesale cigarette dealers. We assume no such express authority has been conferred. Under such circumstances, all three of your inquiries are answered in the negative.

ROLLIN L. SMITH,
Special Assistant Attorney General.

February 20, 1942. 829-C-1

160

Drivers—Revocations—L 41, C 517, 552; (MS41 §§ 169.12, 171.04). Commissioner of Highways.

The Drivers License and Safety Responsibility Acts were amended by Laws 1941, Chapters 517 and 552.

These amendments took away the provisions for revocation only upon recommendation of the court, Laws 1939, Chapter 430, and put the law back where it was prior to 1939.

1. Drivers licenses under the Drivers License Law are now to be revoked by the Commissioner of Highways upon receiving a record of the driver's conviction of any of the offenses listed and described in Mason's Supplement 1940, Section 2720-145b. Under said section the Commissioner of Highways is required to revoke the driver's license of any person convicted of operating a motor vehicle while under the influence of intoxicating liquor or narcotic drug, regardless of whether such conviction is for a first or a subsequent offense.

Under Mason's Supplement 1940, Section 2720-176, subdivision b, prior to its amendment by Laws of 1941, Chapter 552, the driver's license of a person convicted of drunken driving was revoked by the Commissioner of Highways for a first offense only when such revocation was recommended by the court before whom the conviction was had. Ausman v. Hoffmann, 292 N. W. 421. **The requirement for a court recommendation prior** to a revocation with reference to drunken drivers was repealed by said Chapter 552.

2. The Department of Highways is prohibited from issuing a driver's license to the persons described in Mason's Supplement 1940, Section 2720-144a, as amended by Laws 1941, Chapter 517. Under subdivision 3 thereof, the Department of Highways cannot issue a driver's license "to any person whose license has been revoked except upon furnishing proof of financial responsibility in the same manner as provided in the Safety Responsibility Act and if otherwise qualified." Under this subdivision, upon application therefor, the Commissioner of Highways may issue a driver's license to a person whose driver's license has been revoked, providing said person furnishes proof of financial responsibility and such proof of financial responsibility shall be in the form prescribed by Mason's Supplement 1940, Section 2720-106.

In view of the foregoing, it is our opinion that it is unnecessary for a person to apply to the district court for an Order directing the Commissioner of Highways to issue a driver's license after a revocation. Should the Department of Highways refuse to issue a license upon application therefor and after the required proof of financial responsibility has been filed, such action by the Department is reviewable by the district court under the provisions of Mason's Supplement 1940, Section 2720-145d.

It should also be noted that upon a second conviction of driving while under the influence of intoxicating liquor, the revocation must stand for at least ninety days, Laws 1941, Chapter 552.

ARTHUR CHRISTOFFERSON,
Deputy Attorney General.

June 6, 1941. 291-F

LIQUOR

161

Licenses—Bonds—Accepted as legal securities in connection with granting of off sale liquor license cannot be released until expiration of the license period—M27 §§ 3239, 9192; M40 § 3200-27; (MS41 §§ 340.22, 340.95, 541.06).

City Attorney, St. Peter.

Facts and Question

In June of 1940, at a regular meeting of the Common Council of this city said body passed a resolution that the City of St. Peter retain control and possession of all Government Bonds, and other accepted and approved legal securities, held by the city in connection with the granting of "Off Sale" intoxicating license to Schaefer Bros. for a period of six years, from and after the termination of said "Off Sale" license.

This year Schaefer Bros. decided to take out a surety company bond. They now wish to have their bonds returned to them. The State Liquor Control Commissioner, at that time, required evidence that the bonds would be held by the city for a period of six years after the termination of the license before he would approve the same. A certified copy of said resolution, together with agreement of Schaefer Bros. to the terms thereof, was sent the Commissioner. It is our position that the city cannot legally surrender these bonds, or such other bonds as may be accepted in lieu thereof, until after the lapse of six years from and after the expiration date of the license in connection with which said bonds were furnished.

Answer

Bonds or securities given pursuant to Section 3200-27, Mason's 1940 Supplement, by the holder of an intoxicating liquor license are for the benefit of the obligee and all persons suffering damages by reason of the breach of the conditions thereof. Also see Section 3239, Mason's Minn. Statutes 1927. Therefore, you are correct in your conclusion that liability under such bond or securities continues as to private persons for six years from the expiration of the license period, and that your city should hold these securities until the expiration of such six year period. See Olesen v. Retzlaff, 184 Minn. 624,

239 N. W. 672, and Sworski v. Coleman, 295 N. W. 67. The city must commence action within three years for a penalty or forfeiture under the bond. Section 9192, Mason's Minn. Statutes 1927.

M. TEDD EVANS,
Assistant Attorney General.

June 17, 1941. 218-L

162

License—Councilman not to receive—Councilman holding liquor license ineligible to vote on establishment of municipal liquor store—Vote required to establish municipal liquor store—L 1885, C 145 § 5; M27 § 1199.

Attorneys for Cohasset and Squaw Lake Villages.

Questions

1. In a village of the fourth class can a councilman who is now the holder of a liquor license vote on the question of whether or not to establish a municipal liquor store?

2. If the question is voted upon by the village council must it pass by a majority vote or a two-thirds or three-fourths vote of said council?

I do not know exactly what is meant by the term "village of the fourth class." The law makes no division of villages into such classes. However, that is not material to the questions you have submitted.

Answers

1. I understand that the question of the establishment of a municipal liquor store is to be considered by a village council, and that one of the members of that council now holds a license to sell intoxicating liquors either "on sale" or "off sale." I do not understand how a member of the village council could obtain such a license for the reasons hereinafter stated. But laying that matter aside for the present, it is my opinion that such a member is disqualified from voting on the question whether the village shall establish a municipal liquor store. He has a direct interest in the matter. It is directly to his interest that such a store be not established in his village. Therefore, he is disqualified from voting. This is the general rule applicable in such a situation.

See 43 C. J., Title Municipal Corporations, page 508:
"* * * no member of a municipal council shall vote on any question involving his own character or conduct, his right as a member, or his pecuniary interest, if that is immediate, particular, and distinct from the public interest."
Vol. 37, American Jurisprudence, Title Municipal Corporations, page 680:

"It is thoroughly established that a member of a municipal council who has a direct personal interest in a matter coming before the council is not eligible to vote thereon."

2. I find no law which requires that action by the council on such a matter should be taken by any particular majority, and, therefore, it is my opinion that a majority vote of the council is sufficient to establish a municipal liquor store.

Your letter directs my attention to a matter which cannot be overlooked. You do not state whether the villages you represent are incorporated under the 1885 Law or the Revised Laws of 1905. It is my impression that Cohasset is incorporated under the 1885 Law. I find that the Village of Squaw Lake was incorporated under the Revised Laws of 1905. However, it makes no difference with respect to the matter to which I now call your attention.

The 1885 Law (Chapter 145, General Laws 1885, Section 5; General Statutes 1894, Section 1269) provides:

> "No member of the village council shall become a party to or interested, directly or indirectly, in any contract made by the village council of which he may be a member; and every contract or payment voted for, or made contrary to the provisions hereof, is void; and any violation of the provisions of this section, hereafter committed, shall be a malfeasance in office, which shall subject the officer so offending to removal from office."

The Revised Laws of 1905, Section 731 (Mason's Minnesota Statutes 1927, Section 1199), provides:

> "No member of a village council shall be directly or indirectly interested in any contract made by such council, and every violation hereof shall be a misdemeanor."

When a liquor license is granted by the village council, the licensee is required to furnish a bond in favor of the village. Such bond is a contract with the village.

Therefore, no member of the village council is eligible to receive a liquor license. He has a direct interest in the contract, and by accepting the license and posting the bond he is violating the law.

This particular license for this reason should be revoked as it was illegally granted.

Furthermore, it is my information that Cohasset now has a municipal liquor store. Therefore, the license now held by the member of the village council must be in the Village of Squaw Lake. I find that the Village of Squaw Lake was incorporated on December 17, 1940. I call your attention to the provisions of Laws 1941, Chapter 34, which provides:

> "No license for the sale of intoxicating liquor shall be issued by any newly incorporated village, until the expiration of two years from the date of incorporation."

Under this provision of the law no license for the sale of intoxicating liquor can be issued to a person in the Village of Squaw Lake until December 17, 1942.

RALPH A. STONE,
Special Assistant Attorney General.

March 6, 1942. 218-G-13

Reversed - See op. 5/24/47 file 218g-13

163

Licenses—Exclusive liquor store—Establishment of in newly incorporated villages—M40 § 3200-25; L 41, C 34; (MS41 § 340.11).

Cass County Attorney.

Facts

Laws 1941, Chapter 34, provides:

> "No license for the sale of intoxicating liquor shall be issued by any newly incorporated village until the expiration of two years from the date of incorporation * * *."

Question

Whether or not this forbids the authorities of a village incorporated after the passage of that act from establishing, before the expiration of two years after incorporation, an "on sale" exclusive municipal liquor store, as provided in Mason's Supplement 1940, Section 3200-25, paragraph 4. In other words, is the establishment of an exclusive liquor store to be operated by a municipality the issuance of a license within the meaning of said Chapter 34?

Answer

Paragraph 4, supra, reads in part:

> "Such licenses (on sale) 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 stores, which exclusive liquor stores the governing body of such municipalities may establish or permit to be established for the dispensation of liquor either 'on sale' or 'off sale,' or both."

Construing this provision we have held that a municipality may establish an exclusive liquor store for both "on sale" and "off sale" licenses, either to be operated by the village or an individual (opinion January 17, 1934).

The evil the legislature probably had in mind when it enacted said Chapter 34 was the incorporation as a village of areas not actually adapted to village government for the real purpose of making it possible to license the sale of intoxicating liquors therein. Under this act a period of two years must elapse after incorporation before any liquor licenses may be issued.

It has been stated as a general rule that a statute imposing license fees does not apply to state public agencies unless the intention so to do is clearly expressed (37 C. J. 216). Our intoxicating liquor laws make no express provision for the licensing of municipally operated liquor stores. Such a store is merely "established" by the municipality. After receiving a permit from the liquor control commissioner, it may operate. It is not required to obtain a license from the municipality establishing it. It may be operated as a municipal enterprise, or it may be operated privately. If operated by the village, it becomes a department of the village government and its operation is subject to the laws relating to village government.

It is not clear just what the legislature intended should be done in a case like this. The question submitted is close and debatable. We incline to the view that the statute should receive that liberal construction which will effectuate the purpose to be fairly attributed to it, and bearing in mind that purpose — to discourage the incorporation of villages for the purpose of legalizing liquor sales — we feel the establishing of an exclusive liquor store to be operated by the municipality violates the act. Accordingly you are advised that the establishment of an exclusive liquor store under the circumstances described would be unlawful.

ROLLIN L. SMITH,
Special Assistant Attorney General.

April 23, 1941. 218-G-13

164

Licenses—Granting—Reconsideration—Necessity for aye and nay vote— M27 § 3200-25; (MS41 § 340.11).

City Attorney, Chaska.

Facts

Chaska is a city of the fourth class organized under Special Laws 1891, Chapter 2. Its council has enacted an ordinance authorizing the granting of not to exceed five on sale liquor licenses. On June 5, 1941, six applications for liquor licenses were on file with the city clerk. The council considered and voted on these applications. Five were granted. One of the old licensees was eliminated and a new applicant was granted a license in his place. These licenses have been executed by the mayor and are now in the hands of the liquor control commissioner for approval by him. The council wishes to reconsider these applications.

Question

1. Has it authority to do so?

2. May it revoke its action granting the new licensee a license without any cause shown?

3. Must the votes of the council on this proposition be by ayes and nays and recorded in the proceedings?

Answer

The general proposition is that unless restrained by charter or statute the council of a municipal corporation possesses the right to vote and reconsider its vote upon measures before it at its own pleasure. McQuillin Municipal Corporations (2), Section 642.

At any time before the rights of third persons have vested, a council may, if consistent with its charter and rules of action, rescind previous votes and orders. Dillon Municipal Corporations, 539.

Laws 1891, Chapter 2, Chapter IV, Section 3, provides that the Chaska council "shall determine the rules of its own proceedings and such rules when adopted shall not be changed or deviated from except as therein provided." You do not state what rules the council has adopted pursuant to this section. I assume there are none.

Mason's Minnesota Statutes 1927, Section 3200-25, provides that no license shall be effective until approved by the liquor control commissioner. It is not apparent that any rights of third persons have vested at this time. Accordingly you are advised that the council has authority to reconsider its action in granting these licenses.

Our answer to your first question answers your second inquiry. Inasmuch as the council may reconsider its action in granting a license to the new licensee, it may revoke its action granting such license without cause shown.

In the absence of a statute or rule requiring ayes and nays of the council to be recorded, no record of the vote need be made. Preston v. Cedar Rapids, 95 Iowa 71, 63 N. W. 577. The special act incorporating Chaska does not expressly require that the votes of council members be recorded. Frequently charters so provide. Thus in Bender v. Minneapolis, 177 Minn. 19, it was held that a charter provision requiring all votes to be by ayes and nays and recorded in the proceedings was mandatory. See also 43 C. J. 249 and McQuillin Municipal Corporations (2), Sections 638, 639 and 650. Accordingly, you are advised that a record vote of the members of the council on the granting of these licenses is not required.

ROLLIN L. SMITH,
Special Assistant Attorney General.

June 24, 1941. 218-G-6

165

Licenses—Issuance—Should not be issued for less than one year, unless purpose is to bring it to same expiration date as other licenses—M40 §§ 3200-8, 3200-25, 3200-27; (MS41 §§ 340.04, 340.11, 340.13).

Waseca City Attorney.

Question

Nothing to the contrary appearing in the ordinance relative to the issuance of "on sale" intoxicating liquor licenses, may the council issue such license for a portion of the year on a pro-rata basis?

Is the ruling the same with respect to "off sale" licenses?

Answer

I find nothing in the law which would indicate that the situation with respect to the issuance of these licenses on such a basis is different than for other types of licenses. Opinion 218g (Nov. 19, 1938) appears in part in the notes under the statute:

> "City council cannot grant refund of license fee where license holder disposes of business and **city council grants new license to another applicant who pays pro-rata.**"

As to non-intoxicating malt liquors the statute, Section 3200-8, is very specific that the license shall be issued for a period of one year, except for the purpose of coordinating the time of expiration of licenses they may be issued for shorter times, in which case a pro-rata fee will be charged.

Statutory provisions for sale of intoxicating liquor are not as specific, but Section 3200-27, Mason's Supplement 1940, specifically requires that all licenses issued for any municipality shall expire at the same time.

The last sentence of Section 3200-25, Mason's Supplement 1940, says: "Where such license shall be issued for less than one year, a fee may be a pro-rata share of the annual license fee."

We are of the opinion that the statute clearly shows the legislative intent to issue the licenses for a period of one year. All license fees are fixed on that basis, and licenses should not be issued for shorter periods, unless it is to carry out the requirements of having all licenses expire at the same time.

M. TEDD EVANS,
Assistant Attorney General.

April 24, 1941. 218-g

166

Licenses—"Off-sale" or "off the premises"—Meaning of term—Sale by proprietor of golf course to his patrons—Issuance of license to known violator of law—M40 § 3200-25; (MS41 § 340.11).

St. Louis Park Village Attorney.

Facts

Application has been made for an off-sale liquor license by a corporation which operates a public golf course within the Village of St. Louis Park. The corporation maintains a building on the golf course where patrons who pay stipulated fees for the use of the course have locker facilities and where lunches and soft drinks are sold. A stock of intoxicating liquor has been maintained in a room of this building which is not accessible except from an

outside door. The corporation maintaining the course has had an off-sale license for the past two years, but the council has refused its renewal this year because of doubts over its right to grant an off-sale license under these circumstances. The management of this corporation claim that their arrangement has the approval of the State Liquor Commissioner. However, they admit that most of the liquor sold is consumed in the building or on their golf course. The corporation does not maintain a bar but does permit the use of its glassware by persons consuming intoxicating liquor on its premises. The corporation, of course, is not qualified to receive an on-sale license as a club.

Question

Whether an off-sale licensee has been violating the law in the past by selling liquor to the patrons of its golf course, knowing at the time that such liquor was to be consumed in the same building where the sale was made, that is, in the locker or restaurant rooms used by such patrons in the golf course building.

Answer

I assume that the corporation which has held an off-sale license had, and has, either by ownership, lease, or otherwise, control and management not only of the room where the liquor was sold, but also of the golf course building wherein such room is located, including control of the locker room and lunch room therein.

The term "off-sale" is defined in the law to mean:

> "The sale of liquor in the original packages in retail stores for consumption off or away from the premises where sold."

It is my interpretation of the law that the word "premises," as applied to the situation under consideration, includes not only the room in which the liquor is sold, but also the other rooms in the same building which likewise are under the legal control and management of the licensee, and particularly the locker room and lunch room.

> Woollen & Thornton, Law of Intoxicating Liquors, Vol. 2, Section 768, People v. Van Alstyne (Mich.), 122 N. W. 193.

The main business of the licensee is the operation of a golf course. The liquor license has been taken out to foster the golf course business and to increase the patronage of the course. The patrons of the golf course are probably the only patrons of the liquor store. It is apparent that the owner of the liquor store knew and intended that the liquor should be drunk on the same premises owned and operated by him as a golf course. But it is the intention of the law that one who buys liquor at an off-sale store shall carry it away with him. It is an evasion of this intention to isolate the one room of the building where the liquor is sold by providing only one entrance thereto, then to sell liquor therein, with the knowledge that the purchaser will carry his liquor out the front door, enter through another door of the same building, another room therein, which is maintained as a part of the licensee's enterprise, and there drink the same.

It is my opinion that the sale of liquor in the past by the off-sale licensee to the patrons of its golf course, under the conditions and facts here present, has been illegal.

The question then arises whether the council could issue or renew a license to this same applicant, knowing that if it does, the same violations of the law will continue. In my opinion it is not proper for the governing body of the municipality to issue or renew a license, knowing at the time that, operating under it, the licensee intends to violate the law. It seems to me that by so doing the council members would themselves encourage, aid and abet a violation of the law. As it would be their duty to prevent such a practice on the part of the licensee after a license is granted, or to revoke the license if these violations continued, they should not grant the license in the first place.

This opinion is strictly limited to the particular set of facts before me as set out above. I have not considered the effect of Mason's Supplement 1940, Section 3200-25, which reads:

> "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."

RALPH A. STONE,
Special Assistant Attorney General.

February 24, 1942. 218-G-15

167

Local Option—Election—City of fourth class—Petition—Time for filing of— M40 §§ 3200-37, 3200-38; (MS41 §§ 340.22, 340.23).

City Attorney, Granite Falls.

Facts and Question

A petition duly signed by 10% of the voters of Granite Falls, and asking that the question of granting liquor licenses be submitted at the next city election therein, was filed with the clerk of that city January 21, 1941.

This petition was not filed 20 days before the regular January, 1941, city election as the statute requires, and for that reason the question was not submitted at that election. The petition still remains on file in the clerk's office, and it has been assumed that it will be unnecessary to file a new petition in order to submit this proposition to the voters, but that the petition on file can now be acted on and the question can be submitted at the January, 1942, regular city election.

Answer

According to our information, Granite Falls is a city of the fourth class, operating under a home rule charter adopted in 1907. Under Mason's Sup-

plement 1940, Section 3200-37, the petition for a local option election is authorized. The only requirement as to the filing of such a petition is that it be filed with the city clerk "At least 20 days before the election." A filing 384 days before the city election manifestly is a compliance with this provision. It follows that the council may act on the petition involved. The question should be submitted to the voters at the 1942 city election in Granite Falls.

The form of ballot to be used at such an election, as described in Mason's Supplement 1940, Section 3200-38, should be headed: "License Ballot," and should have printed thereon the words "For License," followed by a square, and "Against License," also followed by a square. Although not required by law, a direction to the voters to place a cross mark in the square opposite the words "For License" or "Against License," depending upon how he wishes to vote, might not be out of order. The insertion of such a direction would not, in our opinion, invalidate the ballot.

ROLLIN L. SMITH,
Special Assistant Attorney General.

October 16, 1941. 218-C-1

168

Local option—Election—In counties—Necessity of specifying voters' place of residence—Number of names equal to 25% of vote of last general election preceding presentation of the petition is required—(MS41 § 340.25).

Lac qui Parle County Attorney.

Question

1. Must a petition under Section 340.25, 1941 Minnesota Statutes contain the name of the street following the signature of the petitioner if the streets in the village or city are not numbered?

Answer

The statute to which you refer provides:

> "* * * every such petitioner shall, opposite his signature thereto, specify his residence, giving the street and number, if any, * * *."

The statute does not require the impossible. If the houses are not numbered, no house number can be given. If the streets are not named or numbered, no street name or number can be given. But the statute does require that every petitioner shall specify his residence. Therefore, if the residence of the petitioner can not be specified by reference to the name of the number of the house on the street, it should be specified in some other way with such definiteness as is possible under the circumstances.

Question

2. Verifications on the petition are dated prior to November 3, 1942, and some are subsequent to that date.

Answer

The same section of the statute referred to above contains this language:

> "When there shall be presented to the auditor of any county * * * a petition signed by any number of the qualified voters thereof equal to or exceeding 25 per cent of the total number of votes cast therein for governor at the last preceding general election, * * *."

Then certain proceedings shall be taken.

In the case of the petition in question your inquiry is whether the words "last preceding general election" means the election in 1940 or the November 3, 1942 general election.

Answer

In our opinion, these words refer to the last general election before the presentation of the petition to the county auditor in this case the election of November 3, 1942.

RALPH A. STONE,
Assistant Attorney General.

November 12, 1942. 218-C-1

169

Non-intoxicating—License to sell—Revocation—By county board in absence of criminal conviction—M40 §§ 3200-5 to 3200-10d; (MS41 §§ 340.01 to 340.023).

Lyon County Attorney.

Facts

In March, 1941, the county board granted a 3.2 beer license, after approval by the proper town board, to one "X," who has since then operated what you describe as "an undesirable establishment, where there have been several assaults, and much disorderly conduct." However, there has not been any conviction for law violation.

Question

Whether or not the county board may revoke this license, there being no positive proof of any violation of the law governing the maintenance of such a place, or any convictions arising out of its operation.

Answer

The case of State, ex rel., Peterson v. City of Alexandria, 297 N. W. 723, sustained the action of a city council in revoking a 3.2 beer license, after notice and hearing, on a showing that the licensee permitted whiskey to be sold in his place by a bootlegger. In that case there was no criminal conviction. That decision would seem to be determinative of your question.

The beer law (Mason's Supplement 1940, Section 3200-5 to 3200-10d) provides that violations of the act shall be cause for revocation of the license of the offender. Section 3200-10d id.) The intoxicating liquor law provides that the licensing authority, "shall have the right to revoke licenses issued by them for cause." (Mason's Supplement 1940, Section 3200-33; Op. 155, Atty. Gen. Rep. 1940). The beer law does not contain any similar provision. However, the supreme court decision cited assumes the power to exist.

In view of that decision you are advised that the county board may revoke the 3.2 license in question, after notice and hearing. The board should not act arbitrarily, but if at the hearing there is a showing that assaults and disorderly conduct have been frequent at the licensee's place of business, I believe a court would uphold the county board in revoking the license. Your inquiry is, therefore, answered in the affirmative, subject to the qualifications that due notice of the cause for revoking his license must be given to the licensee, and a hearing must be granted him, and the board must not act arbitrarily or unreasonably.

ROLLIN L. SMITH,
Special Assistant Attorney General.

October 21, 1941. 217-B-9

170

Non-intoxicating—Manufacturer—Sales by to unlicensed retail vendors—Prosecuting truck driver making delivery—M40, §§ 3200-6, 3200-9; (MS41 §§ 340.02, 340.05).

Martin County Attorney.

Question

Whether or not a manufacturer of non-intoxicating malt liquor who makes sales thereof to persons not licensed either for "on" or "off" sale violates the law.

The pertinent statute is Mason's Supplement 1940, Section 3200-6, Subsection (c), which provides:

> "It shall be unlawful to sell non-intoxicating malt liquors, at retail, or wholesale, except when licensed as hereinafter provided * * *.
>
> "A manufacturer of non-intoxicating malt liquor may, without license, sell such liquor to licensed dealers holding either "On Sale" or

"Off Sale" licenses, and may sell and deliver the same in quantities of not less than two gallons, direct to consumers at their homes.

"No manufacturer of non-intoxicating malt liquor, nor any affiliate or subsidiary company of such manufacturer, shall sell such liquor except as herein restricted * * *."

In other words, a manufacturer of non-intoxicating malt liquor may make sales thereof in quantities of two gallons or more to consumers, or in any quantity to licensed dealers, in a municipality without first securing a license from that municipality. In a city or village where no ordinance is in effect providing for the granting of licenses for the sale of such liquor, or when no such licenses have been granted, a manufacturer can, nevertheless, sell such liquor to consumers. Opinions April 24, 1933, and July 1, 1938 (217h). But in such a case a manufacturer cannot sell to retail vendors because they are not licensed.

It follows that if a manufacturer sells such malt liquor to an unlicensed dealer in a municipality, the law is violated and the offender is guilty of a misdemeanor. Mason's Supplement 1940, Section 3200-9. If the offending manufacturer is a corporation, then it, rather than the truck driver who actually delivered the liquor, should be prosecuted. Under some circumstances the truck driver might be equally guilty, and in such a case he, along with the corporation, should be made a defendant. However, in the normal situation, a prosecution of the corporation would seem sufficient.

ROLLIN L. SMITH,
Special Assistant Attorney General.

October 1, 1941. 217-H

171

Sale—To minor—Misdemeanor—M40 § 3200-33f; L 41, C 492, § 33; (MS41 §§ 340.19, 645.33).

St. Louis County Attorney.

Opinion

The sale of intoxicating liquor to a minor was a gross misdemeanor under Mason's Minnesota Statutes of 1927, Section 3238-4, being Revised Laws 1905, Section 1534, as amended by Laws 1911, Chapter 83, and Laws 1913, Chapter 538, Section 1. This law was, however, suspended during the prohibition era under the terms of Laws 1919, Chapter 455, generally known as the Prohibition Law, under which this offense was classed as a felony.

It is now necessary to consider whether the old pre-prohibition law is the valid and enforcible statute as to the penalties therein provided for selling to a minor, in view of later enactments of our legislature on the subject.

On January 6, 1934, the legislature enacted Special Session Laws 1933-4, Chapter 46, regulating the sale of intoxicating liquor in this state. This

law was intended to cover the field and regulate the sale of such liquors following repeal of the Eighteenth Amendment. It deals with the subject of the sale of such liquors to minors. It provides in Section 8 (being Mason's Supplement 1938, Section 3200, Subsection 28):

> "No intoxicating liquor shall be sold or furnished for any purpose whatever to any person under the age of 21 years, * * *."

The penalty section of that law (Laws 1933-4, Chapter 46, Section 13, being Mason's Supplement 1938, Section 3200-33), provides:

> "Whoever shall violate any provisions of this Act as to sale, * * * shall be guilty of a misdemeanor."

Under the old law the offense was a gross misdemeanor as above stated, but by the new law, passed at the 1933-4 special session, any unlawful sale was made a misdemeanor. These two laws cannot be harmonized or reconciled in so far as the penalty for this offense is concerned. In such case the latest law will prevail. I am, therefore, of the opinion that after January 6, 1934, the offense of selling intoxicating liquor to a minor became a misdemeanor.

It remains a misdemeanor unless subsequent legislation has again changed the character of the offense from a misdemeanor to a gross misdemeanor. In 1939 the legislature passed two laws affecting the question. The first of these acts (Chapter 101 of the Laws of 1939), which also makes it unlawful for a licensee to sell to a minor, amended the penalty section of the 1933-4 law so as to provide:

> "Whoever shall violate any of the provisions of this act as to sale, * * * shall be guilty of a gross misdemeanor."

The law last referred to was passed March 31, 1939, but was to become effective June 1, 1939.

However, the legislature spoke again at the same session of the legislature by enacting Chapter 248, Laws 1939 (Mason's Supplement 1940, Section 3200-33f), which provides that a sale without a license is a gross misdemeanor, and that "whoever shall violate any of the provisions of this act as to sale shall be guilty of a misdemeanor." This later act was passed April 14, 1939, and because not otherwise provided was effective immediately.

The two laws affecting the penalties for this offense, which were passed in 1939, cannot be reconciled. By the later act the sale by a licensee to a minor was made a misdemeanor. Under the provisions of Laws 1941, Chapter 492, Section 33, the latest law must be given effect. The statute last referred to reads in part:

> "When two or more amendments to the same provision of law are enacted at the same * * * session, one amendment overlooking and making no reference to the other or others, the amendments shall be construed together, if possible, and effect be given to each. If the amendments be irreconcilable, the latest in date of final enactment shall prevail."

I think this law is applicable, and that it states a rule of construction which must be followed. As the latest law on the subject classes this offense as a misdemeanor when made by a licensee, it is my opinion you should prosecute it as such and not as a gross misdemeanor if the accused had a license.

In case of a sale to a minor the prosecuting attorney should, before drawing the complaint, determine whether the seller had a license. If he had not, the accused should be charged with the offense of selling without a license and the case should be prosecuted as a gross misdemeanor. If the accused has a license to sell, the complaint should so allege, and the crime charged will be a misdemeanor and should be prosecuted as such.

J. A. A. BURNQUIST,
Attorney General.

February 6, 1942. 218-J-12

172

Search and Seizure—Unlawful possession—L 1937, C 185; M40 § 3200-83; (MS41 § 340.67).

Fillmore County Attorney.

Question

Where the prosecution was under Mason's 1927 Statutes, Section 3200-51, charging possession for sale, where a search warrant had been issued ancillary to a charge of sale in order to secure corroboration of such sale, and the possession for sale was dismissed upon the plea of guilty to the sale, whether tax paid liquor can be destroyed under such circumstances under Mason's 1940 Supplement of Minnesota Laws Section 3200-83."

Our Supreme Court in the case of Starrett v. Pedersen, 198 Minn. 416, 270 N. W. 131, held that the owner cannot replevin from the sheriff intoxicating liquor even though state and federal taxes have been paid thereon, if the owner was unlawfully in possession of the same at the time they were seized.

Up to that time the only statutes providing for disposition of liquor was unstamped liquor, the provision being found in Mason's 1940 Supplement, Section 3200-68. Then the legislature passed Chapter 185, Laws of 1937, and Chapter 151, Laws of 1937. The latter chapter applies only to disposition of liquor seized by the Liquor Control Commissioner or his agents.

The situation which you state clearly comes within the provisions of Section 3200-83, Mason's 1940 Supplement, which is a part of the said Chapter 185, Laws of 1937. This specifically provides that after the defendant shall be convicted, all the property so seized shall be destroyed or

disposed of as ordered by the court. It is therefore entirely a question for the court to determine the kind of order he desires to make. This section also provides that in case a sale is ordered the proceeds shall be paid into the school fund of the county.

M. TEDD EVANS,
Assistant Attorney General.

August 29, 1941. 218-F-3

173

Stores—Municipal—Elections—In village—L 1939, C 395; L 1941, C 401; (MS41 § 340.16).

Norman County Attorney.

Question

Whether Laws 1941, Chapter 401, applies to all cities and villages, or only to those having not less than six hundred inhabitants.

Answer

Laws 1941, Chapter 401, among other things provides as follows:

"* * * may hold an election for the establishment of a municipal liquor store as **provided by Chapter 395, Laws of 1939,** following as nearly as possible **procedure** described in the **1940 Supplement,** Mason's Minnesota Statutes of 1927, sections **3200-37 to 3200-39, inclusive.**"

It would appear that the statement "as provided by Chapter 395, Laws of 1939," refers to the population of the particular village or city in the county. That is, it must have a population of 600 inhabitants or more.

The statement in said Chapter 401, Session Laws of Minnesota 1941, which refers to the 1940 Supplement of Mason's Minnesota Statutes of 1927, Sections 3200-37 to 3200-39, refers to the procedure to be followed in said election.

The proposition on the ballot, as provided by Chapter 395, Laws of 1939, should read:

☐ For Municipal Liquor Store

☐ Against Municipal Liquor Store

M. TEDD EVANS,
Assistant Attorney General.

November 26, 1941. 218-G-13

174

Stores—Municipal—In village—Power to condemn for—Election not necessary in order to condemn—Charging cost of site and building upon the profits of store—Power to issue bonds for—M27 §§ 1829, 1938-6; M40 §§ 1848(4), 1942; (MS41 §§ 413.12, 465.01, 475.14, 475.25).

Claude H. Allen.

Facts

The Village of New Brighton was organized and still operates under Chapter 145, Laws of 1885, and pursuant to Extra Session Laws 1933-1934, Chapter 46, operates a municipal liquor store. The funds constituting receipts from said liquor store, are segregated and kept as a special fund. None of the other accounts or funds of the village are overdrawn and the village operates upon a cash basis. The building in which the liquor store is conducted and maintained, is privately owned and is not adequate for the purpose of conducting a municipal liquor store. Attempts to purchase suitable land on which to erect a liquor store have been unsuccessful.

Question No. 1

Can the Village of New Brighton operating under authority of Chapter 145, Laws 1885, exercise the power of eminent domain and condemn suitable property for the purpose of erecting a liquor store within the village limits?

Answer

The village may exercise the power of eminent domain for the purpose of acquiring a site for a municipal liquor store building.

Mason's Minnesota Statutes 1927, Section 1829, provides:

> "All cities and villages may exercise the right of eminent domain for the purpose of acquiring private property within or without the corporate limits thereof for any purpose for which it is authorized by law to take or hold the same by purchase or gift * * *."

This is a general law which applies to all villages. This particular village is authorized by law to establish a municipal liquor store. In order to do so it must have a building wherein to conduct the store. It has the power to do what is necessary to carry on such an enterprise, and this includes the right to secure and own land and a building for that purpose, if in the discretion of the village council that is the proper thing to do.

The 1885 village law provides that villages thereunder incorporated shall "be endowed with all the rights, powers, and duties incident to municipal corporations at common law;" that it shall be capable of contracting and being contracted with, and that it shall have power to "take, hold, purchase, lease, and convey real estate or personal property or mixed estate as the purposes of the corporation may require."

The question suggests itself as to whether the use of land for a municipal liquor store is a public use. This is a judicial question. I am of the opinion that it is. The primary purpose of the law authorizing municipal liquor stores is not to make a profit for the taxpayers. It is one of the means adopted for the control and regulation of the liquor traffic. It will be conceded that that traffic must be regulated and controlled for the good of the public, and for the purpose of avoiding pauperism and suppressing crime. Government distribution of liquor is a means to that end. The employment of property for the purpose of controlling and regulating the liquor traffic is for a public purpose, and the use thereof for that purpose is a public use. Villages act in their governmental capacity in establishing such a store. Cf. County of Anoka v. City of St. Paul, 194 Minn. 554, 559; Central Lumber Co. v. Waseca, 152 Minn. 201.

The question then arises as to whether the acquisition of property for such a public use is authorized by the exercise of the power of eminent domain. I am of the opinion that the statutes do authorize a village to exercise that power for the purpose aforesaid.

Mason's Minnesota Statutes 1927, Section 1829, grants such authority and, therefore, I return an affirmative answer to your first inquiry. Although the power to acquire property for the operation of a municipal liquor store did not exist at the time of the passage of the law now appearing as Mason's Minnesota Statutes 1927, Section 1829, it is the opinion of this office that the statute authorizes the acquisition by eminent domain of property for any purpose for which it is authorized by law to acquire property. This is true even though the purpose is one authorized or included after the passage of the statute cited. That law is construed by us to confer authority to condemn for any purpose for which the village at any time may have authority to purchase property whether such authority existed at the time of the passage of the law or was subsequently granted.

Question No. 2

Must the proposition of condemning such property for such purpose be first submitted to a vote of the people of the village?

Answer

No provision is found in the statutes which requires that the institution of condemnation proceedings for the purpose of acquiring land for the site of a municipal liquor store must be first submitted to a vote of the people. This, however, is subject to what is hereafter said in answer to your Question No. 4 as to the necessity for a vote of the people if bonds are to be issued.

Question No. 3

Can the cost of acquisition and erection of a suitable building for the above purpose be made a charge upon the profits of the operation of the municipal liquor store?

condemnation, then it would not be a compliance with the constitutional provision for "just compensation first paid or secured" to give the owner whose property was taken only the right to be paid out of the profits of the store. While it has been held that compensation is sufficiently secured if the amount awarded is made a charge upon the public treasury, I think that to make the compensation payable only out of the profits of the liquor store would not be to make it a charge upon the public treasury within the meaning of that holding. If the compensation is to be payable only out of the liquor store, compensation would not be sufficiently secured within the meaning of the constitutional provision.

If the land is to be acquired by purchase, it is my opinion that, if the purchaser will agree to receive the consideration from the profits of the liquor store alone, and no other source, it would not be illegal to make such an arrangement if the property is deeded to the village at once in fee simple and is not a conditional sale reserving title as security.

In this connection, see Williams v. Kenyon, 187 Minn. 161.

Payment for the erection of the building: Having acquired the land in fee simple, the village can contract for the erection of the building thereon and pay the contractor solely out of the profits of the liquor store if the specifications upon which bids are invited are properly drawn and so provide, and the successful bidder is willing to enter into such an arrangement.

See Williams v. Kenyon, supra.; Davies v. Madelia, 205 Minn. 526, 532-534; Hendricks v. Minneapolis, 207 Minn. 151, 154.

Question No. 4

Can such acquisition and erection be paid for by a bond issue, and if so, must such bond issue be submitted to a vote of the people of the village?

Answer

The village could issue and sell its bonds for the purpose of acquiring a site for and erecting a municipal liquor store building.

Mason's Minnesota Statutes 1927, Section 1942 (as amended by Laws 1939, Chapter 223, Mason's Supplement 1940, Section 1942). provides:

> "Bonds—For what purposes.—When the governing body of any municipality shall have resolved that it is expedient to borrow money, for one or more of the purposes hereinafter named, and to an amount which will not increase its net indebtedness beyond the limit fixed by law, and a proposal so to do, if required by law, shall have been duly submitted to and approved by the voters thereof, the bonds of such corporation may be issued and sold, * * *, as follows:
>
> "1. Cities, villages, and boroughs—In the case of a city, village or borough, for the acquisition, construction, maintenance, or improvement of any of the public conveniences mentioned in Section 1848, subd. 4; * * * for the purchase or erection of needful public buildings; * * *."

Answer

First, as to the acquisition of the site: If the land is to be acquired by The "Section 1848, subd. 4" referred to in the above quoted statute is Mason's Minnesota Statutes 1927, Section 1935, subd. 4, and includes any public convenience "from which revenue is or may be derived." The statute is broad enough to include the issuance of bonds both for the acquisition of a site and the cost of a building. A municipal liquor store, in the judgment of the council, may fall within the category of "needful public buildings."

Before such bonds could be issued, the proposition would have to be submitted to a vote of the people. This is required by Mason's Minnesota Statutes 1927, Section 1938-6. Such bonds would, of course, be full faith and credit bonds of the village. If the plan of paying for the land and building out of the proceeds of a bond issue is followed, of course, the inquiries suggested in your third question, supra, would not arise. I assume that no question as to exceeding the debt limit would arise.

RALPH A. STONE,
Special Assistant Attorney General.

April 10, 1942. 218-R

175

Stores—Municipality in dry county—Whether affirmative vote of electors at county or municipal election required before municipal liquor store may be established—M40 §§ 3200-30, 3200-35, 3200-40, 3200-41; (MS41 §§ 340.16, 340.20, 340.25, 340.26).

City Attorney, Alexandria.

Facts

Alexandria is a city situate in a county "dry" by virtue of its vote against repeal in September, 1933. (Mason's Supplement 1940, p. 766.) It is considering the establishment of a municipal liquor store.

Question

May the question of establishing a Minnesota (municipal) liquor store be determined by the voters under Section 3200-37, or must the question be determined in a county wide nature first under Section 32-40-41? (Mason's Supplement 1940, Sections 3200-40, 3200-41.)

Answer

The pertinent statute is Mason's Supplement 1940, Section 3200-30 which provides:

"Until such question shall have been otherwise determined by the **electors**, no license shall be issued in any municipality in any county in which the majority of the electors voting at the September 12, 1933, election provided for by Laws 1933, Chapter 214, voted for delegates 'against repeal.' * * *"

There follows an exception relating to cities of a certain class, in which, we understand, Alexandria does not fall. Such cities are authorized thereby to hold an election on the question of establishing a municipal liquor store by following the procedure therein specified.

While it is not clear whether the legislature by the word "electors" meant the electors of the municipality involved, or electors of the county in which that municipality is situate, the fact that the lawmakers felt it was necessary to make an exception in favor of municipalities of a certain class, and to authorize them to hold a local election, indicates that electors of the county were referred to.

The statute was so construed in an opinion rendered November 7, 1939 (218-c-3). It held that all of Cottonwood County would continue to be a dry county until the holding of a special election pursuant to Mason's Supplement 1940, Section 3200-41, and until that time a village could not hold an election under Section 3200-35 idem.

Accordingly, you are advised that before a municipal liquor store may be established in Alexandria, or licenses to sell liquor therein may be issued, an affirmative vote of the electors of Douglas County must first be received at a special election held under Mason's Supplement 1940, Sections 3200-40, et seq.

ROLLIN L. SMITH,
Special Assistant Attorney General.

October 28, 1941. 218-G-13

LOCAL IMPROVEMENTS

176

Airports—City of the 4th class—Necessity of vote to acquire additional land for—Austin charter requirements—Use of water and light funds for—(MS41 §§ 360.20, 360.25).

City Attorney, Austin.

Facts

The City of Austin desires to either purchase or condemn land belonging to private parties for the purpose of extending their present airport. They also desire to improve the old airport and the new part when acquired. The parties who own the land hold it at an exhorbitant figure, and doubtless condemnation will have to be resorted to in order to acquire the land.

Question

1. Is it necessary to first submit to the voters of Austin at a special election the question of whether or not bonds in the sum of $..... shall be issued for the purpose of acquiring land by condemnation or purchase for airport purposes, before any other steps are taken.

Answer

Minnesota Statutes 1941, Section 360.20, reads as follows:

> "The governing body of any city, village, or town in this state is hereby authorized to acquire, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate airports or landing fields for the use of airplanes and other aircraft, either within or without the limits of such cities, villages, and towns, and may use for such purpose any property suitable therefor that is now or may at any time hereafter be owned or controlled by such city, village, or town."

This section operates to vest in the city council general authority to acquire land for airport purposes. It confers the general power upon the city. It does not operate to remove any restrictions that may be contained in your city charter as to the conditions under which, and the manner in which, land may be acquired by the city for municipal purposes.

Your city charter provides in Chapter V, Section 6, Subdivision Fifty-third, page 32,

> "that the common council shall not purchase, build or construct any public water works, * * * or other public improvement, the cost of which shall exceed Five Thousand Dollars ($5,000.00) without first submitting such proposition to the legal and qualified voters of said city for their approval or rejection, at a regular or special election called for that purpose."

A similar restriction with respect to the purchase of property costing more than $5,000 is found in your charter in Chapter V, Section 11, page 33. These restrictions in your charter are operative with respect to the acquisition of land for an airport. If the land to be acquired will cost more than $5,000, it will be necessary to submit the question to the voters.

This opinion is not inconsistent with other opinions issued by this office wherein a contrary view was expressed with respect to municipalities which are not so restricted.

Question

2. Can cost of acquiring said land be levied on taxpayers unless a bond issue is first issued.

Answer

As bearing upon this question, see Section 360.25, Minnesota Statutes 1941, reading as follows:

"The governing body of any city, village, town, or county to which sections 360.20 to 360.27 are applicable, having power to appropriate money therein, may annually appropriate and cause to be raised by taxation in such city, village, town, or county a sum sufficient to carry out the provisions of sections 360.20 to 360.27, not exceeding the taxing limits now provided by law."

Under this section, the council may make an annual levy for airport purposes (including the cost of acquiring land), provided the total city levy does not exceed the tax limitation of the city.

Question

3. Would it be possible to use surplus funds from our Water and Light plant to acquire this land. If possible to use such funds for that purpose, could the city purchase or condemn the land without first putting the question up to the voters.

Answer

You have not called our attention to any provision of the city charter which would prohibit such use of surplus funds of the water and light department, nor have I found any such provision in the charter. In accordance with earlier rulings of this office, it is held that by the favorable action of both the water and light commissioners and the city council, such funds could be transferred and so used if other requirements are complied with. The city could not purchase or condemn land for an airport (if the cost exceeds $5,000) without first putting the question up to the voters as stated above.

Question

4. If a bond election is first mandatory, can you suggest a wording of the question to be submitted to the voters, in order to get around the fact that we can't know in advance just how much this land will cost. I would not want to be the position of the voters authorizing $35,000.00, and the appraisers placing a figure of $50,000.00 on the land, and then have no money to pay for it; i.e., the $15,000.00 balance.

Answer

This question seems to be more of a business proposition than it is a question of law. Naturally, the council will have to determine in the first instance how much money they want to spend before they can determine what amount of bonds they wish to ask authority for. Until your plans reach more concrete form, I would not attempt to advise as to the form of the question to be submitted to the voters.

RALPH A. STONE,
Assistant Attorney General.

October 15, 1942. 234-B

177

Alleys—Procedure where none platted.

Village Attorney, Bovey.

Facts

It appears that the eastern boundary of the platted portion of the Village of Bovey—operating under the 1885 Act—constitutes the eastern boundary of several lots and coincides with the eastern boundary of the NW¼ of the NE¼. No roadway or alley has ever been platted, opened, or used along this line. Persons occupying these lots are demanding municipal services such as refuse removal.

Question

Whether or not a right of way for an alley along the line mentioned is available without the usual proceedings.

Answer

Land within the village limits becomes available for use as a public road or alley only after a dedication to the public for that purpose. Apparently no alley along this boundary line was dedicated by the plat. It does not appear that the council has ever established or opened an alley on this line. There is nothing in your statement indicating there has been any common law dedication of such an alley. It follows that if an alley is to be established on the division line mentioned, the usual proceedings must be taken.

ROLLIN L. SMITH,
Special Assistant Attorney General.

October 21, 1941. 396-G-1

178

Sewers—Authority of council to install storm sewers and defray the costs thereof by general tax levy rather than by special assessment—M27 § 1918-15, et seq.; (MS41 §§ 429.01, et seq.).

City Attorney, International Falls.

Facts

The city charter provides that the cost of sewer construction should be met by special assessment upon the benefited property. There is no provision for defraying the cost by general tax levy.

Question

As to the authority of your city to install storm sewers and defray the cost thereof by general tax levy.

Answer

There is no law under which the city could take the desired action except perhaps Laws 1925, Chapter 382, now found in Mason's Minnesota Statutes of 1927, Sections 1918-15, et seq. The act is applicable to fourth class cities operating under a home rule charter. It provides that sewer construction may be instituted by a petition of the 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 as the location of the desired improvement. The law contemplates that the cost of the sewer construction is to be met by special assessment against the benefited property, but there is some language in Section 1918-23 which would seem to authorize the city to pay at least part of the cost of the construction. That section provides in part that

> "The municipality also may if the council shall so determine, **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 and between street and alley intersections as the council may determine.** * * *"

It is also provided in the same section that

> "* * * the excess cost of a storm sewer, over the part assessed against property assessed for said paving under this act may be paid by the municipality or may be assessed against other property found benefited thereby. * * *"

Although this section seems to give the council great latitude in determining the amount of the cost which it may pay, I doubt if the law, when read in its entirety, contemplates that the city may pay the entire cost of construction. I therefore advise you that the city may pay a reasonable portion of the cost of the installation of the sewer system applicable to intersecting streets, and between street intersections, and between street and alley intersections, but that the rest of it should be met by special assessment against the benefited property.

You say that your charter authorizes your city to issue bonds to defray the cost of sewer construction. If this is the case, we agree with you that the municipality may issue the required bonds to the extent of its debt limit.

EDWARD J. DEVITT,
Assistant Attorney General.

September 30, 1941. 387-B-1

519 c
387 b-10

179

Streets—Assessments—Benefits—M27 § 1918-16; (MS41 § 429.02).

Attorney, Village of Golden Valley.

Facts

The Village of Golden Valley has improved certain streets within its limits by the installation of black top and curb and gutter pursuant to the

provisions of Chapter 382, Laws of 1925. The owners of two tracts of land which abut and front directly on one of the streets improved object to the levying of a special assessment against these tracts, or to the levying of an assessment which the Council would consider adequate, and in that connection several problems arise on which I should appreciate your opinion.

One of these tracts is several feet below the grade of the street improved at the street line, but about 100 feet back of the street line it rises in a slope which is considerably above grade. The other tract, for most of its frontage, is at about the level of the street, but at one point it is about twelve feet above grade at the street line. Both tracts are some 600 feet deep, extending back that distance from the line of the street improved. While access to the improved street, directly from the two tracts, may be debatable, there is no question, but that both have indirect access, by means of other streets, to it.

Laws 1925, Chapter 382, Section 2, permits the assessment of the cost of the improvement on the property benefited thereby. Mason's Minnesota Statutes 1927, Section 1918-16.

Special assessments for local improvements are based upon the theory that the property assessed is specially benefited; and, if in excess of such benefits, constitute a taking of property without compensation. State, ex rel., Oliver Iron Mining Co. v. City of Ely, 129 Minn. 41.

Question

1. "May a special assessment be levied against these tracts, conceding that neither is benefited, because of the fact that they front on the street improved?"

Answer

No.

Question

2. "Is a benefit necessarily implied because of their fronting on the improvement?"

Answer

No.

Question

3. "On the question of benefits, is height above or below grade of abutting property either relevant or material?"

Answer

In consideration of the matter of benefit, when determining whether or not the property is benefited, we must consider first the situation and condition of the property before the improvement and then the situation and condition of the property after the improvement. If the property is of

greater value after the improvement than it was before the improvement, then we must say that the property is benefited. In determining the question whether or not it is of greater value after the improvement, it appears to us that it is proper to consider every fact and circumstance bearing on the situation, location, condition, and desirability of ownership of the property. Any factors bearing upon the question of value before or after the improvement is relevant and material to the determination of the question.

Question

4. "Would evidence of such height be admissible on the trial of an appeal from any assessment levied?"

Answer

Our answer is the same.

Question

5. "Or would evidence of benefits be confined to the market-value yardsticks?"

Answer

This question may be answered in the affirmative, but the other matters bear upon the market value and hence are relevant and material to the determination of that question. A change of grade of a street is a matter affecting the value of the property fronting thereon.

Question

6. "Must benefits accrue to each individual tract in the tax district?"

Answer

If you mean to inquire what benefits must accrue to each individual tract in the tax district in order that the improvement may be made, we will answer the question "no."

Question

7. "If there is no question but that there are benefits to the district as a whole, is it necessary to find tangible benefits in the amount of the assessment in the case of each individual tract?"

Answer

In order to assess a particular tract upon the theory of benefits, a benefit must accrue.

Reading the opinion in State, ex rel., Oliver Iron Mining Co. v. City of Ely, supra, is helpful. It will be noted from such reading that although the special benefits are to be assessed against the property benefited, there is

no obligation on the part of the municipality to assess the entire cost of the improvement to specific property thereby benefited. Such assessment can be made only to the extent of the actual benefits.

CHARLES E. HOUSTON,
Assistant Attorney General.

August 7, 1942. 396-G-7

180

Streets—Dedication of—By plat or user—Statutory dedication—Cannot be revoked except through the courts—L 1878, C 29.

Kanabec County Attorney.

Facts

It appears that in 1885 A owned a 40 acre tract on the edge of the Village of Mora. He platted part of this 40 acres as Kent's Addition to the village, which plat was filed in the office of the register of deeds of your county on March 4, 1885.

The plat shows Oak Street as abutting the easterly side of this addition. Running through the center of the plat in an easterly-westerly direction appears to be a railroad which bisects Oak Street. That part of Oak Street south of the railroad right of way is open and improved by the village for travel as a street. However, there is no crossing over the railroad right of way and each section of Oak Street dead ends at such railroad right of way. Recitals on the plat show all streets to be 80 feet and full lots 50 by 150 feet. There are no alleys in the blocks which are numbered as shown or described on the plat.

A further recital of the plat describes the addition as being bounded on one side by the west line of Oak Street and which description leaves A as the owner of an unplatted part of the 40 acre tract east of Oak Street.

The plat further declares that A, being the owner of the 40 acres in question, has caused part thereof to be surveyed and laid out as an addition and has caused the plat to be made to the end that the same may be filed for record according to the statutes in such case made and provided.

The part of Oak Street involved in this controversy is that part lying north of the railroad right of way. Lots 1 to 6, inclusive, of Block 11, front on said Oak Street. On Lots 1 and 2 there is a filling station and a dwelling is located on Lots 3 and 4. Lots 5 and 6 are not occupied.

The part of Oak Street in controversy, as observed from the intersection of said street and Maple Avenue, indicates a strip about 80 feet wide and 300 feet long. A wire fence extends along the east side and, except for the cemented area around the filling station, which is located on Lots 1 and 2,

there is nothing on the surface to indicate precisely where the west line of Oak Street lies. However, this can be determined from the recital in the plat showing the lots to be 150 feet deep. Oak Street affords the only means of access to Lots 2 to 6, inclusive.

The surface of this street remains in a naturally level condition and on the north two-thirds of said street as it abuts Block 11, it is apparent that a gravel path has been spread wide enough for travel so vehicles may have access to Lots 1, 2, 3, and 4. This was done six or seven years ago at the expense of the village but appears to be the only work the village has undertaken in connection with this part of Oak Street. The south one-third of the street in question, which is south of the gravel as so spread and extends to the railroad right of way, has some ruts in it apparently left by the wheels of vehicles. There are some trees on the southerly one-third of this street that would prevent use of the full width of 80 feet for travel.

In 1892 A quitclaimed to one B all the land owned by him lying "east of Oak Street."

Some time after giving this quitclaim deed to B, A gave a third person a quitclaim deed to the strip of land in controversy, or that part of Oak Street abutting Lots 1 to 6 of Block 11. By subsequent transfer a corporation was given a warranty deed to this part of the street, which corporation now claims the right to close this strip to travel except on such terms as may be satisfactory to the corporation.

The strip of land has been taxed for some years past, which taxes have been paid. It is not evident from the records when the strip first appeared on the tax rolls nor that A paid any taxes on the strip after he platted this addition. No private domain has been exercised over this strip since the plat was recorded except as what might be indicated by the transfers of ownership by the payment of taxes.

Question

Is that part of Oak Street lying north of the railroad right of way to be regarded as a public street of the village or deemed to be regarded as privately owned land over which the owner has a right to forbid travel.

Answer

It is our opinion that the evidence supports the contention that the part of Oak Street in question has been dedicated to a public use.

Laws 1878, Chapter 29, states in regard to the plat:

> "* * * which shall particularly describe and set forth all the streets, alleys, commons or public grounds, and all in and outlots or fractional lots within, adjoining, or adjacent to said town, giving the names, width, courses, boundaries, and extent of all such streets and alleys."

It further required that all in-lots be numbered and the length and width stated on the plat, together with any streets, alleys, or roads which divide or border the same and further states:

> "* * * and the land intended to be for the streets, alleys, ways, commons, or other public uses in any town or city, or addition thereto, shall be held in the corporate name thereof, in trust for the uses and purposes set forth or expressed or intended."

It seems clear that A intended Oak Street to be for the use of the public. In the first place, it is so designated as "Oak Street" on the plat which recites, "All streets are as a boundary of the addition and it appears that in 1892 A again recognized Oak Street by describing the land he quit-claimed to B as "all land east of Oak Street."

The making of the plat, allowing people to travel the designated strip, and making conveyances according to the plat, would all go to show the intent of A to dedicate this as a public highway. It is difficult to believe that he would plat this land into lots and blocks without providing access to such lots. In other words, from a factual standpoint, it seems that there is little question but that it was the intention of A at the time of recording this plat that Oak Street was dedicated to the public for travel.

It is the whole plat which represents the intent of the owner and imposes upon him the binding obligations which are as sacred as the words of a deed. Courts should and will give full effect to the meaning expressed by the lines as well as by the language upon the map. Great Northern Ry. Co. v. City of St. Paul, 61 Minn. 1.

Where a party makes a statutory dedication to the public, it is exceedingly doubtful if he can revoke it under any circumstances except those provided by law through the courts and that is so whether there has been any action taken upon it by the public or not. His act becomes one of public record and the general public is entitled to act upon it so long as it is not cancelled by an act of equal solemnity and authority. Baker v. City of St. Paul, 8 Minn. 436.

If this constitutes a good statutory dedication, no acceptance is necessary. Keyes v. Town of Excelsior, 126 Minn. 456; In re Petition of Schaller, 193 Minn. 604, 615.

The statute governing surveying, platting, and recording towns and cities, presupposes that the land so surveyed, etc., is the property of those laying out the town and that the owners may, by their public record acts, affect the title. In such cases where a plat is made out and recorded, the use of the streets, alleys, and public grounds become eo instante the property of the public by statutory dedication and the public is at once entitled to conform its actions in reference thereto. It would have been manifestly unjust to allow a withdrawal of such dedication at the option of the former owner. Weisberger v. Terry, 8 Minn. 456, (G) 405.

The making of a plat, allowing people to travel the designated strips and make conveyances according to the plat, would go to show the intention to dedicate this land as a street.

A map must be constituted so as to give effect to the intention of the maker thereof, and when the intention of the maker appears upon the face of the plat itself, such intent cannot be ignored, nullified or destroyed by the parties or the court so as to render it meaningless of interpretation.

Each purchaser of land is entitled to the benefit of the land as it appears when he purchases it. If there are public streets, they inure to his benefit. If there are public alleys, he cannot be deprived of the privilege of enjoying them. Gilbert v. Emerson, 60 Minn. 62; Wilder v. City of St. Paul, 12 Minn. 116 (192, 204); Nagel v. Dean, 94 Minn. 25; Pondler v. City of Minneapolis, 103 Minn. 479.

Once there is a dedication of streets and public places, and conveyances are made of lots included in such survey with reference to such plat, the conveyances work an estoppel in favor of the grantee, and no subsequent revocation can be made without their consent and the rights so granted may be adopted and enforced by the public authorities. Hurley v. Mississippi Rum River Boom Co., 34 Minn. 143; Schurmeier v. St. Paul and Pacific Railroad Company, 10 Minn. 82.

It was held in Curtiss and Yale Company v. City of Minneapolis, 123 Minn. 344, that where a tract of land over which extended a public highway—the highway is never excepted from the tax assessment and it would not do in such a case to hold that payment of the tax was evidence of an intention to claim title to the highway to the exclusion of the rights of the public.

We might further add that the quitclaim deed in question conveyed nothing except possibly the fee, subject to the easement, and this would be true regardless of the fact as to whether it were a quitclaim or a warranty.

ARTHUR CHRISTOFFERSON,
Deputy Attorney General.

August 29, 1941.

396g-4
396c-4

181

Streets—Forming part of trunk highway—Cooperative agreement between state and city for improvement of—Assessments by city for its share—M27 § 2557; (MS41 § 160.41).

City Attorney, Red Lake Falls.

Facts

The City of Red Lake Falls contemplates paving its main street (which apparently constitutes part of a trunk highway) in cooperation with the state. Under the agreement proposed the state would pave, at its expense,

the center twenty feet of the street and would pay 75% of the cost of paving the rest of the street, also 75% of the cost of constructing the curbs and gutters, while the city would pay the remaining 25% and the entire cost of any water and sewer connections required.

Question

Whether or not the city must comply with the provisions of Mason's Minnesota Statutes 1927, Section 1815, in the event it enters into such a contract.

Answer

No. It is apparent that the city, if it makes the contemplated contract, will do so by virtue of authority conferred by Mason's Minnesota Statutes 1927, Section 2557. Subdivision 1 of that section empowers a city council to enter into an agreement with the commissioner of highways for the construction of a roadway upon a trunk highway within its boundaries. The first step under this section is the execution of an agreement between the commissioner of highways and the city. The terms of such a contract, subject to the limitations of the statute, are a matter of negotiation between the city and the state authorities. After the agreement is executed, the entire proceeding is in charge of the commissioner of highways. He advertises for bids, lets the contract, pays the contractor, and bills the city for its share in accordance with the cooperative agreement previously executed. Mason's Minnesota Statutes 1927, Sections 1815 to 1828, cited by you, provide a comprehensive scheme for the improvement of city streets, and the levying of assessments therefor against abutting property. There must be a petition by property owners to initiate a proceeding under these sections. There must be a published notice of the meeting, at which the council will pass on the petition. Assessments are made on a frontage basis.

Having particular reference to Mason's Minnesota Statutes 1927, Sections 1815 to 1828, inclusive, it does not seem to us that they apply to this case by reason of the fact that in order to set in operation these sections of the statute there must be a petition filed by persons owning 35% of the frontage affected. In the absence of such a petition and pursuant to the authority granted by Mason's Minnesota Statutes 1927, Section 2557, the council has the power to make the improvement but may pay therefor only out of its general revenue fund or other funds available for that purpose.

ARTHUR CHRISTOFFERSON,
Deputy Attorney General.

July 15, 1941. 396-C-17

182

Streets—Petitions for road surfacing—Whether council may pay cost out of general funds—M27 § 1186, subd. 8; §§ 1815, 1918-15; (MS41 §§ 429.01, 434.01, 434.14, 435.16).

Pine County Attorney.

Facts

There are now on file with the village recorder two petitions, signed by the requisite number of abutting owners, requesting that certain described streets be improved to the extent of making them hard surfaced with blacktop or tarvia paving. The streets involved in the two petitions are contiguous, so that the improvement could be consolidated as one project.

It is not feasible to undertake the improvement under Section 1815, et seq., or 1918-15, et seq., Mason's Minnesota Statutes, 1927, 1940, which sections appear to provide for the payment of the cost of the improvement by assessment of the property benefited.

Questions

1. Whether or not such improvement may be made and the cost thereof paid out of the general fund of the village, notwithstanding the fact that two petitions are already on file, signed by abutting property owners requesting the improvement.

2. If not, what must the council now do, if it decides to proceed with the improvement, so that the cost thereof may be paid out of the general fund of the village.

3. Is it necessary that the petitions, now on file, be withdrawn, and if so, what is the procedure of such withdrawal?

Answer

According to the Minnesota Year Book, issued by the League of Minnesota Municipalities, Sandstone is a village operating under the 1905 general village act and not under Laws 1885, Chapter 145, as your letter indicates. The case cited by you, Borgerding v. Freeport, 166 Minn. 202, deals with 1885 villages.

Villages organized under the 1905 act are governed by Mason's Minnesota Statutes 1927, Section 1186, Subdivision 8 (derived from the 1905 village act), which gives the council power, among other things, to pave village streets. Construing this section, we have heretofore held the cost of paving thereunder **must** be paid out of general village funds, and the council may act under it without any petition, by the abutting property owners. Op. 77, Attorney General's Report 1922. Said Section 1186 does not apply to 1885 villages; only to 1905 villages. Op. 48, Attorney General's Report 1932. However, substantially similar provisions are found in Laws 1885, Chapter

145, Section 21, Subdivision (11), which has been construed by us as empowering an 1885 village to pave its streets without a petition by property owners, and without assessing the cost against the abutting property. Opinion to Village Attorney Spellacy, June 21, 1921.

It follows that while, strictly speaking, Borgerding v. Freeport, supra, has no application to your situation, much of the reasoning therein is in fact applicable.

It is clear your council may, acting on its own motion and without reference to any petition by property owners, resolve to pave the village streets and to pay the cost out of the general village funds.

Examining the other laws cited by you, we find that Mason's Minnesota Statutes 1927, Section 1815 (the source of which was Laws 1919, Chapter 65), applies to both 1885 and 1905 villages. It provides that the council "shall have power" to improve any street after a petition signed by the specified number of voters. We construe this section as vesting discretion in the council. We do not believe the legislature intended that upon filing of a petition the council was obliged to grant it. (Letter July 9, 1927 (396-g7).) The council is obliged to consider the petition and act on it, and it must act reasonably and not arbitrarily.

The other section cited by you, Mason's Minnesota Statutes 1927, Section 1918-15, et seq., which was derived from Laws 1925, Chapter 382, applies to both 1885 and 1905 villages, and requires a petition as a preliminary to any action by the council. Section 1918-17, id. A hearing on the petition is expressly required at the conclusion of which "the council shall determine by resolution whether the improvement shall be made." Section 1918-19 id. Clearly this contemplates the exercise of discretion by the council.

Thus a 1905 village may pave its streets under Mason's Minnesota Statutes 1927, Section 1186, Subdivision 8, or under Mason's Minnesota Statutes 1927, Section 1815 (Laws 1919, Chapter 65), or under Mason's Minnesota Statutes 1927, Section 1918-15 (Laws 1925, Chapter 382).

Summarizing, we answer your first inquiry in the affirmative; the second, by saying the council should adopt an appropriate resolution pursuant to Mason's Minnesota Statutes 1927, Section 1186, and the third in the negative.

If the council wishes to pave streets and is willing to meet the cost out of general village funds, it may act on its own motion without any petition. But if it wishes to assess the cost against abutting owners, it may only proceed after a petition. As to the petitions on file they may be denied.

ROLLIN L. SMITH,
Special Assistant Attorney General.

May 23, 1942. 396-G-10

Note: L. 1943, Ch. 117 put all villages under the 1905 Laws

183

Streets—Right of way—Acquisition of for a new street—Opening new street —Villages—L 1885, C 145 §§ 23, et seq.; M27 §§ 6537 to 6578-2; (MS41 §§ 117.01-117.45 incl.).

Village Attorney, Arlington.

Facts

The Village of Green Isle, Minnesota, is incorporated under Chapter 145, Laws of 1885. A petition to lay out a new street in said village has been presented to the village council.

Section 1186-8, Mason's Statutes 1927, gives the village council authority to lay out, open and improve streets, but is silent on the question of procedure. Section 1203 of Mason's Statutes provides for assessment of benefits, and again no manner of levying the assessments is prescribed.

Chapter 382, General Laws 1903, seems to apply to all local improvements including the establishing of streets and outlines the procedure. This law is omitted from the 1927 Statutes but I have not been able to find where this law has been repealed.

Questions

Who are proper persons to sign the petition?
Under what law should the village council proceed?

Opinion

(1) Section 1186-8, Mason's Minnesota Statutes 1927, does not apply to villages incorporated under the 1885 law.

(2) Section 1203, Mason's Minnesota Statutes 1927, applies only to villages incorporated under the Revised Laws of 1905.

(3) Chapter 382, Laws 1903, does not cover the acquisition of a right of way for a new street.

My search of the statutes (limited by the time at my disposal) for a method of procedure for the establishment of a street in a village (as distinguished from the improvement of a street already legally established or dedicated) discloses only the following:

(1) Such right of way can be acquired in the manner described by Chapter 145, Laws 1885, Sections 23, et seq., found in Mason's Minnesota Statutes 1927, Vol. I, pages 222, et seq.

(2) The right of way for a new street may be acquired by the exercise of the power of eminent domain as provided in Mason's Minnesota Statutes 1927, Chapter 41. If your village has already acquired a right of way for the new street, I call your attention to the case of Borgerding v. Village, 166 Minn. 202.

Assuming that the village has acquired the necessary right of way, we could not answer your question as to the best way to proceed until we know just what work the village proposes to do in the way of opening and improving the street for travel. The applicable law and procedure might be different depending on what work is to be done. If it is a question of paving the new street, the applicable law and procedure might be different than it would be if it were simply proposed to grade the street.

RALPH A. STONE,
Special Assistant Attorney General.

August 7, 1942. 396-G

184

Streets—Vacation—Petition denied by council—Further procedure by interested parties—M27 § 8244; (MS41 § 505.14).

Attorney, Village of Mahtomedi.

Opinion

1. It is well settled that the decision upon a petition for vacation of a street, whether by a court or a municipal council, involves the exercise of discretion. In re Vacation of Part of Town of Hibbing, 163 Minn. 439, 204 N. W. 534, 205 N. W. 613.

2. While a court of appropriate jurisdiction has power in many cases to review the action of a municipal council and to set the same aside where the council has acted arbitrarily or in violation of the constitution or laws, the chance that any court would assume to reverse the decision of a council denying a petition to vacate a street is very remote. Such action on the part of the court would amount to an attempt to control the discretion of the council and compel it to act in a certain way in a matter which is not only discretionary but is essentially legislative in character, hence beyond judicial control. State v. Board of Park Commissioners, 100 Minn. 150, 110 N. W. 1121; Dunnell's Digest and Supplements, Sections 6623-b, 5753.

The courts would be much more likely to set aside a vacation of a street than a refusal to vacate, because vacation is an affirmative act, involving an irrevocable surrender of public rights. Yet even in such cases the courts will not overturn the action of a municipal council unless the decision was arbitrary or the result of an abuse of discretion. Dunnell's Digest, Section 6623-b; Steenerson v. Fontaine, 106 Minn. 225, 119 N. W. 400; In re Vacation of Part of the Town of Hibbing, above cited. It would be very difficult for a court to say that a municipal council acted arbitrarily in refusing to vacate a street, because every reasonable presumption must be indulged in favor of the action of the council and in support of the preservation of the rights of the public, which the council is bound to protect. Even though a street may never have been opened up, the possibility of future public use, however remote, would be sufficient ground for refusing to vacate it, bearing in mind that under present laws there is no time limit on the right of the public to

open up and use a street which has once been dedicated. See opinion of April 1, 1942 (396-G-16). Hence, while it may be theoretically possible for a court to overrule the decision of a municipal council in refusing to vacate a street, it is highly improbable that any court would ever do so.

It may be observed in this connection that in any case where vacation proceedings in district court would lie under Mason's Minnesota Statutes of 1927, Section 8244, nothing would be gained by appealing from a decision of a village council refusing to vacate a street. The proceedings might just as well be commenced anew in the district court. However, the requirements for proceedings in court differ in some respects from those for proceedings before the village council. At any rate, the institution of court proceedings is of no concern to the village council. It is for the interested parties to determine which form of procedure they will adopt. It is incumbent upon the council to act only when presented with a proper petition which complies with the statutory requirements.

3. It is inconceivable that the village or the village council could be held liable for damages to the petitioning property owners or anyone else either for granting or denying a petition for a street vacation. In passing upon such a petition the council is exercising governmental powers conferred upon it by law. Parties deeming themselves aggrieved by the decision of the council may invoke whatever remedies the law affords, but they certainly have no cause of action against either the village or the council for money damages on account of the decision.

CHESTER S. WILSON,
Deputy Attorney General.

April 7, 1942. 396-G-16

OFFICERS

185

Assessors—Compensation for work done on Sundays and holidays—M27 § 10933; M41 §§ 1986-1, 1986-2, 1986-3, 10235; (MS41 § 273.04).

Commissioner of Taxation.

Question

Whether under the law fixing the compensation of village assessors, Mason's Supplement 1941, Sections 1986-1 et seq., an assessor may be paid for work done on Sundays and holidays if the total time for which he submits his bill does not exceed 120 days.

Answer

Mason's Supplement 1941, Section 1986-1, in so far as pertinent, provides as follows:

"* * * the assessor and each deputy assessor of each such town, village and city, shall be entitled to compensation for each day's service neces-

sarily rendered by him, the sum of $5.00 not exceeding, however, 120 days in any one year, and mileage at the rate of five cents per mile for each mile necessarily traveled by him in going to and returning from the county seat of such county to attend any meeting of the assessors of such county which may be legally called by the Minnesota tax commission and also for each mile necessarily traveled by him in making his return of assessment to the proper officer of such county; * * *"

The statute does not limit compensation to working days within the 120 day period. It merely refers to "days service." However, Mason's Supplement 1941, Section 10235, prohibits the doing of any work or business on Sunday except "works of necessity performed in an orderly manner," and Mason's Minnesota Statutes of 1927, Section 10933 (6), prohibits the transaction of public business on certain named holidays "except in cases of necessity." It is doubtful if the legislature contemplated that the work of an assessor would be a work of necessity within the meaning of the exceptions in the above noted prohibitory statutes. In our view of the matter, the assessor should not work on Sundays or holidays, and, accordingly, he should not be compensated for work done on those days under the provisions of Mason's Supplement 1941, Section 1986-1.

If the time limitation contained in the law is too short for the proper performance of the assessor's duties, the legislature may be inclined to change the law.

EDWARD J. DEVITT,
Assistant Attorney General.

February 13, 1942. 12-B-1

186

Assessors—Compensation—Working day—What constitutes—Salary in lieu of per diem—M40 § 1089; (MS41 § 367.05).

Ironton Village Attorney.

Question

As to the compensation of the village assessor of Ironton, organized under the 1905 act, particularly for his services in assessing personal property in the village for the year 1941. There is no special law governing the assessor's pay in Ironton.

Answer

1. The compensation of a village assessor in a village organized under the 1905 act (which includes Ironton) is governed by provisions of Mason's Supplement 1940, Section 1089. There is nothing in the 1905 act which fixes compensation of the village assessor, or empowers the council to do so. This department for many years has held that under such circumstances the law fixing the compensation of town assessors applies. Opinion of Attorney General, January 25, 1939 (12-B-1), Mason's Minnesota Statutes of 1927,

Section 10933, Subsection 22; Vesely v. Hopkins, 190 Minn. 318. The Vesely case dealt with villages organized under the 1885 law, but its reasoning is applicable to 1905 villages. The principle announced in that decision is:

> "Villages in this state may be held to be governed by certain applicable provisions of the general statutes relating to townships when not otherwise provided for in the general village laws or the statute constituting the village charter."

2. The compensation of the village assessor in your case is determined by the same rules and laws which fix the compensation of town assessors. In other words, assuming the council has not fixed an annual salary as authorized by Mason's Supplement 1940, Section 1089, the village assessor is entitled to $4.00 per day for each day's service necessarily rendered during May and June, and mileage at the rate of five cents a mile for attending meetings and returning the assessment book. The provision with reference to town assessors provides said officer shall receive a per diem of $4.00 and mileage, "at the rate of five (5) cents per mile for each mile necessarily traveled by him in going and returning from the county seat of the county to attend any meetings of the assessors of the county which may be legally called by the county auditor, and also for each mile necessarily traveled by him in making his return of assessment to the proper county officer." This applies to village assessors paid on a per diem basis.

The statute uses the phrase "each day's service" and does not say how many working hours. For some purposes a day is defined as the period from midnight to midnight. Mason's Minnesota Statutes 1927, Section 10234. Under Section 4087 idem. 10 hours is declared to be a standard day's work for hire. No person under 16 is permitted to labor over eight hours, Section 4100 idem. There is no state law fixing the number of hours in a day a town or village assessor must devote to his official duties, or providing for overtime. Unquestionably the legislature in using the expression "for each day's service" referred to a working day, and not to a full period of twenty-four hours. II Words and Phrases (Perm. Ed.), page 117. There is authority for the proposition that a statute providing an officer shall receive a per diem for time spent in the discharge of his duties means he is entitled to this daily compensation for each day on which it becomes necessary for him to perform any substantial public service if he does perform the same, regardless of the time occupied in its performance, and the time so spent constitutes a day's service. Smith v. Jefferson County, 13 P. 917, 920 (Colo.). Ordinarily the law does not consider fractions of a day in fixing the salaries and fees for the performance of public services at so much per day. State v. Hurn, 172 P. 1147 (Wash.), Dallas County v. Reynolds, 199 S. W. 702 (Texas).

We are clear that an assessor may not be paid more than $4.00 a day regardless of the number of hours he devotes to his official duties. We are not clear how far a village may go in fixing the number of hours in a working day. Certainly its determination in this regard should be in line with what is ordinarily regarded as a working day. If the village authorities and the assessor agree that a working day for purposes of assessor's compensation shall mean 6, 7, 8, 9, or 10 hours, it is our opinion a court would sustain their

determination. In absence of any statutory definition of what shall constitute a working day this is about as definite as we can be. The village authorities have some latitude in this respect, but it is not unlimited. Their action must not be unreasonable. Vesely v. Hopkins, 190 Minn. 318.

3. The village assessor's compensation may be arbitrarily fixed at not to exceed $240.00 annually by the council without regard to the number of days' service rendered by him. In other words, the council may provide for the payment of a salary to the assessor in lieu of the statutory **per diem.** This is clearly authorized by Section 1089 supra, as construed by Vesely v. Hopkins, 190 Minn. 318. In such a case no itemized statement need be submitted by the assessor.

4. If the council places assessor on a salary basis he is not required to submit an itemized and verified statement showing the number of days and hours he devoted to his official duties. In such a case the assessor is not entitled to mileage. The statute does not so provide. We cannot supply the authority by implication. The legislature apparently intended the salary so fixed should constitute full compensation, both for days worked and mileage traveled.

5. The council may fix one figure for the assessor's salary in odd numbered years, and another figure for his salary in even numbered years, provided it does not in either case fix a salary in excess of $240.00 annually.

ROLLIN L. SMITH,
Special Assistant Attorney General.

July 16, 1941. 12-B-1

187

Assessor—Expenses—Attending school for assessors at University—Authority of village council to reimburse—M27 § 1933-4; (MS41 § 465.58).

Village Attorney, Pine City.

Question

Whether the Village Council may pay the expenses of the Village Assessor to enable him to attend the coming school for assessors to be held at the University next week under the direction of the Tax Commissioner.

Answer

Pine City, according to the Year Book of League of Minnesota Municipalities, is organized under the village incorporation act of 1905 and that act is silent as to the compensation to be paid the assessor in a village incorporated thereunder.

The election of a village assessor in a 1905 village, which has been separated for assessment purposes from the town in which it lies, is authorized. Mason's Statutes 1927, Section 1164; Mason's Supplement 1940, Section 601-

11(2)f. The duties of such an officer are prescribed by Mason's Minn. St. 1927, Section 1173, thus, "The assessor shall assess and return all property taxable within the village of a separate assessment district."

This department, over a period of years, has held that the compensation of a village assessor is governed by Mason's Supplement 1940, Section 1089. Opinion No. 4, Atty. Gen. Rep. 1914, opinion No. 51, Atty. Gen. Rep. 1930, and opinion of December 22, 1933. The basis for these opinions was a definition found in Mason's Minn. St. 1927, Section 10933, subdivision 22, providing, "The word 'town' may include cities, villages, boroughs, and districts unless such construction would be repugnant to the provisions of any act especially relating thereto."

These rulings have never been confirmed by our Supreme Court. In Vesely v. Hopkins, 190 Minn. 318, 251 N. W. 318, our court said:

> "Whether in villages organized under laws other than Laws 1885, C. 145, where the laws under which they are organized do not provide that the village council shall fix the compensation of such officer (assessor) is governed by L. 1927, C. 403, we need not decide." (190 Minn. at 321.)

That case did hold that, as to villages organized under the 1885 act, the council had authority to fix the compensation of the village assessor, the decision being based on a provision in the 1885 act giving the village council authority

> "To limit and define the duties and powers of officers and agents of the village, fix their compensation when no other provision is made by law * * *." L. 1885, C. 145, Sec. 21, subd. 4.

It is clear that in such villages the council may fix the assessor's salary, and in doing so may provide that he shall be reimbursed for expenses actually incurred in the performance of his official duties. Also, if the council in such a village determines it would be for the best interests of the village, and the taxpayers, for the assessor to attend the school in question, his expenses incurred in attending it under such circumstances would be a lawful charge against the village.

In Lindquist v. Abbett, 196 Minn. 233, 265 N. W. 54, which was a taxpayers' action to compel restitution of certain payments made by the Duluth Board of Education and involving, among other items of expenditure, expenses incurred by the director of recreation in attending a meeting of the "Civic and Recreational Representatives" held in connection with the League of Minnesota Municipalities and for expenses of the truant officer in attending a National Convention of Social Workers, our court quoted from Tousley v. Leach, 180 Minn. 293, 230 N. W. 788, thus:

> "If the purpose is a public one for which tax money may be used, and there is authority to make the expenditure, and the use is genuine as distinguished from a subterfuge, or something farcical, there is nothing for the court. **Whether there shall be such use is then one of policy for the legislature.**"

It then went on to say:

> "Beyond that it may be observed that there is also the political remedy of voting out the officers responsible for any expenditure not approved by their constituents. * * * Bad faith is negatived for all concerned. There is no suggestion that the district's money was being squandered. * * * The defendant board having the power to expend public money for the purposes in question is not shown to have transgressed the limits of that power by the mere manner of its exercise." (196 Minn. at page 241.)

The public examiner has been guided by this decision in auditing the expenditures of municipalities, and has taken a liberal view in allowing expenditures of this character.

It goes without saying that so-called "junketing" expenses, and expenses for activities, existing or contemplated, not properly within the power of a village council, may not be paid. Each case must be decided on its own facts.

These authorities seem to sustain such an expenditure by an 1885 village, but still leave the question open as to a 1905 village.

The council in such a village is empowered by Mason's Minn. St. 1927, Section 1186, subdivision 1:

> "* * * to fix the compensation of its employees when not otherwise prescribed."

This phraseology differs from that found in the 1885 act. The 1905 act mentions "employees" and is silent as to "officers." However, the opinions of this office making the statutes fixing the compensation of town assessors applicable to village assessors seem to us out of harmony with some of the statements appearing in Vesely v. Hopkins, supra. It may be that our court, when it is finally called upon to do so, will hold the powers of a 1905 village, and that of an 1885 village, the same in this respect. However, we need not determine this question now.

The circular sent out to the mayors of the various villages by the League of Municipalities, describing this particular school, reads:

> "Program — Assessors' Institute — Nov. 13, 14 and 15, 1941. Center for Continuation Study, University Campus. Sponsored by University of Minnesota, League of Minnesota Municipalities, State Department of Education, and National Association of Assessing Officers. Three short courses for Assessors."

There follows a statement that expenses incident to attending this school are authorized municipal charges by virtue of Laws 1923, Chapter 211 (Mason's Minn. St. 1927, Section 1933-4), which empowers all villages to—

> "appropriate * * * money to pay the annual dues in the League of Minnesota Municipalities and the **actual and necessary expenses** of such delegates as such governing body may designate to **attend meetings of any such League.**"

It may be argued that the school in question is "a meeting of such League" within the act cited. We are inclined to the view that a liberal construction should be given to this act and advise you that the expenses of sending an assessor to this school may lawfully be paid by any city, village or borough in this state however organized — and place our decision on that ground.

ROLLIN L. SMITH,
Special Assistant Attorney General.

November 13, 1941. 12-B-1

188

Attorney—City—Whether layman eligible to position of under Waseca charter—M40 §§ 5687-1 et seq.; (MS41 §§ 481.02 et seq.).

Waseca City Attorney.

Facts

Section 1, Chapter II of your charter, reads:

> "The elective officers of said city shall be a mayor, a judge of the municipal court, seven aldermen, a city attorney, a city treasurer, a city assessor, a city clerk, a constable, and such other officers as may be elective under the provisions of this charter, each of whom shall be a qualified elector of said city and be chosen by the electors thereof as provided in this charter."

Section 5, Chapter IV thereof, reads:

> "The attorney shall perform all professional services incident to his office and when required shall furnish opinions in writing upon any subject submitted to him by the common council or mayor, and shall receive such compensation as shall be determined by the common council."

One of the candidates for city attorney at the forthcoming regular city election in Waseca is a layman not licensed to practice as an attorney, although he has taken a law course by correspondence.

Question

Whether Mason's Supplement 1940, Section 5687-1, restricts and limits the requirement of the charter with respect to candidacy for this office; whether by reason of being a candidate he subjects himself to the penalty of the statute; and what, if any, services could he render the city in said capacity if elected?

Answer

Our courts have held a county attorney need not be an attorney or member of the bar of the state. State v. Clough, 23 Minn. 17. Also, that under the charter of Little Falls a qualified voter, not a duly admitted attorney at law, is eligible to the office of city attorney. State ex rel. v. Nichols,

83 Minn. 3. The charter in that case provided that, "all persons qualified to vote * * * shall be eligible to any municipal office herein constituted," and the office of city attorney was among those so constituted.

Referring to the fact that unless admitted to the bar the city attorney would have no right to appear as an attorney in court, the opinion in that case reads:

> "But whether or not he would be allowed to appear, under the circumstances, would be a matter for the court to determine in which the matter might be pending."

Quoting from State v. Clough, supra:

> "The only offices which, by the constitution, require additional qualifications are those of judges of the supreme and district courts.
>
> "That the provisions of section 7, article 7, are unwise in not requiring proper qualifications for offices, the proper discharge of the duties of which calls for the exercise of peculiar learning and skill, there can be no doubt; but it is the constitutional rule, and we cannot add to it or take from it."

A law requiring a court commissioner to be learned in the law has been held invalid. State ex rel. v. Ries, 169 Minn. 11, the court said:

> "The legislature cannot impose greater restrictions or exact other qualifications for eligibility to constitutional offices than are prescribed in the constitution (citing cases)."

It seems to us your situation falls within the holding of the Little Falls case. All your charter provides is that the city attorney shall be elected and shall be "a qualified elector of said city." It follows that a voter who is not an attorney is nevertheless eligible to the position of city attorney of Waseca. If elected he may qualify and receive the salary prescribed for that position by the council.

The decisions are not clear as to just what duties he may perform without violating the statutes against unauthorized practice of law. Mason's Supplement 1940, Sections 5687-1, et seq. These statutes are much broader now than they were at the time the decisions cited were rendered.

A court apparently had the right under the former law regulating the practice of law to say when a city attorney not licensed to practice law could and could not appear before it. State ex rel. Nichols, supra.

It might be that a layman elected city attorney would find himself compelled to retain a licensed attorney to represent the city in court, or in other matters. However, that circumstance does not affect his eligibility.

Accordingly, you are advised that while a layman may be elected to and may assume the office of city attorney of Waseca, great doubt exists as to the right of such a person to personally represent the city in any matter in court.

ROLLIN L. SMITH,
Special Assistant Attorney General.

March 27, 1942. 59-A-5

189

Attorney—County—Duties in criminal cases—(MS41 §§ 31.14, 97.29, 144.28, 211.13, 340.85, 388.05).

Koochiching County Attorney.

Question

Whether the county attorney has any duty in reference to law violations until an officer or a private citizen presents sufficient evidence to furnish reasonable ground for a conviction and offers to sign a complaint to initiate such criminal prosecution.

Answer

The law imposes no such duty on the county attorney, with certain exceptions hereinafter noted.

The general duties of the county attorney in both civil and criminal matters are prescribed in Minnesota Statutes 1941, Section 388.05, which reads as follows:

> "The county attorney shall appear for the county in all cases in which it is a party, give opinions and advice upon the request of the county board or any county officer upon all matters in which the county is or may be interested, or in relation to the official duties of such board or officer; attend upon all terms of the district court for such county, and upon all other courts having criminal jurisdiction for the preliminary examination of persons charged with crime, when such court shall request his attendance and furnish him a copy of the complaint; attend before the grand jury upon their special request, give them legal advice, and examine witnesses in their presence, and issue subpoenas to bring witnesses before such jury or any magistrate before whom he is conducting an examination; and, at the request of the coroner, he shall attend any inquest. He shall draw all indictments and presentments found by the grand jury and prosecute the same to a final determination in the district court; and when requested by the attorney general shall appear for the state in any case instituted by the attorney general in his county, or before the United States land office in case of application to preempt or locate any public lands claimed by the state, and assist in the preparation and trial."

As above stated, this section defines the general duties of the county attorney. It is supplemented by specific provisions relating to particular classes of cases, to which further reference will be made later.

However, there is no provision in the above quoted section or elsewhere in the statutes requiring the county attorney to take any official action in the investigation or prosecution of alleged law violations unless evidence sufficient to justify such action is presented to him in the manner prescribed or contemplated by law.

The duties of the county attorney in criminal cases under the provisions above quoted may be summarized as follows:

1. To advise the sheriff and other county officers upon their request in respect to criminal cases with which they may be concerned in the course of their respective official duties;

2. To prosecute in the district court all persons who stand charged in that court with crimes of any degree under state laws;

3. To conduct preliminary examinations of persons charged with crimes in other courts (i.e., justice and municipal courts) in those cases where preliminary examinations are required (i.e., felonies and gross misdemeanors) when such court requests his attendance and furnishes a copy of the complaint, and to procure the issuance of subpoenas for witnesses for such examinations;

4. To attend before the grand jury upon their special request and to perform the duties in connection therewith prescribed in the above quoted provisions;

5. To attend any coroner's inquest at the request of the coroner.

It is evident that under the foregoing provisions the county attorney is required to take official action in criminal cases generally only at the instance of some authorized official agency. There is nothing in those provisions directing him to issue a complaint, make an investigation, or otherwise proceed in a criminal case upon his own initiative or at the instance of a private individual. The county attorney is a prosecuting officer, not a police officer. The law does not give him the official authority to make arrests, searches, and seizures or to exercise the other powers which are vested in police officers in order to enable them to enforce the laws effectively. The law evidently contemplates that a private citizen desiring action in a criminal case shall first call upon a magistrate having power to issue warrants or upon a sheriff, constable, or other police officer whose duty it is to take the initiative in enforcing the law and investigating violations, and that the magistrate or officer may call upon the county attorney for advice or assistance, if the matter is within the scope of the latter's official duties. This does not mean that private individuals may not go directly to the county attorney in connection with criminal cases. They frequently do so. Presumably, if a county attorney received from a private individual reliable information justifying the institution of criminal proceedings, he would see that appropriate action was taken by the proper authorities. However, that would be a matter for the exercise of his discretion. As above stated, no affirmative duty is imposed on him by law to initiate criminal proceedings at the instance of private individuals, with certain special exceptions to be mentioned.

In this connection, the question sometimes comes up as to the duty of the county attorney in the preparation and signature of criminal complaints. It is the duty of the county attorney, at the request of the sheriff or any other law enforcement officer who is authorized to obtain his advice or assistance, to prepare criminal complaints for signature by the officer or other

person having knowledge of the facts. However, except in certain special cases hereinafter mentioned, it is not the duty of the county attorney to sign a criminal complaint, or to prepare one at the instance of a private individual. Criminal complaints must be sworn to, and the presumption is that they are made by persons having knowledge of the facts. Ordinarily the county attorney knows only what is told him about an alleged violation of the law, and it is only in exceptional cases that he has sufficient direct knowledge of the facts to qualify him to sign a complaint. At any rate, with the exceptions to be noted, the signing of criminal complaints is not among the official duties imposed on the county attorney by law.

This does not mean that the county attorney may not sign a criminal complaint or make an investigation of a criminal case upon his own initiative, if, in his judgment, the circumstances warrant. He may do so, in his discretion, assuming whatever responsibility may result. However, as before stated, it is not his affirmative legal duty to do so except in certain limited cases to which attention will be called.

The common practice of having complainants consult the county attorney and seek his assistance in drawing complaints in criminal cases where a preliminary examination is required appears to have grown up largely as a matter of convenience. The law does not require that procedure. Section 388.05, above quoted, provides that when a court calls upon the county attorney to conduct a preliminary examination, it shall furnish him with a copy of the complaint, but the law says nothing about requiring the county attorney to prepare the complaint in advance. However, it frequently saves the time of both the court and the county attorney if the latter has an opportunity to examine the facts and prepare the form of complaint in those cases where he is to be called in, so it has become the usual practice of magistrates and police officers to require witnesses to consult the county attorney in such cases at the outset. Even so, the county attorney is under no duty to proceed unless evidence reasonably sufficient to justify action is submitted to him.

As hereinbefore indicated, there are various other statutes prescribing the duties of the county attorney in special cases. I shall not attempt to list all such provisions, but will call attention to a few for the purposes of illustration.

Minnesota Statutes 1941, Section 340.85, concerning enforcement of the liquor laws, provides:

> "Every sheriff, constable, marshal, and policeman shall summarily arrest any person found committing any act forbidden by this chapter, and make complaint against him. Every county attorney shall prosecute all cases under this chapter arising in his county. The president or mayor of every municipality shall make complaint of any known violation of the provisions of this chapter, and the chief of police and all policemen shall make arrests and complaints as in this section provided, anything in the ordinances or by-laws of such municipality to the contrary notwithstanding."

This results in requiring the county attorney to prosecute various misdemeanors, not previously within the scope of his duties, but it does not

affect the rules already stated as to the duty of taking the initiative in enforcing the laws relating to intoxicating liquors. By the express terms of the provisions above quoted, that duty rests upon the sheriffs, constables, marshals, and policemen, and upon the presidents or mayors of municipalities.

Section 97.29, concerning enforcement of the game and fish laws, provides:

> "The county attorneys, constables, and other peace officers are hereby required, and it is made their duty, to enforce the provisions of chapters 97 to 102."

Section 31.14, concerning enforcement of the pure food laws, provides:

> "It shall be the duty of every prosecuting officer to whom the commissioner shall report any violation of sections 31.02 to 31.17 and 31.28 to 31.43, to cause appropriate proceedings to be commenced and prosecuted in the proper courts, without delay, for the enforcement of the penalties as in such case therein provided."

Section 144.28, concerning enforcement of the laws relating to vital statistics, provides:

> "The county attorney of each county shall make complaint and prosecute any person charged with violating any of the provisions of sections 144.15 to 144.28 when the facts and circumstances constituting such violation are presented to him by the state registrar or by any local registrar."

Section 211.33, concerning enforcement of the corrupt practices act, contains the following provision:

> "If the county attorney of the county shall be notified by any officer or other person of any violation of any of the provisions of this chapter, it shall be his duty forthwith to diligently inquire into the facts of such violation, and if there be reasonable ground for instituting a prosecution, it shall be the duty of such county attorney to present the said charge, with all the evidence which he can procure, to the grand jury of such county. If any county attorney shall fail or refuse to faithfully perform any duty imposed upon him by the provision of this chapter, he shall be guilty of a misdemeanor, and on conviction thereof shall forfeit his office. It shall be the duty of the county attorney, under the penalty of forfeiture of his office, to prosecute any and all persons guilty of any violation of the provisions of this chapter, the penalty of which is fine or imprisonment, or both, or removal from office." * * * etc.

These provisions, as well as others of a similar character, broaden the duties of the county attorney to some extent in the matter of making complaints and investigations and prosecuting offenses in certain special cases, as compared with his general duties under Section 388.05. However, even under such provisions the county attorney is not required to act as a police officer or detective or to institute criminal proceedings in any case unless evidence or information reasonably sufficient to justify action is brought to

his attention, either by an officer or by a private individual. Accordingly your specific question, quoted at the beginning of this letter, is answered in the negative, subject to such qualifications as may be required under various statutes relating to particular matters, as above noted.

CHESTER S. WILSON,
Deputy Attorney General.

November 10, 1942. 121-B-7

190

Attorneys—County—Duties—May not act as attorneys for private parties in actions to quiet title to tax-forfeited lands—Duty to represent the state—M40 § 2190-2; L 41, C 43; (MS41 §§ 282.24 et seq., 284.08).

Aitkin County Attorney.

Facts

You state that one of your private clients was the owner of an undivided three-fourths interest in a piece of real estate. The other one-fourth interest became forfeited for delinquent taxes. Thereafter your client, under a claim that he was the former owner of this one-fourth interest, repurchased it under Extra Session Laws of 1937, Chapter 88. Other parties interested in the land now insist that an action be commenced to quiet the title, naming the State of Minnesota, as well as others who appear in the chain of title, as defendants.

Question

You suggest that the state, having received all the money it had coming from the land in question, and having no substantial interest in the matter, would not be prejudiced by such an action, and you inquire whether it would be proper for you to bring it.

Answer

Passing over possible questions as to the validity of the repurchase by your client, and conceding for present purposes your suggestion that the state has no substantial interest in the matter, the fact nevertheless remains that the only authority for suing the state in such a matter (other than by Torrens title registration proceedings) is that which is conferred by Laws 1939, Chapter 341, Section 2 (Mason's Supplement 1940, Section 2190-2). Under that statute, assuming that the land is ordinary tax-forfeited land under control of the county board, service of the summons and complaint must be made upon the county auditor and county attorney, and it is the latter's duty to defend the action in behalf of the state. This clearly disqualifies a county attorney from acting as attorney for the plaintiff in any such proceeding.

It is by no means certain that the state has no substantial interest at stake in the matter. We have held that one tenant in common has no right

to purchase in his own name the undivided share of another tenant in common so as to cut out the latter's rights. See opinions dated October 2, 1941, and October 23, 1941. Of course our opinion would not necessarily be controlling in a court action involving a particular case. Possibly the court might hold that the repurchase was valid, with such recognition of the rights of the other tenants in common as the circumstances might require. On the other hand, it is possible that the court might hold the repurchase invalid, because not made by an authorized person. In that case the repurchase would have to be cancelled, and the land would revert to its previous status of tax-forfeited land, subject to sale. In the latter event it would still be subject to repurchase under Laws 1941, Chapter 43, prior to November 1, 1941.

CHESTER S. WILSON,
Deputy Attorney General.

October 23, 1941. 121-A-7

191

Coroners—Duties—Moving body from railroad tracks before coroner arrives —M27 § 957-1; (MS41 § 390.22).

St. Louis County Attorney.

Facts

A certain railroad company has asked that the coroner sign an order directing that a body of a person killed by a train may be removed from the tracks before the coroner arrives, in order to permit the train to proceed. The form of order in this instance contains this language:

> "When the dead body of any person is found on the track, so as to block the movement of a train, or when a fatal injury results from the operation of a train, and the body of the deceased lies on the track so as to block the movement of the train, it is not necessary, in compliance with the law, to hold up the progress of the train until the coroner arrives. The coroner should be notified as promptly as possible of the matter. The body should then be moved to the side of the track, and it shall be the duty of the conductor to see that the body is left in charge of a member of the crew, or some other proper person, until the coroner arrives or orders disposition of the body. The position of the body on the track should be carefully noted before it is moved."

Answer

It is my opinion that the coroner may issue such an order as this before the death occurs under Mason's Minnesota Statutes of 1927, Section 957-1. That statute is intended primarily to aid and assist in the solution of crimes. I think that this matter is within the control and discretion of the coroner, and he may issue an order in the form requested if he sees fit to do so.

RALPH A. STONE,
Special Assistant Attorney General.

July 20, 1942. 103-D

192

Coroner—Office vacated—Infamous crime—Conviction for violation of Federal Anti-Narcotic Act—Effect—M27 § 6953; (MS41 § 351.02).

Pipestone County Attorney.

It appears that on November 23, 1940, your coroner pleaded guilty in federal court to a violation of the Harrison Anti-narcotic law and that a sentence of 3½ years imprisonment was imposed and subsequently suspended on condition that the defendant submit to medical treatment at a United States hospital at Fort Worth, Texas. The county board, acting on your advice that the office of coroner was vacant by reason of incumbent's conviction in federal court, appointed a successor. The question has now arisen as to the correctness of your opinion.

We agree with you. The pertinent statute provides that every office shall become vacant upon the incumbent's conviction of any "infamous crime." Mason's Minnesota Statutes of 1927, Section 6953. Whether or not a crime is infamous within the meaning of this statute is not determined by the nature of the offense, but by the consequences to the individual. Any crime punishable by imprisonment in the state prison is infamous. 16 C. J., p. 60; Attorney General ex rel. O'Hara v. Montgomery, 267 N. W. 550 (Mich.). Violations of federal law may be infamous crimes. Opinion 101, Attorney General's Report, 1930; Opinion 399, Attorney General's Report, 1934; State ex rel. Attorney General v. Irby, 81 S. W. (2) 419, 296 U. S. 616. There is some authority to the contrary. State ex rel. Mitchell v. McDonald, 145 So. 508 (Miss.). The question is, whether the crime is one for which the statute authorizes the court to award an infamous punishment, and not whether the punishment ultimately awarded is an infamous one. In re Classen, 140 U. S. 200 at 205. The fact that the sentence has been suspended has never been regarded by us as sufficient to remove the disqualification. It is the fact of conviction, not the fact of imprisonment, which disqualifies. Opinion April 3, 1939 (490-d). In the case under consideration a presidential pardon is necessary. 20 R. C. L. 564; Johns v. Alcorn, 56 Miss. 766; Opinion 399, 1934 report.

Some conflict on this point exists in the rulings of this office. On August 21, 1934, the former Attorney General held (490-d) that a person does not lose his right to vote or hold elective office in this state where such person is convicted of a felony in federal court by a plea of guilty and later is sentenced and the sentence suspended. That opinion ignored a prior opinion rendered November 7, 1928 (490-d), reading in part, "The conviction of the defendant was complete when sentence was imposed, and his office was thereby immediately vacated. This consequence of the conviction is not suspended or set aside by any stay of execution of sentence or other subsequent proceedings. Even though the conviction may later be set aside by the trial court, or by the supreme court on appeal, the defendant will not be entitled to have his office restored to him."

No reference whatever was made in the later opinion of August 21, 1934, to the earlier opinion of November 7, 1928, and on reconsideration of the

question we have come to the conclusion that the opinion of November 7, 1928, is supported by the better reason and authority. Accordingly we adhere to it. The opinion of August 21, 1934, is therefore superseded, and our view now is that the suspension of sentence does not remove the disqualification, and that a person convicted of a felony in either state or federal court automatically forfeits any public office held by him.

In the case of Becker v. Green County, 184 N. W. 715 (Wisc.), cited by you, a county judge was convicted in federal court of a violation of the national espionage act and was sentenced to three years imprisonment. The circuit court of appeals reversed the conviction and held as a matter of law the evidence did not justify the conviction. In the words of the court, the question was "whether the written law of this state provides that a public officer who has been erroneously convicted of crime which works an ouster from his office may upon a reversal of such erroneous judgment and conviction, recover the salary during the time he was so excluded therefrom." The court held that he could not. It is to be observed that a federal offense was involved. I fail to see how this decision weakens your conclusion.

Other cases of interest in this connection are Ex Parte Wilson, 114 U. S. 417; Macken v. U. S., 117 U. S. 348; Parkinson v. U. S., 121 U. S. 281; U. S. v. DeWalt, 128 U. S. 393; Re Medley, 134 U. S. 160; In re Mills, 135 U. S. 263, at 267, and Byers v. Smith, 47 P. (2) 70.

You are therefore advised that the coroner in question automatically vacated his office when he pleaded guilty to a violation of the Harrison Anti-narcotic law in federal court.

ROLLIN L. SMITH,
Special Assistant Attorney General.

January 20, 1941. 490-d

193

County Auditor—County Treasurer—Fees—For certifying as to delinquent and current taxes—County auditor should certify as to delinquent taxes; county treasurer as to current taxes—M27 §§ 2231, 2232, 2232-1.

Sibley County Attorney.

Question

In view of Mason's Minn. Statutes of 1927, Sections 2231, 2232 and 2232-1 is it proper for the auditor to certify both as to delinquent and as to current taxes? Is it not proper for each office, that is, the treasurer and the auditor, to make a certificate of his own, the auditor as to the delinquent taxes, and the treasurer as to the current taxes?

Answer

These sections of the law should be read and construed together. So construed, it is my opinion that it is the official duty of the auditor to certify under his hand and seal as to the delinquent taxes shown by the records in

his office and in his official custody at the time the request is made. It is the official duty of the treasurer to make a similar certificate as to the current taxes as shown by the records in his office and in his official custody at the time the request is made.

It is my opinion that each officer should certify officially only to what is shown on the records officially in his custody at the time of the request. The treasurer has the official custody of the current tax records and is the proper officer to give an official certificate as to what is shown by such current tax records.

Under this statute, the county auditor could not be required to give a certificate as to what is shown by the current tax records which are not in his official custody at the time but are in the custody of the county treasurer. If he could not be required under this statute to do so, it is because the statute does not make it his official duty to do so; and if it is not his official duty to do so, it is the official duty of the county treasurer to give a certificate with reference to records which, for the time being, are in his official custody.

However, there is nothing in the law to prohibit the county auditor from giving additional information not required of him officially. He may properly give such information as a gratuity, but it is my opinion that his official duty is confined to the records which are in his official custody at the time of the request. The auditor, of course, has access to the records in the county treasurer's office. The tax books, which are in the possession of the county treasurer, are, in reality, the records of the auditor's office, but the official custody thereof belongs to the county treasurer during the current year and, therefore, the treasurer is the proper person to give an official certificate as to what is shown thereon during the time they are in his custody.

Question

Whether the auditor and treasurer are permitted to retain the fees which they collect under Mason's Minnesota Statutes of 1927, Sections 2231, 2232 and 2232-1.

Answer

See Opinion dated January 4, 1928. I am assuming that the compensation of your county auditor and treasurer is not regulated by any law of peculiar application to your county, which would change the general rule set forth in the opinion referred to.

RALPH A. STONE,
Special Assistant Attorney General.

March 27, 1942. 21-A

194

County Auditor—Mileage—M27, § 824, allows actual transportation expense attending auditors' meeting called by Tax Commission. MS40, § 254-47, limits mileage for own auto to 5c per mile—M27 § 254-47; M40 § 824; (MS41 §§ 350.11, 384.06).

Kanabec County Attorney.

Question

1. Can the auditor who uses his own car charge mileage at the rate of five cents per mile to and from said meeting or should such charge be made merely on the basis of railroad or bus transportation?

Answer

Mason's Minnesota Statutes of 1927, Section 824, provides:

> "The county board of each county shall audit and if found correct, allow duly itemized and verified claims of the county auditor **for actual and necessary expenses** incurred and paid by him in attending any meeting called by the Minnesota tax commission to confer in regard to assessments and taxation."

Accordingly, there may be no flat charge of five cents per mile for the auditor's transportation to any such meeting. He must charge his "actual and necessary" traveling expense.

If the auditor traveled in his own automobile, he would be limited by the provisions of Mason's Supplement 1940, Section 254-47, to a maximum mileage allowance of five cents per mile. That section establishes a maximum only and does not alter the basis of actual expense provided by Section 824, supra.

Question

2. We are also wondering whether or not your office has ever passed upon the question of the payment of the annual dues of the auditor to the Minnesota County Auditors' Association out of county funds.

Answer

We do not find that our office has previously passed upon the propriety of the county's paying the annual dues of its auditor to the Minnesota County Auditors' Association, and we are aware of no statute which would permit such payment.

FREDERICK O. ARNESON,
Special Assistant Attorney General.

March 12, 1941. 104-A-8

195

County Auditor—Payment of claims—May pay claims allowed by Welfare Board without waiting 15 days—M40 §§ 646, 974-11; (MS41 §§ 373.09, 393.01).

Dakota County Attorney.

Question

Is it mandatory for the county auditor to hold up the payment of claims presented to and approved by the county welfare board fifteen days, as in the case of regular county claims which are approved by the county board of commissioners?

Answer

No. Mason's Supplement 1940, Section 646, which prevents the issuing by the auditor of an order in payment of a claim until fifteen days after such claim is allowed, refers only to claims allowed by the county board. It would appear that the reason for such waiting period in part is to give either the county attorney or at least seven taxpayers the opportunity to appeal the board's decision.

Pursuant to Mason's Supplement 1940, Section 974-11, the duty of administering funds for public assistance rests with the county welfare board and not the county board. Generally speaking, claims against the poor fund are allowed by such welfare board, and this office has previously held in an opinion to L. A. Wilson, County Attorney of Mahnomen County, that there is no statutory appeal from the decision of the welfare board. Of course the amount to be expended by the welfare board is limited as far as county funds are concerned by the amount contained in the budget, which is submitted by the county welfare board to such county board and approved by the latter.

In this connection I merely mention the fact that all the members of the county board are now members of the welfare board, so a claim when allowed or disallowed by the welfare board has been considered by the members of the county board of commissioners acting as part of the welfare board.

HAYES DANSINGBURG,
Assistant Attorney General.

October 16, 1941. 125-A-64

196

County Highway Engineer—May perform services without charge to city when ordered by county board.

Chippewa County Attorney.

Facts

At the present time, all of the engineers excepting the county engineer have left for some government work. The county engineer has very little work to do. The City of Montevideo needs part time engineering services

which the county engineer could very easily render under present circumstances. The county board is perfectly willing that the engineer should do so and is willing that whatever monies are paid by the city should go into the county treasury.

Opinion

I do not feel that the statute should be so construed as to compel an officer to remain idle or to be paid for idling away his time. If the county engineer is willing to do engineering work for the City of Montevideo receiving no compensation in addition to his salary from the county, I do not think there could be any very serious objection if he performs engineering services for that city during his spare time, provided he is ordered to do so by the county board. If the City of Montevideo pays the county a reasonable amount for the services rendered to the city by the engineer, I think the county would have a right to receive it. Of course, the county engineer can receive no personal remuneration for any work he may do for the city upon the order of the county board.

RALPH A. STONE,
Special Assistant Attorney General.

July 16, 1942. 122-B-3

197

County officials—Contracts—Interest in—Purchase of tax-forfeited land at tax sale—M27 §§ 990, 10305; (MS41 §§ 382.18, 620.04).

McLeod County Attorney.

Question

Whether or not any county officials may legally purchase any real estate within the county in which they reside, where said property has been forfeited to the State for the nonpayment of taxes * * *."

Answer

Section 990, Mason's Minnesota Statutes 1927, referring expressly to county officials, their deputies and clerks, and Section 10305, Mason's Minnesota Statutes 1927, referring generally to all public officials and their employees, are very sweeping in their prohibition.

The general rule is that a purchase by one who conducts a sale is unlawful, 26 R. C. L., page 417. Public officials having to do with tax sales may not buy at such sales, Annt. 5 A. L. R. 969.

In State v. Byhre, 137 Minn. 195, it was claimed that the statute (now Section 990, Mason's 1927 Statutes) should not be construed to make it illegal for a county official to be interested in a county contract unless the official is one who has to do with letting the contract or approving it. The Court, rejecting the assertions, said (page 198):

"There is no room for the construction that it was intended to apply only to those officers who had official duties to perform in letting or approving the contract. The statute is plainly applicable to all county officials, their deputies and clerks. While the evil may be greater when the official has to do with letting the contract, we see no reason in not making the prohibition apply to all officials."

The later case of the County of Marshall v. Bakke, 182 Minn. 10, deals with a different situation and suggests in relation thereto the necessity for a reasonable construction. The case, however, expressly states that the Byhre decision is neither criticized nor overruled.

It is clear, therefore, that all county officials who have any part in tax sales, their deputies and employees, may not lawfully purchase at such sales. In view of the broad language in the statutes and the decisions mentioned, it is, to say the least, very doubtful whether any county official or his deputies and employees who have no part in tax sales may buy at such sales.

J. A. A. BURNQUIST,
Attorney General.

September 3, 1941. 90-B

198

County Treasurer—Bond—County Board may designate surety—M40 § 9693; (MS41 § 574.19).

Houston County Attorney.

Facts

The county treasurer of Houston County was re-elected. He made arrangements for a surety bond through a local agent, but the county board refused to approve the bond so provided by him, and did approve or agree to approve a bond offered through another agent.

The county treasurer takes the position that it is his privilege to furnish the bond for his office, and that he can furnish a bond with any surety company he chooses, and that the county board has no right to designate who the surety company shall be.

Question

Whether the county board has the right to designate the surety company.

Answer

Section 574.19, Minnesota Statutes 1941, being Section 9693, Mason's Supplement, 1940, provides as follows:

"The several county and town boards * * * may allow the treasurer of the municipality such reasonable sum, not exceeding the amount

herein specified, as may have been paid by him for such suretyship, to be paid out of the general revenue fund of the municipality. The officers required by law to approve such bill may first designate the surety company to be employed, if its charges be as low as those offered by any other responsible company."

You will thus observe that the county board has the right to designate the surety.

RALPH A. STONE,
Assistant Attorney General.

December 18, 1942. 450-B

199

Judge of Probate—Salaries—Method of determining on assessed valuation of property—M27 § 8707; M40 § 1993; (MS41 §§ 273.13, 526.12).

Blue Earth County Attorney.

Facts

Section 8707 of Mason's Minnesota Statutes, 1927, provides for salaries of Judges of Probate in certain counties. Blue Earth County, following receipt of the figures of last census at the office of the Secretary of State on May 12, now has over 36,000 inhabitants, which would raise the salary of the Judge of Probate in this county.

Question

When the change in salary will take effect, and if in determining the salary the additional $50.00 for each one million dollars assessed valuation should include money and credits as well as real estate; and also if a fraction of a million dollars is counted as a whole or if a pro rata percentage of $50.00 would be used for said fraction.

Answer

Under Section 8707, Mason's Minnesota Statutes of 1927, the increase in salary would not become effective until next year, the annual salary for 1941 having been already fixed. Said section provides that probate judges shall receive annual salaries based on the then last preceding state or national census and the then last preceding assessed valuation of real and personal property as fixed by the Minnesota State Tax Commission.

Since the statute makes no provision for fractions or pro rata of each million dollars of assessed valuation, the allowance can only be $50.00 on each full million dollars of assessed valuation.

The assessed valuation includes real property, personal property and monies and credits. There will also have to be an adjustment made on homestead property, because Section 1993, Mason's Supplement 1940, under

class 3b and class 3c provides that for the purpose of determining official salaries, valuation of homesteads should be figured at 33⅓% on unplatted, and 40% on platted property, the same as it was figured prior to the passage of the homestead assessment law.

M. TEDD EVANS,
Assistant Attorney General.

July 18, 1941. 347-I

200

Peace officer—Duties of "officer of the law" defined—Presence at public dances—M27 § 10170; (MS 41 § 617.50).

State Division of Employment and Security.

Opinion

As to the proper construction of Mason's Minnesota Statutes 1927, Section 10170. The section reads as follows:

> "It shall be incumbent upon the person to whom said permit is issued to have an officer of the law present at every public dance to be given or held thereunder during all the time said public dance is being held. In the case of a public dance to be held or given in a city, village or borough, said officer of the law shall be designated by the chief peace officer thereof. In all other cases said officer of the law shall be designated by the sheriff of the county. In all cases the fees and expenses of such officer of the law shall be paid in advance by the person to whom said permit has been issued. In case any person, not a public officer, shall be designated as such officer of the law, the person or persons to whom said permit has been issued shall be responsible for his acts and conduct and there shall be no liability for his acts and conduct on the part of the officer designating him under the provisions of this act."

1. It is noted that the words "officer of the law" are used five times in this section. Is this "officer of the law" a public officer?

"Officer of the law" has been defined to mean "peace officer." 29 W. & P. 360. Our conclusion is that the "officer of the law" mentioned in Section 10170, supra, is a public officer. A public officer, as such, is not the employee of any private person or entity. A public officer owes no obligation of loyalty to any individual as such. His responsibility and loyalty is owing to the public or, all of the people.

An opinion was rendered April 25, 1936, by this office, wherein it was held that the proprietor of a dance hall could not be appointed an officer of the law under this section. Neither could an employee of the proprietor of the dance hall be appointed such officer of the law. The reasons assigned for the conclusions were that the interests of the proprietor and the interests

of the public might be inconsistent, and in the performance of his duty the officer must be free from any consideration other than that of the public.

The opinion of January 28, 1938, is inconsistent with this one. It is hereby superseded.

2. What is the meaning of the words "any person, not a public officer," in the last sentence of the quoted section?

It is our opinion that this must be considered as if it read: "In case any person, not having any official position at the time of his selection, shall be designated as such officer of the law, * * *." The only significance of the last sentence in the section is that when a person, not having any official status at the time he is selected, is designated as a special officer to serve only in the capacity mentioned in the section, the officer making the designation shall have no liability either by statute or common law, such as might follow if this sentence had not been inserted in the section. If the person designated was a deputy sheriff at the time of his designation to this special duty, then the last sentence of the section does not apply to him. But, in either event, he is a public officer.

3. Of what significance is the fact that the quoted section requires the proprietor of the dance hall to pay the fees and expenses of the officer of the law?

None. The law requires the performance of many duties on the part of public officers, especially sheriffs, at the instance of a citizen. The citizen pays the fees for the service. It is the duty of the officer under the law to act, but the citizen has no power of direction over the officer. The law directs him. As an example, the citizen delivers to the sheriff an execution which requires the sheriff to levy upon the property of the judgment debtor not exempt from execution. If the citizen directs the sheriff to levy upon property which is exempt from execution, the sheriff has no obligation to follow his direction, and, in fact, it is the sheriff's duty not to follow such direction of the citizen because the law forbids. The duties performed by the officer are such as the law requires. The citizen has no control.

4. Neither has the proprietor of the dance hall any authority to discharge the officer of the law, and he has no power to nominate. His suggestions have no binding effect upon the appointing power. Irrespective of what the practice may be in certain localities, it is our opinion that this is the proper construction. The statute cannot be repealed by practice not authorized.

5. The question is submitted whether the proprietor of the dance hall has any authority to control the officer of the law.

Our conclusion is that he has not. The mere fact that he is responsible for the conduct of the officer mentioned in the last sentence of the section — one who was not a public officer at the time of his designation — does not

give him any power of direction. It is an obligation that the proprietor voluntarily assumes by becoming such proprietor.

J. A. A. BURNQUIST,
Attorney General.

December 24, 1942. 802-A-16
885a-1

201

Police—Civil Service—Part-time special officer—Power of Commission to employ, promote, discharge and suspend police officers—M40 §§ 1933-52, 1933-63a; (MS41 §§ 419.05, 419.15).

St. Louis Park Village Attorney.

Facts

On October 1, 1937, by resolution of the Village Council, a Police Civil Service Commission was created in the Village of St. Louis Park, pursuant to Chapter 299, Laws of 1929. Thereafter the Commission appointed by the Council adopted its rules, wherein the police service of the village was divided into the following classifications: Chief of Police; Patrolman; Special Patrolman (traffic); Special Patrolman (part time). On February 28, 1938, the Village Council adopted a resolution in which it determined what individuals were in the police service of the Village on October 1, 1937, and holding the respective offices of Chief of Police, Patrolman, and Special Officer. A certified copy of this resolution was filed with the Civil Service Commission and acknowledged by its Secretary.

On June 20, 1938, the Civil Service Commission minutes show that it "discarded" its former rules and adopted a new set of rules which provided for the following classifications only: Police Chief and Police Patrolman. There is nothing in the minutes or no rules to indicate the intention of the Commission with respect to the status of special patrolmen in the police service as of the date of adoption of the new rules.

One of the men who was employed as a special patrolman, part time, from October 1, 1937, has been continuously employed as a patrolman on a part time basis since that time. There have been no examinations conducted for the position of part time patrolman but there have been two examinations for the position of patrolman, one to select an additional officer provided for by the village council and one to fill a vacancy caused by death.

The applicant who ranked highest on the last examination now claims that he should be employed as a part time patrolman in place of the individual who was in the police service as a part time patrolman at the time the Civil Service Commission was appointed and who has continued as such since that time.

Question

Whether this part time officer is entitled to civil service status under Laws 1933, Chapter 197, or whether he may be replaced by another who has taken the examinations?

Answer

Laws 1933, Chapter 197, Section 17, now found in Mason's Supplement 1940, Section 1933-63a, reads as follows:

> "Any police officer regularly employed at the time of the creation of the civil service commission shall automatically come under the jurisdiction of the civil service commission."

If the part time officer was a regular employee at the time the civil service commission was created, he is entitled to a civil service status, and should not be replaced by another who has taken the examinations.

Question

Did the commission have the right to abolish the classification of "Special Officer (part time)" in the absence of actual abolition of employment of part time special officers by the Village Council?

Answer

No, not to the detriment of the special officer working since October 1, 1937.

EDWARD J. DEVITT,
Assistant Attorney General.

October 20, 1941. 785-E-2

202

Police—Civil Service—Removal of police officers and employees under the provisions of Laws 1929, Chapter 299, as amended by Laws 1933, Chapter 197—L 29, C 299; L 33 C 197; (MS41 §§ 419.01, 419.15, 419.16, 419.17, 419.18).

Golden Valley Village Attorney.

Facts

The Village of Golden Valley adopted civil service for its police force and inaugurated such system on January 1, 1941, in accordance with the police civil service law. Sometime prior to January 1, 1941, but after the adoption of the resolution creating the civil service commission, all policemen of the village were notified in writing that they were purely temporary employees and that they would serve subject to a probationary period before receiving civil service status.

It appears that one "X" contends that he was blanketed in because he was a member of the police force at the time the civil service resolution was adopted. You ask our view.

Opinion

Mason's Supplement 1940, Section 1933-63a, states:

> "Any police officer regularly employed at the time of the creation of the civil service commission shall automatically come under the jurisdiction of the civil service commission."

This provision was made a part of the law by Laws 1933, Chapter 197. In an opinion dated May 16, 1938, it was held that by this amendment the legislature intended taking from the commission the power to summarily remove employees of police departments who are regularly employed at the time of the establishment of such a commission. We concur in such opinion.

If "X" was regularly employed at the time the civil service commission was created, then he is entitled to civil service status and the notice in writing that he was a temporary employee working subject to a probationary period was without legal effect.

EDWARD J. DEVITT,
Assistant Attorney General.

October 8, 1941. 785-E-2

203

Register of Deeds—Bond—Liability on bond after death of register—M27 § 897; M40 § 659; (MS41 §§ 375.08, 386.33).

Traverse County Attorney.

Facts

It appears that your register of deeds has just passed away. He had a chief deputy who is now acting as incumbent of the office until a successor shall have been appointed pursuant to Section 659, Mason's Supplement 1940. That section provides for the filling of a vacancy in the office of the register of deeds by appointment of the county board and it further provides:

> "Whenever such vacancy occurs in any of the offices hereinbefore mentioned in which office there is a chief deputy or first assistant, then the said chief deputy or first assistant is empowered and authorized to perform all the duties and functions of the said office until such time as the same is filled by appointment by the said county board."

Question

Assuming that the County Board does not fill the vacancy at once and further assuming that the office of the register of deeds is conducted by the

deputy register of deeds, would the bond of the deceased register of deeds afford protection?

Answer

In this connection you call attention to Section 897, Mason's Minnesota Statutes 1927, the last sentence of which provides that "registers shall be responsible for the acts of their deputies and may revoke their appointment at pleasure."

Your question should be answered in the negative. The bond of the deceased register of deeds would not continue in force so as to make the surety liable for acts which may be committed by the temporary or de facto successor of the deceased register after the death of the latter. Many reasons might be assigned for this opinion. One reason which is quite conclusive is this: the bond of the register of deeds is conditioned "if the said principal shall faithfully and impartially in all things, **during his continuance in office,** perform the duties thereof * * *." Thus the language of the bond itself limits its effectiveness to the time the principal continues in office. It cannot be enlarged or extended so as to make the surety's liability extend beyond the time stipulated and agreed upon in the contract. The surety cannot be held liable for anything occurring after the death of the principal because it did not agree to assume any such liability.

RALPH A. STONE,
Special Assistant Attorney General.

June 22, 1942. 373-A-2

204

Register of Deeds—Chattel mortgages—Conditional sales contracts—Satisfied by duplicate satisfaction delivered and filed—(MS41 §§ 511.08, 511.18).

Mower County Attorney.

Question

You call attention to the opinion of the Attorney General dated November 19, 1929, published in the 1930 Report as Opinion No. 138, and inquire whether the ruling therein has been changed.

Answer

The writer of that opinion said that in his opinion the exclusive method for satisfaction of such lien is as provided in the statute. The opinion has not been reversed.

Upon reading these statutes you will observe that the positive duty on the part of the mortgagee exists when the chattel mortgage or conditional sales contract debt has been paid to execute a satisfaction in duplicate. One of the duplicates is delivered to the owner. One is filed with the Register of

Deeds at the expense of the mortgagee. In respect to chattel mortgages, the mortgagee is liable to treble damages for his failure to follow the statute.

The satisfaction on the margin of the record in the office of the Register of Deeds, that is, the chattel mortgage index, is not authorized by law. Doubtless if the signature of the mortgagee were proven it would operate as an estoppel against him, but it would not relieve him from the penalty which the statute imposes in Section 511.08 if damages were suffered.

The Register of Deeds should conform to the law and insist that chattel mortgages be satisfied in the manner which the law prescribes.

CHARLES E. HOUSTON,
Assistant Attorney General.

December 22, 1942. 373-B-5

205

Register of Deeds—Filing Deputy Sheriff's appointments—Such appointments need not be recorded—County liable for Register of Deeds' fees for filing appointment—M27 §§ 917, 979, 7002(6); (MS41 §§ 357.18, 382.08, 387.14).

Dakota County Attorney.

Question

1. When the Sheriff of Dakota County appoints a special deputy sheriff and the appointment, together with the oath, is handed to the Register of Deeds, pursuant to Section 917, Mason's Minnesota Statutes 1927, is it obligatory on the part of the Register of Deeds to record the said appointment and oath in addition to filing the same?

Answer

1. No. The statute (Section 917, Mason's Minnesota Statutes 1927) requires the appointment and oath to be filed. It does not require that the same be recorded.

Question

2. What fee is the Register of Deeds entitled to charge for performing the work required to be done by Section 917, Mason's Minnesota Statutes 1927, in either filing or recording the appointment and oath of the special deputy sheriff?

Answer

2. Ten cents (10c). Section 7002, Mason's Minnesota Statutes 1927, subsection 6.

Question

3. Who is responsible for the payment of the Register of Deeds' fee in the above instance, and does this fee have to be paid in advance?

Answer

3. The county. Mason's Minnesota Statutes 1927, Section 979. The fee does not have to be paid in advance.

This opinion is written on the assumption that the compensation of the Register of Deeds of your county is not fixed by any law having local application thereto. I have not been able to find any such law.

RALPH A. STONE,
Assistant Attorney General.

August 31, 1942. 373-B-10-b

206

Register of Deeds—Liens—Exhibiting old age assistance—Modifying opinion of August 31, 1942—18 USCA § 61e.

Kittson County Attorney.

Opinion

As to the right of a register of deeds to furnish a list of old age assistance liens on file in his office.

The federal law, known as the Hatch Act, Title 18, U.S.C.A., Section 61e, provides as follows:

> "Section 61e. List of benefit recipients; furnishing.
>
> "It shall be unlawful for any person for political purposes to furnish or to disclose, or to aid or assist in furnishing or disclosing, any list or names of persons receiving compensation, employment, or benefits provided for or made possible by any Act of Congress appropriating, or authorizing the appropriation of, funds for work relief or relief purposes, to a political candidate, committee, campaign manager, or to any person for delivery to a political candidate, committee, or campaign manager, and it shall be unlawful for any person to receive any such list or names for political purposes. Aug. 2, 1939, 11:50 a.m. E.S.T., C. 410, Section 6, 53 Stat. 1148."

This statute is plain upon its face and it must be observed and followed.

There is grave doubt as to the validity of the federal law as applied to other than federal elections, but I would not advise a person to violate the terms of the act in order to make a test of the question of the power of the federal government to reach out and control state elections.

RALPH A. STONE,
Assistant Attorney General.

September 23, 1942. 521-P-4

207

Register of Deeds—Recording—Acknowledgments in foreign state—Notary having no seal—Certificate of secretary of state as to official character of notary—Deed may be recorded—M27 §§ 6977, 6978; (MS41 §§ 358.22, 358.23).

Koochiching County Attorney.

Facts

A deed which was executed in Michigan has two witnesses. It was executed in all respects in accordance with the laws of Minnesota, except that the notary public who took the acknowledgment did not affix a seal. In Michigan, notaries public do not have seals. There is attached to the deed a declaration of the secretary of state of Michigan that the person who acted as notary and took the acknowledgment was then actually such notary under the laws of Michigan, and her signature is authenticated.

Opinion

Mason's Minnesota Statutes 1927, Section 6977, provides that acknowledgments of deeds may be taken in any part of the United States by a notary public. Section 6978 provides that if the acknowledgment is taken before a notary of a foreign state and such officer has no seal, the acknowledgment shall be accompanied by a declaration, such as is attached to the deed in question; that an acknowledgment accompanied by such a certificate of the secretary of state shall be sufficient.

Therefore, this deed is in all respects executed in accordance with the laws of Minnesota. In answering your inquiry with respect thereto, it is my opinion that it may be recorded by the register of deeds; that a certificate that it is executed in accordance with the laws of Michigan is not necessary.

Had the execution of the deed been different in any other respects not covered by Section 6978 — for instance, the lack of two witnesses — it would be necessary to obtain the certificate that the deed was executed in accordance with the laws of Michigan.

RALPH A. STONE,
Special Assistant Attorney General.

July 30, 1942. 373-B-9-a

208

Register of Deeds—Recording—Deeds—Embracing several parcels—Whether eligible to record when taxes unpaid on one parcel—M27 § 2211; (MS41 § 272.11).

Traverse County Attorney.

Facts

A deed conveying several parcels of land, on one of which taxes have

not been paid, has been presented to your county auditor for his endorsement as to taxes as a preliminary to the record thereof in the office of your register of deeds.

Question

Whether or not the auditor may make the notation "Taxes paid and transfer entered" on this deed, excepting therefrom the one parcel on which taxes are unpaid.

Answer

The pertinent statutory provision is Mason's Minnesota Statutes of 1927, Section 2211. It reads:

> "When a deed * * * is presented to the county auditor for transfer, he shall ascertain from his records if there be taxes due * * * or in case no taxes are due, he shall transfer the land upon the books of his office, and note upon the instrument, over his official signature, the words, 'taxes paid and transfer entered' * * * and, unless such statement is made upon such instrument, the Register of Deeds * * * shall refuse to receive or record the same * * *."

A violation of this section by the register of deeds is made a gross misdemeanor.

It is true that the case cited by you, State ex rel. v. Weld, 66 Minn. 219, dealt with a conveyance which described several lots on which taxes were unpaid. The relator sought by mandamus to compel the auditor to endorse the conveyance "taxes paid and transfer entered," and was not successful. You suggest that this decision does not prevent the auditor from making the statutory endorsement as to the parcels on which taxes have been paid, and excepting therefrom parcels on which they have not been paid.

We do not believe the court's ruling in this case can be limited in the manner you indicate. On pages 221 and 222 the court said:

> "This doctrine applies to all the description or parcels in the deed or instrument, and not to any particular part or separate parcel. The notation (the county auditor's) on the deed or instrument **must be to all the description therein as a whole**, and not to any particular portion, where the delinquent unpaid tax is upon all of such premises, whether taxed separately or as an entirety."

Previous opinions of this department are in harmony with this view. In Opinion 127, Atty. Gen. Rep. 1918 (February 7, 1918 (373B-9-e)), it appeared that a deed for 5,000 acres had been sent to a register of deeds late in December for recording. It was immediately referred to the auditor and treasurer for their certificates. The auditor noted that taxes on one forty had not been paid. The person presenting the deed was notified, and thereupon asked that it be recorded without the payment of taxes on this

40 acre tract. The register of deeds was advised not to accept it for record and told that he could not disregard the statutory provision "which is positive in its terms."

In an opinion rendered the Hennepin County Attorney, Op. 13, 1929 (393B-9-e), it appeared that a deed conveying five separate tracts of land had been recorded with the register of deeds. It subsequently developed that one of the tracts conveyed was registered land. The grantee then asked to have the deed filed with the registrar of titles. The question arose as to the right of the auditor to certify as to the payment of taxes on the registered tract only, so as to enable the register of deeds to record it, and was answered in the negative. The opinion cited State ex rel. v. Weld, supra, and stated:

> "The interest of the state in having taxes paid requires that the statute providing for those certificates before a deed may be recorded should be strictly construed in favor of the state."

Accordingly your inquiry is answered in the negative. The auditor's notation must be as to all the parcels described in the conveyance, and not as to a part of them in order to entitle the instrument to record.

ROLLIN L. SMITH,
Special Assistant Attorney General.

December 9, 1941. 373-B-9-e

209

Registrar of Titles—Torrens System—Correction of record—Petition to court necessary—(MS41 § 508.71).

Benton County Attorney.

Facts

A number of years ago, the title to several tracts of land owned by the same owner was registered. All proceedings were properly had and judgment entered. A certificate was issued in the name of the adjudicated owner. Thereafter, he sold two tracts and new certificates were issued to the purchasers and a retention certificate was issued to the original owner for the balance that he still owned. This last mentioned certificate failed to include a tract two rods in width which had at times been used as a roadway.

Now the purchaser of adjoining land, which is unregistered, has purchased the two-rod strip from the original owner and has been given a deed thereto, but the Register of Deeds advises that he cannot record the deed and cannot issue a new certificate to this two rods of registered land until the old certificate has been returned to him for cancellation. The old certificate, however, does not contain this description, an error apparently having been made by a former Register of Deeds in issuing the original certificate.

Opinion

In our opinion it will be necessary for the owner to secure an order of the court to correct the situation. He should proceed pursuant to the provisions of Minnesota Statutes 1941, Section 508.71, which reads in part as follows:

> "No erasure, alteration, or amendment shall be made upon the register of titles after the entry of a certificate of title or of any memorial thereon, and the attestation of the same by the registrar, except by order of the court. A registered owner or other person in interest may, at any time, apply by petition to the court upon the ground that * * * any error or omission was made in entering a certificate or any memorial thereon, or on any duplicate certificate; * * * or upon any other reasonable ground; and the court may hear and determine the petition after notice to all parties in interest, and may order the entry of a new certificate, the entry or cancelation of a memorial upon a certificate, or grant any other relief upon such terms, requiring security if necessary, as it may consider proper; * * *."

I would not feel that the registrar of titles can issue a new certificate containing the correct description without an order of the court correcting the record. You might consider asking the registrar of titles to stand the expenses, or part of the expenses, in view of the fact that it was his error.

RALPH A. STONE,
Assistant Attorney General.

September 3, 1942. 374-J

210

Sheriff—Fees—Criminal cases—Insane cases—Juvenile cases—(MS41 §§ 260.29, 350.11, 387.11, 387.18).

Rice County Attorney.

Opinion

The sheriff's compensation in Rice County is controlled by the sheriff's general salary law, being Section 387.18, et seq., Minnesota Statutes 1941, and the sheriff's mileage statute, Section 350.11, Minnesota Statutes 1941. Under these statutes, the sheriff's salary is in full for his services in serving an insane warrant and conveying the patient to the state institution. This applies to insane, feebleminded and inebriate cases. In such cases, the sheriff receives mileage at seven cents per mile (Minnsota Statutes 1941, Section 350.11) and also receives his actual disbursements for travel, board and lodging of himself and the patient and his authorized assistants paid on the order of the probate court.

As to juvenile cases, it cannot be held that the sheriff is entitled to any fees because his services for the county are covered by the general salary act above referred to. It is my opinion that Laws 1941, Chapter 158, Section

4, being Minnesota Statutes 1941, Section 260.29, did not modify or change the sheriff's compensation provided for under the general salary law. Expenses incurred by the sheriff in juvenile cases should be audited and ordered paid by the probate court. As to the mileage rate of the sheriff in juvenile cases, that is — whether it is seven cents per mile as provided by Section 350.11, Minnesota Statutes 1941, or five cents per mile as provided by the 1941 law — is difficult to determine. It was held under date of August 5, 1941, in an opinion issued by this office that the sheriff's mileage rate for services rendered upon order of the juvenile court is five cents per mile. This mileage should be approved and ordered paid by the probate judge.

The sheriff is not entitled to charge his county for the service of subpoenas in criminal cases. He is entitled to be paid mileage at the rate fixed by the county board, which, I understand, in your county is seven cents per mile.

RALPH A. STONE,
Assistant Attorney General.

October 21, 1942. 390-A-11

211

Sheriff——Fees—Execution sale of real estate—Sale to judgment creditor—Sheriff entitled to percentage of amount bid.

Rice County Attorney.

Facts

The Sheriff of Rice County recently sold a tract of real estate at a sale pursuant to an execution. The judgment creditor purchased the real estate, and thus there was no cash handled by the Sheriff.

Question

Is the Sheriff entitled to charge fees as provided by Section 6993 (5), Mason's Statutes, or is he only entitled to the fees provided by Section 6993 (8)? And further, would it make any difference whether the purchaser paid cash to the Sheriff — that is, if someone besides the judgment creditor purchased the real estate at the execution sale?

Answer

I respectfully refer you to the case of Sharvey v. Central Vermillion Iron Company, 57 Minn. 216. In that case our Court passed upon the question you ask. The syllabus in the case reads:

> "When a sheriff levies an execution and sells the property, the execution creditor being the purchaser, it is a collection of the amount of the bid within the meaning of 1878 G. S., Chap. 70, Sec. 11, allowing sheriffs a percentage for collection on executions."

The Court held that the sheriff was entitled to a percentage on the collection in such cases. The 1878 statute referred to reads substantially the same as the statute today. I think a full answer to your case is contained in the case cited.

RALPH A. STONE,
Special Assistant Attorney General.

June 24, 1942. 390-C-11

212

Sheriffs—Fees—Juvenile court matters—M40 § 254-47; L 41, C 158 § 4; (MS41 § 260.29).

Goodhue County Attorney.

Facts

Mason's Supplement 1940, Section 254-47, sets the maximum mileage to be paid sheriffs and deputy sheriffs at seven cents, and Laws 1941, Chapter 158, Section 4, provides for mileage not to exceed five cents per mile of witnesses and of officers serving notices and subpoenas ordered by the court.

Question

Whether the county may pay the sheriff more than 5c per mile in accordance with 254-47 for serving subpoenas and warrants or either of them.

Answer

Mason's Supplement 1940, Section 254-47, is the general mileage statute for state and municipal subdivision employees, and for sheriffs and deputy sheriffs. Laws 1941, Chapter 158, refers solely to juvenile court matters.

Sheriffs acting under the provisions of Laws 1941, Chapter 158, are to be paid on certification by the judge of probate and that under this section such judge has no authority to certify mileage in excess of five cents per mile.

J. A. A. BURNQUIST,
Attorney General.

August 5, 1941. 390-A-11

213

Sheriff—Right to rent out rooms in residence of county jail—M27 § 10847; (MS41 § 641.01).

Olmsted County Attorney.

Facts

The Sheriff resides with his family in the County Jail in the residence portion thereof. There are one or two extra rooms in this residence portion

and for the last forty years it has been the practice of the various sheriffs to rent out these rooms to private persons and collect rent therefor, which rent is kept by the Sheriff. The County, however, furnishes the heat for these rooms.

Considerable objection was made to this practice recently by a small group of boarding house and rooming house keepers. There has been no allowance made by the Sheriffs to the County in any way out of the rents received by the Sheriffs. Apparently the practice has been acquiesced in by all of the County Boards, as well as the public, for the last forty years, at least, and I believe that this situation is prevalent in other counties.

Question

As to the legality of this renting of rooms by the Sheriff and as to the powers of the County Commissioners in this respect.

Answer

Section 10847, Mason's Minnesota Statutes of 1927, reads:

> "The county board of each county is authorized to construct and maintain at the expense of its county a jail for the safe keeping of prisoners, and also, adjoining and connected therewith, a residence for the use of the sheriff."

There is some reason for considering the fact that the heat and light is furnished at county expense. We are of the opinion that in the sound discretion of the board of county commissioners under the foregoing section of the statute, they may determine what is necessary for the residence of the sheriff and his family.

The county commissioners may restrict the use that can be made of any portion not necessary for the use of the sheriff and his family for residence purposes; and if the remainder is rented out or used for any purpose, the rent and revenue therefrom should go to the county treasurer.

M. TEDD EVANS,
Assistant Attorney General.

April 4, 1941. 390-A-17

214

Sheriffs—Fees—Tax warrants and citations—Personal property—(MS41 § 357.09(23)).

Fillmore County Attorney.

Opinion

I.

It has been the holding of this office that the sheriff can collect regular mileage and fees from each person who pays his delinquent personal property taxes to the sheriff holding either a warrant or citation, and that the amount

collected over and above the tax, penalty and interest and clerk's fee belongs to the sheriff. See opinion of August 21, 1941, (390c-13).

II.

You also inquire as to the situation in a case where the sheriff attempts to collect personal property tax warrants or citations but makes no collection.

A. In cases where no service is made, the sheriff's compensation is included in the amount allowed by the county board pursuant to Minnesota Statutes 1941, Section 357.09, Subsection 23. This section reads as follows:

> "(23) For services in attempting the collection of personal tax warrants, such reasonable compensation as the county board shall allow * * *."

The word "warrants" has been interpreted by this office to include "citations" also. I gather from your letter that your county board allows 7c per mile as compensation to the sheriff under this section.

Of course, in a case where no judgment is entered, there are no fees to be taxed. Nevertheless, the sheriff receives compensation from the county at the mileage rate.

B. In cases where the service of the citation is made but nothing is collected and judgment is entered, the services of the sheriff are also paid by the county and the allowance made to him pursuant to Section 357.09, Subsection 23, supra. In such cases, there being a judgment entered, the amount of expense incurred by the county should be included and taxed as costs in the judgment, if the amount thereof can be justly determined. If the county allows compensation to the sheriff pursuant to Section 357.09, Subsection 23, on a mileage basis, the mileage pertaining to each citation should be ascertained, noted on the sheriff's return of the citation and taxed and included in the judgment. Please note opinion No. 76, Report of the Attorney General for 1924, where it was held, "Although collection be not made, the sheriff's fees for mileage travel, service, return, etc., nevertheless, and in all cases, should be noted upon the original citation with his return of service, and the amount then should be included in the judgment entered."

If the sheriff is allowed reasonable compensation at the rate of 7c per mile, then it is my opinion that such mileage should be taxed and entered in the judgment at the same rate.

As intimated in your letter, there may be situations in which it may be difficult to determine just how much mileage is allocable to each warrant, but the sheriff should be able to justly allocate the mileage.

It would seem to me, if the county is obliged to disburse money to the sheriff on a mileage basis for attempting collection of personal property tax warrants and citations, that in cases where service is made but collection fails and judgment is entered the county should be allowed to include the amount of expenses to which it has been put by way of sheriff's mileage

on each warrant. Therefore, it is my opinion, assuming that the sheriff's compensation fixed for the period is 7c per mile, that it be computed and charged by the sheriff in proper cases in a just manner. No definite rule or formula for allocating mileage can be laid down. The sheriff must adjust and allocate his mileage as between several citations in a just and fair way.

The question is whether the sheriff's mileage to be included in the judgment should be computed at the rate of 7c per mile allowed by the county board or at the legal mileage rates allowed the sheriff for serving other papers. I think it would be more just to the taxpayer to include in the tax judgment only the amount actually disbursed by the county. The sheriff should collect his mileage from other sources wherever possible and save the county a charge therefor, and he should not make a duplicate charge against the county for the same mileage for which he is otherwise compensated.

When the sheriff has been paid mileage by the county, the amount included in the judgment on that account, when collected, belongs to the county.

RALPH A. STONE,
Assistant Attorney General.

October 21, 1942. 390-C-13

215

Sheriff's Fees—Traveling when return of not found is made—(MS41 § 357.09).

Chief Attorney, Veterans Administration.

Opinion

In the matter of sheriff's fees for return of not found. In an opinion of March 9, 1938, following the line of previous opinions on the same subject, it was stated that a sheriff may not receive more than one dollar for making due and diligent search and inquiry and returning summons when a defendant cannot be found.

Said opinion was based on Minnesota Statutes of 1927, Section 6993(18), which provides that a sheriff is entitled to a fee of one dollar for "making diligent search and inquiry and returning summons when defendants cannot be found."

That provision does not in my opinion contemplate that the sheriff shall travel about the county for the purpose of ascertaining the whereabouts of the party to be served. The words "search and inquiry" as used in said section should, I believe, be construed so as to require the sheriff to procure without necessarily being obliged to travel a reasonable amount of information on which to base his return. In the absence of a request that service be made on a defendant at some specific address, any traveling which the sheriff may do in making "search and inquiry" is upon his own responsibility.

However, Minnesota Statutes of 1927, Section 6993(24), provides:

"For services not herein enumerated, the sheriff shall be entitled to the same fees as for similar duties."

Section 6993 does not enumerate services or mileage fees in connection with a situation where the sheriff travels to make service upon a defendant on specific instructions by a party entitled to such service that it be made at a certain place and the defendant cannot there be found.

In such circumstances it is my opinion that under the last quoted provision the sheriff should be entitled to the same mileage as is allowed if service had been successful.

In so far as any previous opinions on the aforesaid Section 6993 are inconsistent with the construction herein given, they are hereby superseded.

J. A. A. BURNQUIST,
Attorney General.

August 8, 1942. 390-C-10

216

Village officials—Salaries—Assessed valuation—L 41, C 221; L 41, C 243; (MS41 § 415.04).

Kinney Village Attorney.

Facts and Question

The 1941 Legislature passed legislation affecting the salaries of village officials, to-wit: Chapter 221 and Chapter 243, approved respectively on April 14 and April 16. I assume that the latter is the one which controls the salaries of all villages except those specifically exempted in the State of Minnesota.

The village officers in my village prior to the adoption of these laws were drawing a different salary than they would under the provisions of the laws above stated, and as all of them were in office at least from January 1, 1941, until the time of the enactment of the above laws, what effect do the laws as enacted have on their salaries? That is, does Chapter 243 change the salary schedule of village officers already in office and not simply those of future officials?

Answer

The above question is answered in the affirmative.

Question

What is meant by the phrase "assessed valuation" as used in Chapter 243? Does this mean the full and true assessed valuation as placed by an assessor on property, or does it mean the valuation on which taxes are levied, that is, on the 25, 33, 40 or 50% of the full and true value on which taxes are collected?

Answer

This means the valuation for taxation based on the 25, 33, 40 or 50% of the full and true valuation. Because of the homestead law it is subject to additional adjustment because the provisions for class 3b and 3c of Section 1993, Mason's Supplement 1940 provides: "For the purpose of determining salaries of all officials based on assessed valuation and of determining tax limitations and meeting bonded debt limitations, class 3b and class 3c shall be figured at 33⅓% and 40%." (That means they should be figured the same as if the homestead provisions for assessment had not been passed.)

M. TEDD EVANS,
Assistant Attorney General.

July 18, 1941. 469-A-1

217

Welfare Board members—County—Membership fee in unofficial state organization—Expenses of persons attending unofficial conferences not authorized by law unless directed as a duty by welfare board.

Mower County Attorney.

Facts

The Minnesota State Conference of Social Workers is a state organization independent of any state agency. Its members are those interested in social work. The conference holds several meetings a year, at which social welfare subjects are considered. The annual membership dues in the organization are $3.00 per member.

Questions

1. "Can the Welfare Board pay the $3.00 membership fee for any of its members or its executive secretary or its investigators who may wish to join the organization?

2. "Can the Welfare Board pay the expenses of the executive secretary, members of the Welfare Board and investigators of the Welfare Board who attend the three day conference?"

Answer

The money disbursed by the county welfare board is raised by taxation. It is public money. It must be spent for public purposes.

I fail to find that the law requires any of the persons mentioned to be members of this voluntary organization. Therefore, it is not a legal duty of any of these persons to be members thereof. If it were a legal duty, payment of the membership fee by the public would be justified. In the absence of the duty, payment of the membership fee cannot be justified unless the law directs or authorizes the payment.

The same course of reasoning applies to the second question. If it is the duty of the persons mentioned to attend the conference, then the public should pay their expenses. If it is not the duty of the members to attend the conference, the public should not be burdened by the payment. Undoubtedly the members of the legislature know of the existence of this organization and if the legislature considered that the public welfare would be promoted by requiring certain persons engaged in welfare work to attend the conference, it has that power to so require. Whether these persons shall attend such a conference is primarily a legislative question and until the legislature directs that as a matter of official duty such persons shall attend, it is optional with them whether or not they shall attend at their own expense for reasons which they consider good.

CHARLES E. HOUSTON,
Assistant Attorney General.

March 27, 1942. 125-A-64

218

Welfare Board—Members—County—Mileage—For use of car—Chapter 99 of Laws 1939, as making an exception to Section 254-47 of Mason's Supplement 1940—L 39, C 99; M40 §§ 254-47, 974-13; (MS41 § 350.11).

Morrison County Attorney.

Question

Whether members of the county welfare board may, under Laws 1939, Chapter 99, Section 16, receive 7c per mile for the use of an automobile in the performance of their duties as members of the welfare board.

Answer

In our opinion your inquiry should be answered in the affirmative. Section 16 of said Chapter 99 reads as follows:

> "All county officers and their deputies or clerks shall be allowed all necessary traveling expenses incurred by them in the performance of the official duties of such office. If any officer, deputy or clerk shall use an automobile for travel in the performance of such duties, he shall be allowed and paid seven cents per mile for the use thereof."

Mason's Supplement 1940, Section 974-13, pertaining to the compensation of county welfare board members, reads as follows:

> "Except as herein provided in Section 1, Subdivisions (b) and (c) (§ 974-11 (b-c)), the members of the County Welfare Board shall receive, in addition to any salaries they may receive from any other source, from the state or county or any municipality, the sum of $3 per day for time actually spent in transacting the business of the Board not exceed-

ing, however, a maximum of twenty-five days a year. Members shall be reimbursed by the county for expenses actually incurred in the performance of their official duties."

Mason's Supplement 1940, Section 254-47, reads as follows:

"The maximum amount which shall be paid by the State, any department or bureau thereof, or any county, city, village, town or school district, to any officer or employe except sheriffs or deputy sheriffs, as compensation or reimbursement for the use by such officer or employe of his own automobile in the performance of his duties, shall not exceed five cents per mile. In case of sheriffs and deputy sheriffs the maximum amount so to be paid shall not exceed seven cents per mile."

In an opinion of this office, dated October 13, 1937, it was ruled that the provision last quoted above was applicable to county welfare board members, and that their reimbursement was limited to the 5c a mile rate. However, this office has also ruled, in opinions dated May 16, 1933, and March 8, 1935, that Section 254-47 was not applicable when there were specific statutes to the contrary. The result was that county commissioners in counties operating under Mason's Minnesota Statutes of 1927, Sections 656, 657, and 2051 were held entitled to a higher rate of reimbursement.

Chapter 99 is a special law covering a specific subject matter in the counties to which it applies. It is a well established principle of statutory construction that the specific provisions of a statute control the general. See Dunnell's Minnesota Digest for 1927, Section 8970. The rule is thus stated in Rosenquist v. O'Neil & Preston, 187 Minn. 375, 245 N. W. 621, as follows:

"3. It is another case where two statutes in pari materia, G.S. 1923, §4295, as amended, 1 Mason, 1927, id., and G.S. 1923 (1 Mason, 1927) §4319, are in literal opposition, and if possible a way must be found to harmonize and give them both effect. It is easily done by applying § 4295 to the special issue there dealt with—the fact question whether the right to continued payments has ceased. The general language of §4319 is well satisfied by giving it effect upon all other cases. As between such statutory provisions, the special controls the general within the former's limited scope. Cohen v. Gould, 177 Minn. 398, 225 N. W. 435; 6 Dunnell, Minn. Dig. (2 ed. & Supp.) § 8970."

Furthermore, Section 254-47 was first passed in 1931 and amended in 1933 and 1935. The first county welfare board statute went into effect in 1937, and Chapter 99 was passed in 1939. In our opinion Chapter 99 is intended to specifically cover the compensation of county officers in all counties to which it applies. Section 16 uses the phrases "All county officers" and "any officer."

Our conclusion that it is intended to cover the automobile traveling expenses of the members of the county welfare board is confirmed by Section 12, the second sentence of which reads as follows:

"Provided, further, that the county commissioners who are not members of the county welfare board may participate in the meetings of the county welfare board in an advisory capacity, without voice, when such welfare board transacts business pertaining to old age assistance. The compensation of such members of the county board to act in such capacity on the county welfare board shall receive in addition to any salaries they may receive from any other source the sum of three dollars per day for time actually spent while acting in such advisory capacity, on the welfare board and shall in addition thereto be entitled to mileage at seven cents per mile to and from such meetings while acting in such advisory capacity."

WILLIAM W. WATSON,
Special Assistant Attorney General.

September 29, 1941. 125-A-64

219

Incompatible—City attorney and library board member are.

City Attorney, Lake City.

Facts

The city attorney is a member and secretary of the library board organized under the provisions of your city charter. The city attorney renders opinions to the city and to the library board.

Question

Are the two offices incompatible?

Answer

For a full discussion on the subject of incompatible offices, and a citation of cases, see Dunnell's Digest, Section 7995, and the Supplements. It is there stated that

"Public offices are 'incompatible' when their functions are inconsistent, their performance resulting in antagonism and a conflict of duty, so that the incumbent of one cannot discharge with fidelity and propriety the duties of both."

The test of incompatibility is the character and relation of the offices; that is, whether the functions of the two are inherently inconsistent and repugnant.

In my opinion the offices of city attorney and member and secretary of the library board are incompatible. This is consistent with prior opinions of this office in analogous situations. Opinion dated October 24, 1930, held the offices of village attorney and member of the park board incompatible.

Opinion dated December 4, 1931, held the offices of village attorney and member of the water, light, power and building commission incompatible.

EDWARD J. DEVITT,
Assistant Attorney General.

April 30, 1941. 358-E

220

Incompatible—Clerk of district court—Deputy register of deeds and register of deeds—Deputy clerk of district court are not.

Wadena County Attorney.

Questions

1. Are the offices of Clerk of the District Court and Deputy Register of Deeds incompatible?

2. Are the offices of Register of Deeds and Deputy Clerk of the District Court incompatible?

Answer

The offices are not incompatible.

CHARLES E. HOUSTON,
Assistant Attorney General.

September 25, 1942. 358-B-1

222

Incompatible—Probate Judge and Village Clerk are not.

Chisago County Attorney.

Opinion

The offices of Village Clerk and Judge of Probate are not incompatible.

RALPH A. STONE,
Assistant Attorney General.

November 30, 1942. 358-B-3

223

Incompatible—School board member and village president—School board member and officer of school depository bank are—M40 § 10305; L 41, C. 228 (MS41 § 620.04)

Itasca County Attorney.

Question

Whether or not the president of a village council may also hold the office of member of a school board in a school district which embraces the

village; also whether or not the officer of a bank duly designated as a depository of school district funds may lawfully hold the office of member of the school board of that district.

Answer

Both questions are answered in the negative. Previous opinions of this department are to the effect that the statutory duties of a member of the school board and the charter powers of a village president are inherently such that the functions of the offices in question and the interests of the constituencies represented by the village president who is also a member of the school board may at times be inconsistent and conflicting and are incompatible. Opinion December 13, 1939 (358F). You do not state under what law the village involved is organized. We assume it is operating under a law which provides that the village president is a member of the council.

The law imposes absolute liability on a school treasurer for the safety of the funds coming into his hands. The legislature has created an exception to this rule by authorizing the school board to designate a depository and by exempting the treasurer from liability if loss comes from acts of the bank so named. This exception is inoperative where the school treasurer is interested in the depository contract. School District No. 1 v. Ailon, 173 Minn. 428, 217 N. W. 496. Mason's Supplement 1940, Section 10305, as amended by Laws 1941, Chapter 228, which forbids a public official's making contracts where he is interested, is applicable. The exception made by that section to the effect that where the designation is made by a two-thirds vote it is valid, has been held unconstitutional. Opinion November 13, 1933. The exception made by the 1941 amendment to the effect that where the designation is made by unanimous vote, and a school board member is a shareholder, but not an officer, of the depository bank has not as yet been passed upon by us. It can have no application to your case because the school board member in question is an officer of the bank.

Consequently you are advised that an officer of a bank, which has been designated as a depository of school district funds violates Mason's Supplement 1940, Section 10305 as amended if he assumes the office of member of the school board which designated the depository.

ROLLIN L. SMITH,
Special Assistant Attorney General.

October 13, 1941. 358-F

224

Incompatible—School director and county welfare board member are not. Commissioner of Education.

Question

Whether or not the offices of school board director and member of the county welfare board are incompatible.

Answer

Your inquiry is properly answered in the negative. We are unable to see how any antagonism can result from the efforts of one person to discharge the duties of both of these offices at the same time. There is no law expressly forbidding a school director from also serving as a member of the county welfare board. Consequently the test is, are the two offices incompatible? We do not believe they are.

ROLLIN L. SMITH,
Special Assistant Attorney General.

May 28, 1942. 358-F

225

Incompatible—School district clerk and village assessor are not.

Redwood County Attorney.

Question

Whether the office of village assessor and clerk of the common school district are incompatible.

Answer

We cannot see that the clerk of the common school district has any additional duties which would put him in a different class than the other members of the school board, and therefore the clerk of the common school district is not incompatible with the office of the village assessor.

M. TEDD EVANS,
Assistant Attorney General.

July 31, 1941. 358-F

226

Incompatible — Street commissioner and member of board of education in same municipality are not.

Deputy Commissioner of Education.

Question

Whether or not the street commissioner of a municipality may hold an elective office in that municipality, to-wit: member of the school board.

Answer

Categorically, this question is answered in the affirmative. The constitution prescribes the qualifications a person must possess in order to hold

public office in this state. Article 7, Sections 1 and 7. It is beyond the power of the legislature to add to or take from the qualifications thus fixed. Consequently, a person holding the office of street commissioner in a municipality, if otherwise qualified, is eligible to be a candidate for member of the board of education of that municipality, and if elected may qualify, and exercise the functions of that office. Whether or not such a person would automatically forfeit his employment as street commissioner by so doing, is another question.

In the absence of any statement by you as to the duties of the street commissioner, we cannot say that any antagonism would result from the efforts of one person to discharge the duties of both positions. Ordinarily a street commissioner is charged with the duty of maintaining the city's streets and keeping them in a passable condition. It is difficult to see wherein a conflict of duty would result in the discharge by an employee of a city charged with the care of the city's streets of the duties of member of the board of education.

However, there is another phase of this question which requires consideration, and that is the city's charter, or the law under which it is organized. No reference is made in your letter to any particular city. There are at least seven different kinds of cities and villages in Minnesota, each possessing different powers, and each governed by different laws. An examination of the charter, or the law under which the municipality you have in mind was organized, should be made. Absent any provision forbidding the appointment of an officer of that city to any employment therein, or some similar provision, then the street commissioner would not forfeit his position by assuming office as member of the school board.

In such a situation the question of whether or not the street commissioner could continue his employment would rest with the appointing authorities, normally the council, subject of course to charter provisions.

ROLLIN L. SMITH,
Special Assistant Attorney General.

June 2, 1941. 358-F

227

Incompatible—Village assessor and member of planning commission are not—M40 § 1933-68, et seq.; (MS41 § 471.26, et seq.).

Village Attorney for Golden Valley.

Question

Whether the offices of village assessor and that of a member of the village planning commission are compatible.

Answer

The governing body of any village is empowered by Mason's Supplement 1940, Sections 1933-68, et seq., to carry on city planning activities.

By Section 1933-74 id. such governing body is authorized to create or dissolve a planning commission of resident citizens, "* * * to be advistory to that body, which commission when established, shall have the power to carry on the duties conveyed to the municipality hereunder, under direction of the city or village council * * *."

In other words, such a commission is largely a board of recommendation. It acts pursuant to the council's directions. The actual power resides in the council. We fail to see wherein the duties of an assessor, which are largely made up of assessing property for the purposes of taxation, conflict with the duties of a member of the planning commission, which are advisory. Neither sits in review on the other.

Accordingly you are advised that the two offices mentioned are not incompatible, and may be held by one person at the same time.

ROLLIN L. SMITH,
Special Assistant Attorney General.

March 10, 1942. 358-E-2

228

Incompatible—Village president and deputy sheriff are—M27 § 916; (MS41 § 387.13).

Village Attorney, Sherburn.

Facts

The deputy sheriff who is compensated by fees but receives no salary from the county, has filed as a candidate for president of a village council.

Question

Whether or not the two offices are incompatible.

Answer

In 1909 this office ruled these two offices were incompatible, the opinion being based on a provision in Revised Laws 1905, Section 558, reading:

> "Nor shall any sheriff or deputy sheriff be eligible to any other lucrative civil office, except village or city marshal."

This same provision appears in Mason's Minnesota Statutes of 1927, Section 916, and is still in effect. The office of village president is a lucrative civil office. You are therefore advised that by virtue of the statutory provision quoted a deputy sheriff may not lawfully assume the office of village president. If he does so he exposes himself to a penalty of $50. The deputy can, nevertheless, be a candidate for village office, but if elected he should resign as deputy sheriff before qualifying for village president.

ROLLIN L. SMITH,
Special Assistant Attorney General.

November 29, 1941. 358-A-5

229

Incompatible—Village recorder and town clerk are not—M27 §§ 1049, 1068; (MS41 §§ 366.01, 367.16).

Big Stone County Attorney.

The question arises as to whether or not the office of town clerk and village recorder in a village situate within the same township are incompatible. We have heretofore held that a village recorder may hold the office of town supervisor (opinion March 4, 1918, 358e-7). The same reasoning is applicable. The duties of a village recorder are largely ministerial. He is clerk and bookkeeper of the village and custodian of its records and seal.

The duties of a town clerk are also ministerial. He is not a member of the town board (Mason's Minnesota Statutes of 1927, Section 1049) and does not participate in the proceedings. His duties are prescribed by Mason's Minnesota Statutes of 1927, Section 1068. Briefly, he is required to keep a record of the board's proceedings, entitled to custody of its records, keep minutes of meetings, file accounts audited by the board, deliver notices of election, record requests for special meetings, post copies of by-laws, furnish the town board of audit with a financial statement, and perform various other duties.

I fail to see wherein the exercise of the duties of village recorder is inconsistent with performing the duties of town clerk. Accordingly you are advised that the two offices are not incompatible, but may be held by one and the same person at the same time.

There are a few villages organized under special laws which provide that the village clerk shall be a member of the village council. In such a situation the conclusions reached herein might not apply. I am assuming that in the village you have in mind the recorder is not constituted a member of the council.

ROLLIN L. SMITH,
Special Assistant Attorney General.

March 6, 1941. 358-E-7

230

Vacancy—Constable—Term of Appointee—M40 §§ 601-11(2), 601-11(2)f; (MS41 §§ 212.28, 212.34).

Village Attorney, Houston.

Facts

At the December, 1940, regular village election two constables were elected, each for a two-year term. One failed to file his oath or bond within the time required by law, although he was given due notice of his election.

Thereupon the council declared his office vacant because of his failure to quailfy, and forthwith appointed him to fill the vacancy so created "until his successor is elected and qualifies." The appointee qualified, and since then has been acting as constable.

He has now filed as a candidate for constable at the December 2, 1941, village election, apparently on the theory that the council's appointment was effective only until the 1941 village election.

Question

Does this appointment hold for the balance of the unexpired term, to-wit, until December 31, 1942, or only until the successor chosen at the 1941 election qualifies?

Answer

Houston is organized under the 1885 Act. Elections therein are governed by the present laws relating to elections in villages. Mason's Supplement 1940, Section 601-11(2).

A vacancy in the office of constable should be filled by appointment by the council "for the remainder of the term." Mason's Supplement 1940, Section 601-11(2)f. This provision supersedes a provision in Mason's Minnesota Statutes of 1927, Section 1134, to the effect that such vacancies shall be filled "for the remainder of the **year.**"

Consequently, regardless of whether the constable in question holds office by virtue of his election, or by virtue of his appointment, he is entitled to exercise the duties thereof until December 31, 1942. No candidate for this office should be chosen at the 1941 election as there is no vacancy to be filled.

ROLLIN L. SMITH,
Special Assistant Attorney General.

November 25, 1941. 847-A-3

OFFICIAL PUBLICATION

231

Printing—City charter may provide lesser maximum fee than that prescribed by statute—M27 § 10939-1; (MS41 § 331.08).

City Attorney, Detroit Lakes.

Question

Section 53 of the charter of the city of Detroit Lakes provides that the rate of compensation paid by the city for its official publications "shall never exceed two-thirds of the amount allowed by law for legal advertisements."

This year the only bid received for city printing was offered on the basis provided in Section 10939-1, Mason's Minnesota Statutes 1927, and the

council accordingly rejected the bid. You inquire whether Section 53 of the city charter is valid and whether the council is bound by it.

Answer

An answer to your inquiry turns upon the true meaning of Section 10939-1, Mason's Minnesota Statutes 1927, which provides as follows:

> "The fee for publication of a legal notice in any legal newspaper in this state shall be Ninety (90) cents per folio for the first insertion and Forty-Five (45) cents per folio for each subsequent insertion of a notice. The fee for the publication of the delinquent tax list shall be the same as now provided by Sec. 2096, General Statutes of Minnesota, 1913, provided, that in all cases where a notice for publication contains tabular matter in whole or part, or what is termed 'price and one-half' or 'double price' composition, an additional fee of twenty-five cents per folio shall be paid for all such price and one-half and double price composition matter for the first insertion of a notice, provided, further, that in the publication of official ballots for elections in the counties and state the same shall be measured as though the entire space occupied is that of solid Brevier or eight-point type, and no additional fee shall be allowed on account of tabular matter."

Transcript Publishing Company v. County of Morrison, 157 Minn. 435, 196 N. W. 485, involved two contracts, one covering the financial statement and delinquent tax list and the other covering all other county printing. The prices specified in each of the bids were the same: ninety cents per folio for the first insertion and forty-five cents per folio for each subsequent insertion. No mention was made of tabular matter or any other kind of composition.

Plaintiff sought to charge an additional twenty-five cents per folio for tabular matter, which he claimed was allowed by Section 10939-1. The court said:

> "That question must be and is resolved against plaintiff. The statute does not help its claim because it goes to the extent only of establishing prices for the publication of legal notices where such prices are not fixed by contract. That is not denied, but counsel urges that the tabular matter in question was not covered by the contract, and in consequence plaintiff is entitled to compensation at the legal rate. The decision below was placed on that ground and no other. * * * To sustain the judgment for plaintiff, it must be held that although it agreed expressly to publish the financial statement and knew that it would consist almost wholly of tabular matter, it may disregard the contract and recover under a statute intended to control only in the absence of contract * * *. * * * It is obvious that no such claim could be sustained. The situation is not altered to plaintiff's advantage, or at all, simply because of the general law establishing a maximum charge for tabular matter."

The specific rates provided in Section 10939-1 have thus been construed by our Supreme Court as fixing two limitations only: 1. A maximum rate

which may not be exceeded in any event for official or legal publication; and, 2. A legal rate which becomes a part of the contract whenever the parties do not provide another rate. The court has further stated that, at least in the absence of a statute providing a specific rate of compensation for a particular publication or type of publication, Section 10939-1 does not forbid a lower rate of compensation. In the Transcript Publishing Company case the court held that the parties had agreed upon a lower rate of compensation and that such contract was enforcible.

The statute does not, therefore, completely remove from contracting parties the power to fix lower rates. It does not completely embrace the subject so as to withdraw from municipalities the power to limit rates on their official printing to a lesser sum.

It is the general rule that the provisions of home rule charters upon all subjects proper for municipal regulations prevail over the general statutes relating to the same subject-matter. Exceptions to the rule include those cases where the charter contravenes the public policy of the state, as declared by the general laws, and 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. Dunnell, Mun. Corp., Section 6539.

As was said by our Supreme Court in Grant v. Berrisford, 94 Minn. 45, 101 N. W. 904; at page 126:

> "This limitation forbids the adoption of any charter provisions contrary to the public policy of the state, as declared by general laws, or to its penal code—for example, provisions providing for the licensing of prize fighting or gambling or prostitution, or those which are subversive of the declared policy of the state as to the sale of intoxicating liquor. But it does not forbid the adoption of charter provisions as to any subject appropriate to the orderly conduct of municipal affairs, although they may differ in details from those of existing general laws. This is necessarily so, for otherwise effect could not be given to the constitutional amendment which fairly implies that the charter adopted by the citizens of a city may embrace all appropriate subjects of municipal legislation, and constitute an effective municipal code, of equal force as a charter granted by a direct act of the legislature."

The City of Detroit Lakes has authority, by its charter, to fix a maximum rate on official city printing or publications which may be less than the maximum provided by Section 10939-1. The charter has so fixed a lesser rate, and the city council is accordingly bound to adhere to the specific provisions of Section 53 of the charter.

FREDERICK O. ARNESON,
Special Assistant Attorney General.

March 14, 1941. 277-A-11

ORDINANCES See 207 Mass. 601 17 Dauphin 17
3 M. L. R. 250

232

Curfew—Validity of.

City Attorney, Mankato.

Question

Whether the City of Mankato can by ordinance make it an offense, punishable by fine or imprisonment, for any child under 16 years of age to be upon the streets of Mankato after ten o'clock at night unless accompanied by an adult or upon a business errand of necessity, and make it such an offense for a parent to permit a child to commit such an assumed offense? We will assume that the child is not guilty of disorderly conduct while on the street.

Would such an ordinance be valid?

Answer

I have found only one decision in the courts of the United States dealing with the subject of the validity of a curfew law such as the one you mention. That case is Ex parte McCarver, 39 Tex. Crim. Rep. 448, 46 S. W. 936, 42 L. R. A. 587. It was therein held that an ordinance, passed without express legislative authority, prohibiting all persons under the age of twenty-one years from being on the streets or alleys of the city after nine o'clock at night, unless accompanied by a parent or guardian, or in search of a physician, under penalty, is void for unreasonableness and as an invasion of the personal liberty of citizens.

The ordinance involved in that case affected all persons under twenty-one years of age. Your proposed ordinance would apply only to persons under sixteen years of age. That distinction might be reason for holding the ordinance in the Texas case unreasonable but would not be material on the question of the power to pass a curfew law.

Your charter confers no express authority to enact such an ordinance. If such power exists, it must be found to be conferred by Subdivision 57 of Section 71, Chapter VIII, of your charter, which reads as follows:

> "To enact appropriate legislation, and do and perform any and all other acts and things which may be necessary and proper to carry out the general powers of the city, or any of the provisions of this Charter, and to exercise all powers not in conflict with the Constitution of the State, with this Charter, or with ordinances adopted by the people of the city; and the above enumeration of specific powers shall not be held in any way to curtail or restrict any power which the council might otherwise have under the common law."

This language is not the usual language of the general welfare clause, which is found in many charter and legislative acts. The exact question to be decided is whether this language, above quoted, is broad enough to

authorize the passage of such a curfew law as you propose. You will note that power is conferred to do such things as may be necessary to carry out the "general powers" of the city; and also that the enumeration of specific powers does not "curtail or restrict any power which the council might otherwise have under the common law."

The clause last referred to indicates that it was the intention to confer upon the municipality such powers as municipalities had at common law. I think the words "common law," as used in this connection, mean not only the common law of England, but also the common law of the United States as it existed at the time your charter was adopted in 1911. At that time the power to enact curfew laws was quite generally exercised by municipalities in the United States. I quote the following from the article on "curfew" in Volume 8 of The Encyclopedia Americana, page 306:

> "Curfew, ker fu, also Curfeu, from the French couvrir, to cover, and feu, fire. The ringing of a bell at nightfall, originally designed as a signal to the inhabitants to cover their fires, extinguish lights and retire to rest. The practice is said to have been instituted by William the Conqueror, in all probability as a safeguard against fire, but the English in early days regarded the curfew as a badge of servitude. Originally the hour set for the ringing of the curfew bell was 8 o'clock, but it was also rung at 9 o'clock. The bell in each village or community which tolled the curfew became known as the curfew-bell. In certain parts of rural England the custom is still kept of ringing a bell at 9 o'clock.
>
> "The curfew bell was introduced into the United States early in the century, but without regularity of practice. About 1880 Col. Alexander Hogeland, who has been called 'the father of the curfew-law,' introduced an ordinance in Omaha, Neb., compelling youths to absent themselves from steamboat landings, railroad stations and low variety shows. The curfew ordinance, somewhat changed and modified, was adopted in 1894 at Lincoln, Neb. The term curfew-law has since been given to all laws intended to keep young people off the streets after a certain hour, generally 9 o'clock at night. In 1894 at the National Convention of the Boys' and Girls' Home Employment Association in Indianapolis, the adoption of curfew ordinances was urged in view of the great increase in crime among children. Since that time the law has been generally enforced in over 3,000 cities and towns in this country. The officials of many of these towns report a decrease of 80 per cent in the arrest of boys and young men, under the provisions of the law, and former objections to the curfew have ceased. In 1898, a concensus of opinion was taken in 300 towns where the curfew law was in operation and all reports showed that there was a decided improvement in the youth morally and socially.
>
> "The curfew law, in general use, provides that all children under 15 years of age shall not be on the streets at night after 9 P. M. in summer and 8 P. M. in winter, without the written consent of their parents or guardians. The law has been endorsed by city officials, commercial associations, school boards and boards of trade in various

sections of the country. The enforcement of the law has largely reduced the number of commitments to reform schools as is illustrated at the State Reform School at Boonville, Mo. During two years prior to the adoption of the curfew ordinance at Kansas City, Mo., 47 boys were sent to the reform school while for two years after the adoption of the law only 17 boys were committed from Kansas City. The ordinance has been recognized as a crime-reducer, child protector and home builder. Benjamin Harrison called the curfew law, 'the most important municipal regulation for the protection of the children of American homes, from the vices of the street, of the present century.' "

Believing that the common law of both England and the United States recognized the right to pass curfew laws, it is my opinion that the City of Mankato may pass the ordinance in question, and that it will be valid. I believe it was the intention of the people, in adopting the charter, to confer upon the council power to pass an ordinance of that character.

RALPH A. STONE,
Assistant Attorney General.

November 27, 1942. 62-B

233

Employment of women as barmaids, or bartenders—Validity of provision prohibiting — International Falls Charter — M40 §§ 3200-25, et seq.; (MS41 §§ 340.11, et seq.).

International Falls City Attorney.

Facts

International Falls is a city of the fourth class operating under a home rule charter.

Question

Whether or not it may adopt an ordinance forbidding the employment of a woman as a barmaid, or as a bartender, in an "on-sale" licensed drinking establishment.

Answer

The power of a municipality to issue licenses for the sale of intoxicating liquor at retail is derived in part from our statutory law. Mason's Supplement 1940, Section 3200-25, et seq. That law prescribes what a municipal licensing ordinance may and may not provide. It contains certain prohibitions which might properly be embodied in any such ordinance, but which operate regardless of whether or not they are so embodied. For example, the hours of sale are fixed by state law. Also it is provided, "No person under 21 years of age shall be employed in any rooms constituting the place in which intoxicating liquors are sold at retail 'on-sale'." Mason's Supple-

ment 1940, Section 3200-28. Sale to minors, students, intoxicated persons and certain other classes are forbidden. Mason's Supplement 1940, Section 3238-4. Nowhere is there any statutory prohibition against the employment of women in places licensed for the "on-sale" of intoxicating liquor. The regulations of the liquor control commissioner do not cover the situation described.

Your inquiry therefore resolves itself into whether or not your charter gives your council authority to adopt such an ordinance.

Our copy of your charter, printed in 1911, enumerates the council's powers in Chapter VII (page 25). By Section 26, Subsection thirty-second thereof (page 35) the council specifically is given power:

> "To license and regulate all traffic in spirituous, vinous, fermented, malt or intoxicating liquors in said city; to define and establish the territorial limits within which and the number of saloons at which such traffic may be carried on; to prohibit all persons from vending or otherwise disposing of or dealing in such liquors in said city without first obtaining a city license to do so; to prescribe the manner in which and the conditions under which such licenses may be granted and issued; to regulate all saloons and other places where any such liquors are sold or kept for sale and the manner of doing business therein; and to prescribe days and hours during which such saloons or other places shall be kept closed and during which no such liquor shall be sold or disposed of therein or elsewhere in said city, and the powers conferred upon said City Council in and by this subdivision shall be exclusive."

In our opinion this grant of power is broad enough to include a prohibition against women acting as barmaids or bartenders. The question then arises: Would such an ordinance be valid?

The supreme court of the United States has sanctioned the validity and constitutionality of reasonable distinctions between men and women in police regulations. Cronin v. Adams, 192 U. S. 108; 24 Sup. Ct. 219. According to one author this is the trend of recent decisions. 2 McQuillin Municipal Corporations (2nd ed.), Section 794, page 961. Such legislation is directed against disorder and immorality. Treating women as a class is within the competency of the legislative body where such classification is reasonable. The view of the supreme court of the United States is that a municipal ordinance which makes it unlawful to employ women to wait upon and attend any person in such places is a valid exercise of the police power, not repugnant to the federal constitution. The court in Cronin v. Adams, supra, held squarely that one who accepts a license under a municipal ordinance authorized by state law is not deprived of his property, or liberty, without due process of law, within the meaning of the federal constitution, by reason of conditions or prohibitions in the ordinance as to the sale of liquor in places where women are employed. This case was cited in The Winnebago, 205 U. S. 354, at 360, as authority for the proposition that the supreme court does not listen to objections of those who do not come within the class whose consti-

tutional rights are alleged to be invaded, and was again cited to the same purpose in Sprout v. South Bend, 277 U. S. 163, at 167. It appears to still represent the view of that court.

Accordingly, on the basis of the authorities cited, you are advised that the council of your city may adopt a valid ordinance forbidding the employment of women as barmaids or bartenders in places where intoxicating liquor is sold at retail under an "on-sale" license.

The further question is submitted as to whether or not such an ordinance would prohibit a woman-owner of a hotel, duly licensed for the "on-sale" of intoxicating liquor, from dispensing such liquor therein.

Unquestionably your ordinance could be drafted so as to prohibit a woman, even though she is the owner of the establishment, and the holder of a municipal "on-sale" license, from acting as barmaid or bartender therein. We cannot undertake to construe an ordinance before it has been drafted.

It would seem that the same reasons which impelled our court to hold legislation forbidding the employment of women in licensed drinking places valid, would apply in the case of a woman-owner-licensee. Manifestly the dispensing of liquor by the female owner might breed quite as much disorder and immorality as the dispensing thereof by female employees. There does not appear to be an authority on this phase of your question, so we do not feel we can answer you positively. Our feeling is that our court would sustain such a prohibition. In any event, your council could accomplish the same result by declining to issue an "on-sale" license to a woman, and in that we believe it would be upheld.

ROLLIN L. SMITH,
Special Assistant Attorney General.

December 16, 1941. 498-A

234

Gasoline stations — Authority of city council to enact ordinance limiting number of.

City Attorney, International Falls.

Question

As to the authority of your city council to enact an ordinance limiting the number of gasoline stations in the city.

Answer

The power of a city to license and regulate filling stations in this state has been sustained, and municipalities have been vested with some discretion in the granting or denying of licenses to operate filling stations. Standard Oil Co. v. City of Minneapolis, 163 Minn. 418. The police power which may

be exercised over gasoline stations is quite extensive. Crescent Oil Co. v. City of Minneapolis, 175 Minn. 276. However, the power to license may not be exercised arbitrarily, and a license may be denied only because the operation of a filling station at a particular location may prove a menace to the public safety. I do not believe that your council has authority to enact an ordinance limiting the number of gasoline stations. We have so held. Opinion to Belle Plaine Borough Attorney Irwin, April 10, 1939; opinion to Sauk Centre City Attorney Kells, March 29, 1941. Such an ordinance would have the effect of restraining trade and preventing competition contrary to the constitution. McQuillin Municipal Corporations, Vol. 2 (Revised), Section 773.

It is very probable, however, that the number of stations could be limited through a legitimate exercise of the police power either by a zoning of the city, which would prohibit the operation of filling stations within certain residential zones, or by the enactment of an ordinance prohibiting the operation of filling stations within certain distances from churches or public buildings, or other filling stations. In several cases ordinances prohibiting filling stations within a designated number of feet from any church, school, or public building have been sustained. Savitz-Denbigh v. Bigelow (N. J. 1926), 134 Atl. 557, 137 Atl. 439; Bauer v. Fire & Police Comm'rs., (N. J. 1926), 132 Atl. 515; Schait v. Senior (1922), 97 N. J. L. 390, 117 Atl. 517; Wettkop v. Garver (N. J. 1926), 132 Atl. 339; Magnolia Petroleum Co. v. Wright (Okla. 1927), 254 Pac. 41; San Antonio Humble Oil & Refining Co. (1930, Tex. Civ. App.), 27 S. W. 2d 868; Interstate Oil Co. v. Orange (1933), 11 N. J. Misc. Repts. 89, 165 Atl. 99; and Kramer v. Mayor and City Council of Baltimore (Md. 1934), 171 Atl. 70.

Other ordinances have been sustained which prohibited stations within a specified number of feet from existing filling stations. San Antonio Humble Oil & Refining Co. (1930, Tex. Civ. App.), 27 S. W. 2d 868; State ex rel. Newman v. Pagel (Wisc. 1933), 250 N. W. 430.

In summation, therefore, you are advised that an ordinance directly limiting the number of filling stations would perhaps be declared invalid, but your objective could perhaps be partially reached by enacting an ordinance zoning the city and prohibiting filling stations within certain zones, or by an ordinance prohibiting the operation of filling stations within certain distances from existing stations or from churches, schools or other public buildings.

EDWARD J. DEVITT,
Assistant Attorney General.

September 26, 1941. 62-B

235

Initiation—Signatures to petition—Charter of Mankato.

Mankato City Attorney.

Facts

Petitions are being presented to the City Council under Chapter XII of our City Charter, in initiation of a proposed Airport Ordinance.

In some instances the names on the petitions are not exactly like the registered name of the voter; that is, at places the petition is signed by the voter's initials of his given or Christian names, again a woman signs as "Mrs." and follows up with her husband's name either in full or by initials of the given names of her husband and his surname. The residence is the same on the petition as on the registration card.

Question

Is the Clerk to refuse to count these names unless they appear the same as on the registration cards? If he is satisfied that the one signing the petition is the same party as named on the registration card is he permitted to let the name stand on the petition and certify the name as being a legal signer of the petition in initiative of the proposed ordinance?

Answer

Your City Charter provides in Chapter XII, Section 112:

> "Any proposed ordinance may be submitted to the council by a petition signed by registered electors of the city equal in number to the percentage hereinafter required."

This section further provides that the provisions of Chapter IV of the Charter shall be applicable to elections on initiated ordinances.

Said Chapter IV provides among other things:

> "Within ten days from the date of filing such petition, the City Clerk shall ascertain from the voters' register whether or not said petition is signed by the requisite number of qualified electors, * * * and shall attach to said petition his certificate, showing the result of said examination."

There is no requirement anywhere in the charter that the registered voters must sign the petition in exactly the same way that his name appears upon the register of voters. If the clerk ascertains that the person who signed the petition is a duly registered voter, notwithstanding his signature may vary from that on the election register, he should accept it and certify accordingly. The identity of the signer of the petition with that of the person whose name is upon the election register is a question of fact for the determination of the clerk.

RALPH A. STONE,
Assistant Attorney General.

September 10, 1942. 62-B

236

Liquor—Validity of ordinance establishing municipal liquor store—Sufficiency of title of ordinance—Search and seizure provision does not render ordinance void in toto—Question as to propriety of agreement with licensees not answered—1885 villages—Advertising for bids for lease of liquor store—Not an improvement within meaning of the law— L 1885, C 145 § 50.

Village Attorney, Coleraine.

Question

"In the case where a village council adopts an ordinance entitled, 'An Ordinance Establishing a Municipal Liquor Dispensary in the Village of .....'

"(a) Should the title necessarily include 'and repealing ordinances inconsistent therewith?'

"(b) Should the title necessarily include 'and providing penalties for the violation thereof?'

"(c) The ordinance includes a provision for search and seizure. Is there any reason why this should not be proper?"

Answer

You have since sent to this office a copy of the ordinance adopted by the Village of Bovey, to which the question pertains, and this letter is limited strictly to that particular ordinance and none other.

It seems to be an open question in this state whether the state constitutional provision that "no law shall embrace more than one subject which shall be expressed in its title." Section 27, Article IV, State Constitution, applies to village ordinances. But it is unnecessary to answer this question. The law under which the Village of Bovey is incorporated provides that "all ordinances shall be suitably entitled." (Laws 1885, Chapter 145, Section 50; Mason's Minnesota Statutes 1927, page 226, top of page.)

I construe this statutory provision as to ordinances of 1885 villages to have the same meaning as the constitutional provision does as to state laws.

In my opinion the ordinance is not void because of the failure to include in the title the words "and repealing ordinances inconsistent therewith." State v. Gallagher, 42 Minn. 449; City of Winona v. School Dist., 40 Minn. 13.

I am of the opinion that the ordinance is not void because the title does not include the words "and providing penalties for the violation thereof."

State v. Sharp, 121 Minn. 381.

There is some doubt as to the validity of the provision for search and seizure, but even if the section of the ordinance relating thereto is void, it would not necessarily render void that part of the ordinance which estab-

lishes the store. This same comment applies with reference to the penalties. Even if the section relating to searches and seizures or to penalties should be held void, nevertheless I think that part of the ordinance whereby the store is established would still stand as a valid ordinance.

Question

Does a village council, operating under the 1885 Laws, have to advertise for bids or proposals to lease (with the option of purchasing) a building for use as a municipal liquor dispensary?

It is my opinion that the leasing of a building for a liquor store is not an improvement within the meaning of this law, and, therefore, an advertisement for bids is not required.

Question

May I also have your opinion as to the propriety of a village council entering into an agreement with a group of liquor licensees to the effect that if they are granted licenses for a definite period to close their businesses without hardship, they would undertake not to commence legal action to enjoin or prevent the establishment of a municipal liquor dispensary?

In answer to this question I would say that I believe the several persons now having licenses should be treated fairly so as not to cause them any unnecessary hardship or loss. In this connection I call to your attention the earlier rulings made by this office to the effect that municipal liquor stores should not begin operations until all outstanding licenses have expired.

Your inquiry, however, is as to the "propriety" of such an arrangement. This office should not be expected to answer questions as to the "propriety" of the course proposed. I may say, however, as to the enforcibility of such an arrangement that it would certainly not be a bar to an action attacking the ordinance by a person who was not a party to it.

RALPH A. STONE,
Special Assistant Attorney General.

April 7, 1942. 218-G-13

237

Milk inspection—Authority of Minnesota city to contract with North Dakota cities for cooperative milk inspection service — M27 § 3820 (MS41 § 32.30).

City Attorney, Breckenridge.

Opinion

The measure of the power of the city council of Breckenridge to adopt any particular ordinance is found in the home rule charter of that city and in our statutory law applicable to cities of that class.

However desirable, economical and beneficial the adoption of the ordinance contemplated may be from the public's viewpoint, the fact remains that the council has no power to enact it unless such power has been expressly or impliedly conferred.

It appears that the adoption of the milk ordinance recommended by the United States public health service and the division of sanitation of the Minnesota department of health is under consideration. Mason's Minnesota Statutes of 1927, Section 3820, grants power to "any municipal corporation" to provide by ordinance for the inspection of milk, subject to the qualification that such ordinance must not conflict with any state law. This statute confers power on your city to enact a reasonable milk inspection ordinance. We believe a provision in such an ordinance creating the office of milk inspector and fixing his salary is authorized by the statute cited and is lawful, notwithstanding Sections 5 and 84 of your charter which deny to your council power to grant any new or salaried office. The source of your council's power in this regard is the state law, not your charter. However, we find no authority for entering into the contract under consideration. Briefly, that contract proposes a cooperative milk inspection agreement between the City of Breckenridge and the state of North Dakota and six different cities in North Dakota whereby each pays a specified part of the salary and travel expense of such an inspector.

The benefit to the milk consuming public from such an arrangement is manifest, but until the legislature sees fit to grant power to municipal corporations to enter into such contracts, we believe municipal authorities are without any authority to bind the city they serve by such an agreement and so advise you.

It is settled beyond controversy that the officers of a municipal corporation cannot bind the corporation by any contract beyond the scope of its powers. In other words, contracts ultra vires the municipality are invalid. II Dill. Mun. Corp., Section 791. To some extent the contract proposed involves a surrender of the council's discretion. Such contracts are uniformly held invalid. II Dill. Mun. Corp., Section 792.

ROLLIN L. SMITH,
Special Assistant Attorney General.

December 29, 1941. 292-B

238

Zoning—Consent—"Owner," for purpose of consenting to non-conforming use includes vendee, but not vendor; Does not include lessee — All cotenants of joint property must join in consent.

City Attorney, Blue Earth.

Facts

As to the proper interpretation of Section X, paragraph 5 of Ordinance No. 108 (N. S.), the zoning ordinance of the City of Blue Earth which provides in part:

"Petitions for special permits to allow the construction or operation of any non-conforming use must be accompanied by the written consent of the owners of at least seventy-five per cent of the real property within three hundred feet of the proposed non-conforming use."

It is a cardinal rule of statutory construction that the intention of the legislative body which enacted a measure shall be sought. No indication is given us in this instance of any particular interpretation intended by the council, nor are we advised of any practical construction attached to paragraph 5 by custom or usage.

Question

1. Does the term "owners" include a vendee under a contract for deed?

Answer

Yes. The term "owners" should be interpreted to include the vendee, but not the vendor, of an executory contract for the sale of real estate. Copy of an opinion dated April 29, 1941, on a similar inquiry is enclosed.

Question

2. Does the term "owners" include a lessee under a long term lease?

Answer

No. In its popular signification the "owner" of real estate is understood to be the one holding title to the property. In American Woolen Co. v. Town Council of North Smithfield, 29 R. I. 93, 69 A. 293, 16 Ann. Cas. 1227, it was held that lessees were not owners within a statute providing that no liquor license should be granted where the owners of the greater part of the land within two hundred feet of the place of sale objected.

Question

3. Does the term require an apportionment of the voting power in the case of joint tenancy or a tenancy in common?

Answer

No. One or more cotenants cannot impair or affect the rights of another or other cotenants in respect of the joint property. Krost v. Mayer, 166 Minn. 15, 207 N. W. 311. As against everyone but his cotenants, a tenant in common or a joint tenant is the owner of the entire property in which he has an undivided interest.

Unless all cotenants of a parcel or tract of real property join in the consent, there can be no consent granted in respect of property held in cotenancy.

Question

4. Would the calculation of the real property within 300 feet be made with reference to the outer limits of the tract upon which the proposed non-conforming use is to be made, or would it include adjacent tracts under common ownership?

Answer

Unless adjacent premises under common ownership may reasonably be said to form a part of the proposed non-conforming use, the calculation of the 300 feet should be made from the outer limits of the tract of which the proposed non-conforming use is to be made.

FREDERICK O. ARNESON,
Special Assistant Attorney General.

June 2, 1941. 62-B

239

Zoning—Neon Lights—Prohibition of—Residences—M40, § 1933-42; (MS41 § 462.01).

City Attorney, Austin.

Facts

A local man has placed neon lights on his house so that it outlines the entire house. He did this to spite his neighbor. Other people in the block have complained. I have tried to draw an ordinance that would prevent this and I enclose you a copy of the proposed ordinance which, however, has not been passed. I have encircled the pertinent portion that I have drawn to prevent this condition.

The man in question runs a beauty shop in his home.

Question

As to the validity of a proposed zoning ordinance to be adopted under Mason's Supplement 1940, Sec. 1933-42. The particular provision which you propose to incorporate into your zoning ordinance is as follows:

> "No name plate, sign, flood light, spotlight, neon illumination or other means of calling attention to the business carried on in said residence shall be permitted, either in a residential or apartment house district, except that attached to the building on the premises may be a name plate, containing the name and occupation of the occupant, which plate shall not exceed two square feet in area and may be illuminated at night by lights placed wholly within said sign."

Opinion

Your attention is called to the case of Gunderson v. Anderson, 190 Minn. 245, 251 N. W. 515. In that case the ordinance permitted a funeral home in a restricted commercial district. The defendant had operated the home prior

to the adoption of the ordinance. The plaintiffs, residents of the same neighborhood, brought an action seeking to have the ordinance held void and the operation of the funeral home prohibited. You have the opposite of that situation in the facts you present. You would have a case where the owner of the beauty shop would be seeking to have the ordinance held invalid and to have the operation of the lights permitted. The law, as stated in the case cited, is applicable to the situation which you present because in each case the object would be to have a zoning ordinance held invalid. However, to apply the law announced in the Gunderson case to your state of facts, it would be necessary to state it from the opposite point of view.

In the one case the contention was that the ordinance was void because it permitted a nuisance. In your case the contention would be that the ordinance was void because it prohibits what is not a nuisance.

The law, as deduced from the case cited, when made applicable to the case before us might be stated as follows:

1. If the reasonableness of the ordinance is debatable, the court may not interfere with the council's discretion.

2. The court may determine the facts and the inferences to be drawn from the facts.

3. If, upon the facts so found, the ordinance is clearly unreasonable because no nuisance exists, then there is no room for debate, and, as a matter of law, the ordinance is void.

Whether or not the acts of the person in question constitute a nuisance is, therefore, the paramount question. It would be for the court to decide as a question of fact whether the acts of this person in maintaining the offensive lights did or did not amount to a nuisance. If, as a matter of fact, the acts do not amount to a nuisance, then "the facts are against the (ordinance) and there is no room for debate."

It will thus be seen that the question which you present is one of fact. This office cannot issue opinions upon matters which depend upon the decision of questions of fact. A great many elements and facts unknown to us and not stated in your letter may enter into a determination of that question.

I do not believe that the ordinance would be held valid unless the trial court should hold, upon all the evidence presented, that the acts of the owner of the beauty parlor constituted a nuisance, particularly in view of the fact that the business and lights were in operation before the adoption of the ordinance.

In a footnote to your letter you state:

> "I suppose forbidding neon lights on houses and permitting them on grocery stores would be unconstitutional."

In answer to the question implied in this statement, I would say that I believe the answer to that question also depends upon the question of whether the owner of the lights is creating a nuisance. I do not believe that, independent of the zoning ordinance, the council would have the right to prohibit neon lights on houses unless the same constituted a nuisance.

Since the foregoing was written, your supplementary letter of July 15 has been received. The additional facts therein stated have not induced any change in what was first written as above.

I presume you have considered the advantages and disadvantages of a suit by private persons suffering special injury for an injunction against the nuisance. I call your attention to the rule that the rights of habitation are generally considered superior over business or trade rights.

> Roukovina v. Island Farm Creamery Company, 160 Minn. 335, 338; Brede v. Minnesota Crushed Stone Company, 143 Minn. 374, 379.

The acts of the man who persists in lighting his residence on the outside at night might well be held illegal and a proper case for injunctive relief within the doctrine of the cases cited and others. It should not require as strong a showing to have the lights declared a nuisance as in a case where it was sought to have the operation of the business suspended. Here the operation of the business would not be interfered with in the least. The only interference would be with the advertising of the business and that advertising being of doubtful value.

Additional Question

Whether the enabling statute contained in Mason's Supplement 1940, Section 1933-42, is broad enough to permit us to pass an ordinance as submitted for your consideration.

Additional Opinion

This presents a little different question. You do not wish to know whether the ordinance would be held valid with reference to the acts of the individual in question, but to be advised generally whether the statute authorizes any ordinance of the nature set forth in the proposed amendment.

This statute was originally passed as Chapter 176, Laws 1929. It is entitled

> "An Act to authorize the regulation of the location, size, use and height of buildings, the arrangement of buildings on lots and the density of population in all cities of the second, third and fourth class, and in all villages, and the adoption of comprehensive plans pursuant to such regulations."

Section 1 of the law provides that zoning ordinances may be passed "for the purpose of promoting health, safety, order, convenience, prosperity and general welfare." The title of your ordinance employs generally the same language.

While there is perhaps a trend in the later decisions to recognize the force and effect of aesthetic and cultural considerations, yet I believe that the opinion of this office of February 8, 1932, is still good. That opinion was to the effect that a zoning ordinance must have something besides an

aesthetic purpose to support it. However, I may assume that one of the purposes of the proposed amended ordinance is to prevent the annoyance and inconvenience which excessive illumination in a residence district would cause at night, and therefore I feel that the ordinance is within the power granted and within the purpose of the statute authorizing zoning ordinances in your city. It has a tendency to promote the convenience of and prevent annoyance to the people and relates to the use of buildings.

However, as stated in my former letter, I do not believe that the adoption of such an ordinance or amendment to the present ordinance at this time for the purpose of preventing the use of a neon light theretofore erected by a certain individual (the sign being erected and used prior to the enactment of the amendment to advertise this person's business) would be held valid as against him or enforcible as against him unless the operation of the sign is per se a nuisance, in which case it could be prohibited without any zoning ordinance.

For your assistance in deciding the questions confronting you, I take the liberty of citing the following authorities which have some bearing upon the questions presented:

General Out Door Advertising Company v. Dept. of Public Works, 289 Mass. 149, 193 N. E. 799;

Ackerman v. Steiner, 7 N. J. Misc. 1056, 147 Atl. 746;

People v. Norton, 108 Cal. App. (Supp.) 767, 288 Pac. 33;

People v. Wolf, 220 N. Y. S. 656, 220 App. Div. 71;

Appeal of Liggett, 291 Pa. 109, 139 Atl. 619;

General Out Door Adv. Co. v. Indianapolis, 202 Ind. 85, 172 N. E. 309, 72 A. L. R. 453; Ill. Life Ins. Co. v. Chicago, 244 Ill. App. 185;

supporting the opinion herein rendered that the city cannot prevent the use of the sign, erected prior to the passage of the ordinance, unless it is a nuisance per se.

State v. Wong Hing, 176 Minn. 151.

Assuring you of the desire of this office to be of service to you at all times, I am,

RALPH A. STONE,
Special Assistant Attorney General.

July 21, 1942. 477-b-34

POLICE DEPARTMENTS

240

Compensation—Mayor fixing compensation of police officers within fixed maximum. Delegation of power to mayor—Uncontrolled discretion— (MS41 §§ 419.01, et seq.).

City Attorney, Mankato.

Question

Would a resolution of the tenor following be valid?

Facts

It is proposed that the city council pass a resolution setting a certain amount as the maximum monthly salary for each police officer, and providing that such salary shall not be paid to an officer at the end of the month except upon the certificate of the mayor, and giving the mayor power to certify a less amount than such maximum as the amount to be paid to the officer for the preceding month if in the mayor's opinion the particular officer has not earned the maximum salary during that month. Subject to the maximum rate, this arrangement would give to the mayor the power to fix the salary of every police officer in the city, in accordance with his judgment.

The charter provides that the compensation of all officers and employees shall be fixed by the council (Charter, p. 18, Section 48). Such an arrangement as the one proposed would be a clear delegation of the power vested in the council, and the question to be decided is whether such a delegation of power would be legal.

Opinion

Under the plan proposed, the delegation of power to the mayor would be uncontrolled entirely. It would be wholly within his judgment to determine how much each officer has earned during the preceding month, with no lights to guide him in that respect other than his own whim or caprice or judgment. There is no standard set up by which, upon finding the facts, the mayor could say how much the salary should be.

The power is not "canalized within banks which prevent it from overflowing." The plan, in our opinion, would be an illegal delegation of the power of the council to the mayor, because it vests in him uncontrolled discretion as to what each police officer should receive, which is a discretion which should be exercised by the council.

It might also be urged (although I do not base this opinion upon that ground) that the plan would be contrary to the Police Civil Service Commission Law (Minnesota Statutes 1941, Sections 419.01, et seq.). This law provides that the employees of the police department shall be graded and classified. The argument would be that there would be no such classifying of employees if the mayor could, at any time he saw fit to do so, change the

compensation of any officer in the class or grade so that others in the same class or grade would receive larger or smaller salaries. In fact, it would put the power of classifying and grading in the hands of the mayor.

September 23, 1942.

785 a-2

241

Supplementing Above Opinion

The city charter provides that the compensation of all officers and employees shall be fixed by the council. Nevertheless it is proposed that the salary of the police officers be set at a certain maximum by the council, but that the amount which the police officer shall receive within or below that maximum is to be fixed by the mayor in his discretion, depending upon the amount which the mayor thinks the police officer has earned during the preceding month.

The right to fix the salary of the police officers is a legislative power. The charter clearly vests that power in the council. The question now arises whether the plan just mentioned would constitute an unlawful delegation of the legislative power of the city council to the mayor.

It will, of course, be undisputed that the council can not delegate its legislative power. It can delegate to an agency the power to administer the law in accordance with standards which are set up by the council.

This question of how far the legislative power vested in a legislative body can be delegated has been before the Supreme Court of the United States in a number of cases, some of comparatively recent date.

Perhaps the leading case on this subject is that of Wichita Railroad Company v. Public Utilities Commission, 260 U. S. 48, 59. It is there said by the Supreme Court of the United States with reference to an administrative agency (and the mayor under the proposed arrangement, if it is valid, would be a mere administrative agent):

> "In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action."

In the plan which you propose there are no rules laid down to guide the mayor to determine whether a certain officer has earned a maximum salary or what part of it he has earned. There are no rules of decision and there is no course of procedure. No provision is made for determination of the facts. The plan immediately runs counter to this decision of the United States Supreme Court.

I direct your attention to the case of Panama Refining Co. v. Ryan, 293 U. S. 388 (Jan. 7, 1935). Congress attempted to vest in the President of the United States the right to prohibit the transportation in interstate commerce of any oil produced or withdrawn from storage in excess of the amount permitted by state authority. The Congress did not declare in what circumstances that transportation should be forbidden or require the President to make any determination as to any facts or circumstances. It simply attempted to vest power in the President to permit or prohibit as he might think desirable.

The council in Mankato can no more abdicate the powers vested in it by its charter than the Congress of the United States can abdicate the powers vested in it by the Constitution.

It was held in the case last cited that the law was invalid as attempting to delegate to the President functions which were purely legislative, i.e., to delegate the discretion vested in the Congress. There were set up no standards by which the President could be guided in making his determination whether to permit or prohibit, nor was the exercise of the discretion attempted to be vested in him to be controlled by the determination of any facts.

Even in the dissenting opinion of Justice Cardozo he conceded that "to uphold the delegation there is need to discover in the terms of the act a standard reasonably clear whereby discretion must be governed."

I next direct your attention to the case of Schechter Poultry Corp v. United States, 295 U. S. 495, in which the National Industrial Recovery Act (N.R.A.) was held to be unconstitutional. The ground of the decision was that unfettered discretion was conferred upon the President of the United States to adopt codes for the conduct of business containing any rules or regulations he saw fit. The Act did not undertake to prescribe rules of conduct to be applied to the particular state of facts determined by appropriate administrative procedure. It set up no standards whatever. The discretion of the President was virtually absolute. It was held that the law conferring the right to set up codes or rules for the conduct of business without any guides or standards other than the President's whim was a violation of the Constitution.

So I hold that the right to fix salaries which is vested in the council by your charter can not be conferred upon the mayor without first setting up some standards or rules by which he is to be guided and whereby upon determining the facts his discretion would be controlled.

Even Mr. Justice Cardozo concurred in this opinion. He said:

> "The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant, * * *" (p. 551).

It was to this dissenting opinion which I had reference when I quoted a part of the above language in my opinion of September 23, 1942, to which you object.

Many more federal cases of like import could be cited.

As the constitution controls Congress, so your city charter controls the council.

The case of Dimke v. Finke, 209 Minn. 29, 37, bears out the views herein expressed. It is there stated:

> "The application of the law must depend not on the whim and caprice of the executive but on facts which may be found by the board or other executive officer."

But in the situation which you propose, the amount of salary which each officer would receive would lie entirely within the whim or caprice of the mayor. He has no light or rules to guide him in determining what conduct by a police officer would merit a $75.00 monthly salary and what conduct would merit a $125.00 salary.

RALPH A. STONE,
Assistant Attorney General.

October 23, 1942. 785-E-2

242

Prisoner—Property taken from—May be disposed of when owner cannot be found and property has been abandoned.

City Attorney, Sauk Centre.

Facts

A man was arrested in your city by your city police for the authorities of Hennepin County. He was taken away by an officer of the State Bureau of Criminal Apprehension. He left behind an automobile in which he had several opera chairs and other articles which he was selling. The conditional vendor has repossessed the automobile. The other articles are being held by your city police department.

Question

What to do with them?

Opinion

It occurs to me that these articles should be stored for a while in the basement of the city hall, or some other place (there must be some available space) and an effort made to locate the true owner and ascertain his wishes with respect thereto. This man who had possession has not returned to claim the same. He may be unable to do so. I suggest that your police department ascertain his present whereabouts, if possible, and communicate with him as to the ownership of the property and as to his desires, if he is the owner. If he is located, the property should be disposed of as the owner (either

this man or the man whom he identifies as owner) suggests—he to reimburse the city for its expenses, if any. If, after reasonable efforts, the police are unable to find the owner, then after the lapse of reasonable time the city may treat the property as abandoned property and dispose of it as it sees fit.

It is well settled that personal property may be abandoned and the ownership thereby lost. When property is abandoned it becomes the subject of appropriation by the first taker. The one who appropriates it becomes the owner—as distinguished from lost property, in which case the finder acquires title as against everyone but the true owner.

What lapse of time without hearing from the owner will be sufficient to establish title by abandonment is a question of fact. The council should act upon its own good judgment in the premises. If the council considers that the owner can not be found and determines that he has abandoned the property, the same may be sold (if it has any salvage value) in the manner ordered by the council, and the proceeds would go into the general fund.

See 1 C. J. S., p. 13. 1 A. J., pp. 2-4.

If the city sells the property, it runs some risk, however slight it may be, that the owner will return within the period of limitation and make claim for the property or its value.

RALPH A. STONE,
Assistant Attorney General.

September 4, 1942. 91i

PROPERTY

243

Buildings—Perpetual lease of space in to American Legion Post as Memorial Room—M27 §§ 1933-10, 4382; (MS41 §§ 197.55, 416.01).

Clearwater County Attorney.

Facts

A few years ago the Village of Bagley acquired a building comprised of a full basement and one story, formerly used as a school gymnasium. The village has other buildings which are used by the Fire Department and for other village purposes such as council meetings, etc. The old gymnasium is used mostly for public meeting places, and for sewing projects and things of that nature.

The village now desires to grant to the American Legion the perpetual use of the major portion of the basement as a sort of memorial room. The same to be supervised and superintended by the Legion. All costs of remodeling and upkeep to be paid by the American Legion so that the matter entails no financial costs whatsoever to the village.

Section 1933-10, Mason's Minnesota Statutes for 1927 provides for the construction of memorial building by a municipality after the approval of the voters at a special election called for that purpose. That section of the statutes, however, apparently has in mind the expenditure of public monies in the construction of a memorial building.

In the present case, however, no public monies are to be expended and the council unanimously wishes to go ahead and issue a grant to the American Legion as hereinbefore stated, without submitting the matter to a vote of the people.

Question

Whether the village may proceed to grant to the American Legion a portion of the premises as indicated and in the manner outlined without first submitting such matter to a vote.

Answer

Mason's Minn. St. 1927, Section 1933-10, cited by you, authorizes "the erection, equipment and maintenance of a building" as a memorial to veterans only, "after the approval of a majority of the voters." It confers no right on the village council to act in this respect without first securing a majority vote of the electors, which cannot be construed as empowering the council to grant a perpetual lease of any space in a village building.

Two courses appear open to the council:

1. It may call an election for the purpose of authorizing the council to maintain a memorial building pursuant to the statutes cited.

2. It may lease space in the existing building provided such lease is subject to cancellation upon twenty days' notice. This may be done pursuant to Mason's Minn. St. 1927, Section 4382, which was so construed in an opinion rendered March 29, 1940 (469-a-9), copy of which is enclosed for your information.

The general principle is that even in the absence of a statute, a village may lease space in village buildings provided so doing does not interfere with the use thereof for legitimate public needs. Copy of an opinion of January 19, 1940 (469-a-9) to that effect and citing earlier opinions is enclosed.

However, there is no authority that we are aware of which would enable the council to execute a binding perpetual lease such as is contemplated.

ROLLIN L. SMITH,
Special Assistant Attorney General.

January 19, 1942. 469-a-9

244

Equipment—Lease—To private parties—1885 Village Act.
Attorney for Village of Golden Valley.

Facts and Question

It appears that the Village of Golden Valley, operating under the 1885 act, owns Diesel equipment, weed cutters, tractors, graders, and the like, which it uses in municipal work, and the question arises as to whether or not the village may rent or loan said equipment to private individuals.

You direct attention to the fact that if rented or loaned the equipment will not be under direct control of the council or its agents and that there will always be a possibility not only of damage to the equipment but of a delay in returning it, which might prevent the proper discharge of village functions.

Answer

While we have held that unused space in a municipal building may be leased if doing so will not interfere with legitimate municipal purposes (Opinion January 26, 1942 (469-a-9), Anderson, v. Montevideo, 137 Minn. 179), we have never extended this principle to personal property.

However, even assuming the same reasoning is applicable in the case of personal property, and that no legal principle forbidding the leasing thereof when not needed by the city is involved, it is quite apparent there is a practical difference. Considerations of prudence are involved. A man might prudently rent his house, but hardly his automobile. Under some circumstances, the members of the council might be personally liable in the event of damage to the city's equipment.

As a general rule, it would seem bad policy for the village to rent its personal property, and the only safe course for it to pursue would be not to rent it under any circumstances; but we cannot say, as a matter of law, that such a leasing would be invalid.

ROLLIN L. SMITH,
Special Assistant Attorney General.

May 18, 1942. 469-a-9

382c

PUBLIC SAFETY

245

Ambulance service—Authority to establish.
Moorhead City Attorney.

Question and Facts

Whether the City of Moorhead has authority to establish what you call a "stand-by ambulance service." The cost will be $25.00 per month. The

purpose of the service is to pick up persons who may be injured on the streets, or otherwise, in the city and transport them to the hospital or other place where they may receive medical attention.

A provision of the Moorhead city charter reads:

> "And in general to adopt all such measures and establish all regulations in cases for which no express provision in this chapter is made as the council may from time to time deem necessary for the promotion of the health, comfort and safety of the inhabitants, the preservation of peace and good order, and the suppression of vice and enhancement of the public welfare."

Answer

Under this grant of authority the common council has authority to establish the ambulance service mentioned.

RALPH A. STONE,
Special Assistant Attorney General.

January 6, 1942. 59-B-5

PUBLIC UTILITIES

246

Accounts—Compromising of—Water charges—Discrimination in favor of churches and charitable institutions.

City Attorney, Eveleth.

Where a municipal corporation acts in a proprietary capacity as it does in the selling of city water, it has the same authority that a private corporation has as to the compromising of an account or closing an uncollectable account. The general rule is stated in volume 4, Dunnell's Digest, Section 6746, thus:

> "A municipality may compromise a claim pending litigation thereon at any time before final judgment, but it cannot compromise a judgment claim if the judgment debtor has sufficient assets to pay it in full. All compromises and settlements made by a municipality must rest in good faith."

In this connection see McQuillin Municipal Corporations (2nd) Section 1962, Dunnell's Digest, Sections 6696 and 6697. Your first inquiry is therefore answered by the statement that the city authorities may act in their discretion in compromising accounts of water users.

As a general proposition, a municipality operating a public utility plant may not discriminate against customers of the same or similar classes, although the rates charged for the service furnished may differ according to a reasonable classification of the users of such service. In other words, a municipal corporation operating a public utility plant is not required to

give absolute equality of service or rates, but is only required not to act arbitrarily in exercising its discretion and not unjustly discriminate between patrons. Thus this office held in an opinion to City Attorney Montague of Virginia, of date April 1, 1938 (624c-11), that the water and light commission of the City of Virginia in the exercise of its judgment and discretion might furnish heat to a particular class of users, such as churches, at less than the rates charged to consumers generally, so long as it did not act arbitrarily or fix rates which were unjust and unreasonable. In this connection you are referred to the following authorities: Volume 1, Pond Municipal Corporations, Sections 280, 289; Volume 4, McQuillin Municipal Corporations (2nd), Sections 1824, 1833, 1836; Kennebunk, etc., v. Wells, 128 Me. 256; Knotts v. Nollen, 218 N. W. 563 (Iowa); Preston v. Board, 76 N. W. 92; Fretz v. City of Edmond, 168 Pac. 800 (Okla.); Twitchell v. Spokane, 104 Pac. 150 (Wash.); N. Y. Tele. Co. v. Siegel-Cooper, 202 N. Y. 502, 96 N. E. 109; U. S. v. C. & N. W. R. Co., 127 Fed. 785; Keifer v. Idaho Falls, 289 Pac. 81 (Idaho). Accordingly, you are advised that it is within the discretion of the municipal authorities to furnish water service to churches and charitable institutions at a lesser rate than charged other consumers. We do not believe the furnishing of free water service to such institutions would be sustained by a court. Lower rates for such institutions may be fixed, but in establishing them the authorities must not act arbitrarily or unreasonably.

You ask whether section 15 of your ordinance, which provides:

> "* * * the owner shall, as well as the lessee or occupant of the premises be liable to the city for the rents or rates of water from said waterworks used upon said premises, which may be recovered in an action against such owner, lessee, or occupant or against any or all of them."

empowers the city to recover from the present owner for water service charges incurred by the tenant who has now left the premises. McQuillin Municipal Corporations (2nd), Section 1824, contains this statement:

> "In the absence of statutory regulation, a supply or service cannot be refused by a public service company or a municipality because of arrearages of a former tenant or owner of the premises. By statute or charter provisions in some jurisdictions, however, failure to pay arrears of predecessors may be ground for cutting off or refusing to turn on the supply. But if payment in advance for a supply has been accepted, the supply cannot be cut off because the former occupant had not paid the water rent for the preceding year."

It is our interpretation that the innocent purchaser of the premises would not be liable for the water furnished such premises before acquiring title and that under such circumstances the city must look to the former owner or occupant.

ROLLIN L. SMITH,
Special Assistant Attorney General.

February 25, 1941. 624-C-11

Opinion modified - See op. 3/4/46 to Mitchell file 707a-15

247

Bids—Necessity of advertising for—Purchase of materials necessary in operation—M27 §§ 1852-1859; (MS41 §§ 453.01-453.06).

Attorney, Village of Proctor.

Question

Whether or not the Proctor village utility commission created under Mason's Minn. Statutes 1927, Sections 1852-1859, must advertise for bids before making purchases necessary for the operation of its plant.

Answer

Under Section 1857, idem., such commissions are given power, "to buy all materials * * * all fuel and * * * employ all help necessary to operate said plants." The absolute independence of such a commission from council control is established in State ex rel. v. McIlraith, 113 Minn. 237. There is no statutory provision expressly requiring the calling for bids as a prerequisite for the purchasing of materials by such commissions. Cases from other states involving such commissions operating under similar statutes have frequently held advertising unnecessary. Comley v. Board, etc., 149 At. (Conn.) 410; Hahn Motor, etc., v. Atlantic City, 140 At. (N. J.) 675; Peterson v. Board, etc., 141 At. (N. J.) 924.

However, an opinion of this department in 1924 is to the effect that the statutory provision quoted above, "was merely a granting of the power therein mentioned, and that it was the intention of the legislature that such powers should be exercised by the commission in accordance with other general provisions relating to villages." The opinion held squarely that advertising for bids was required. (Opinion to Village Attorney Johnson, March 3, 1924 (624e-1)). The precise question submitted has never been passed upon by our Supreme Court. However, in view of the fact that the opinion cited has received legislative acquiesence and has never, to our knowledge, been reversed by any court, we are inclined to abide by it.

Accordingly, your inquiry is answered in the affirmative. There are, of course, the usual exemptions to this requirement, such as emergencies or where the purchase of patent articles is involved, or where no possible good could be served by advertising. Generally, in this connection, see Taylor v. Smith, 115 At. (Del.) 405; Los Angeles Co. v. Long Beach, 291 P. (Cal.) 839.

ROLLIN L. SMITH,
Special Assistant Attorney General.

January 27, 1942. 624-E-1

707a-15

248

Electrical energy—Contract for purchase of—Council or water, light, power and building commission to execute—M40 § 1857; (MS41 § 453.04).

Village Attorney, North St. Paul.

Facts

North St. Paul is a village operating under the 1885 village laws. The village has a water, light, power and building commission created under authority granted by Laws 1907, Chapter 412.

Question

Whether the village council or the water, light, power and building commission (hereinafter called the commission) should execute a contract for the purchase of electrical energy.

Answer

No court, to our knowledge, has ever passed upon the question. This office held in opinions dated Feb. 2, 1928, and Feb. 31, 1932, that the village council is the proper body to execute such a contract. Opinion dated Dec. 18, 1940, held that the village council is the proper body to execute a contract for the purchase of water. In an opinion dated Dec. 11, 1934, an apparently contrary view was taken and the opinion held that the commission is the proper body to execute a contract for the furnishing of water to augment the regular water supply of a village.

General authority to purchase electrical energy for municipal purposes is granted by Laws 1913, Chapter 317, same as Mason's Minnesota Statutes of 1927, Sections 1252, et seq. It is to be noted that Section 1253 therein provides that such contract is to be made by **the common council** or other governing body of such municipality. It is not clear just what the legislature had in mind when it used the expression "or other governing body." It perhaps wanted to include municipalities where the governing body was known by some name other than common council. At all events, I do not believe the expression can be extended so as to include a commission.

It would appear, therefore, that the common council is the proper body to execute the contract, unless the legislature by a later or inconsistent law has provided that some other agency of the municipality is to execute it.

It is urged that Mason's Minnesota Statutes of 1927, Sections 1882, et seq., the law authorizing the creation of commissions, vests in such commissions the authority to execute contracts for the purchase of electrical energy because of the wording of Mason's Supplement 1940, Section 1857, which gives to such commissions the authority to

> "* * * buy all material, and employ all help necessary, or * * * to contract, to extend, add to, change, or modify said plants. * * *"

and the power to

"* * * buy all fuel and supplies, and to employ all help necessary to operate said plant. * * *"

It is also urged that it was the intention of the legislature to give to such commissions full and complete authority over all matters in connection with the operation of water, light, and power plants, including the authority to purchase electrical energy, and that the case of State ex rel. Chisholm v. Bergeron, 156 Minn. 176, when construing the act and holding that

> "The duties and powers of the Commission emphasizes the legislative intent to create a body free from any coercion or control by the village council."

goes to sustain the argument.

A memorandum attached to the opinion of February 2, 1928, fully considered the arguments advanced in the following manner:

> "I think it is clear that the power to enter into the contract in question rests in the city council unless such power has been conferred upon the light and water commission by said section. After a careful study of its provisions it appears to me that the proper construction thereof is that the powers of the commission relate to the management, control and operation of the physical properties constituting the municipal plant. Thus, the commission has "full, absolute and exclusive control * * * over the * * * plant or plants," including all parts, attachments and appurtenances thereto, and all apparatus and material used in operating the same (the plant). This appears to be a declaration of the general purpose of the commission, and the subsequent grants of express powers are consistent with such purpose. It is given power "to operate the same (the plant), and to extend, add to, change or modify the same" (the plant) and to do "any and all things in and about the same (the plant) which they deem necessary for a proper operation of the same" (the plant), etc. You will note that all powers enumerated are specifically limited to dealing with the plant as such. An analysis of these powers seems to indicate a legislative intent to create the commission as a body to manage and operate the plant as a plant, and to clothe them with only such powers as are necessary to accomplish that end.
>
> "The purchase of electrical energy has nothing to do with the physical properties constituting the plant, or with the operation of the same as a plant. Electrical energy is a commodity subject to sale and purchase. It is true that it is distributed through the plant, and undoubtedly the commission has full power over the distribution thereof language that is inconsistent with the construction above outlined, or which tends to indicate an intention to vest any contractual powers in the commission except in connection with its general power to operate after delivery to the city. I have been unable to find in Section 1857 any and manage the physical properties constituting the plant."

We subscribe to the foregoing reasoning and give to the statute the same interpretation given to it by the Attorney General in 1928. This view

is supported by the fact that Sections 1252 and 1253, supra, which confer power on villages to purchase electrical energy and expressly provide that such contract is to be executed by the council, were passed subsequent to the enactment of Section 1857, indicating an intent to vest the power to contract in the council, notwithstanding the existence of a commission.

The amendments to Section 1857 by Laws 1933, Chapter 278 and Laws 1937, Chapter 281, in no way changes the statute in so far as the present inquiry is concerned.

We have fully considered the case of State ex rel. Chisholm v. Bergeron, supra, and conclude that it has no direct bearing on the subject of this inquiry. The court in that case dealt with the exclusive character of the powers of the commission in matters which clearly came within the scope of the powers granted by Section 1857. The case establishes the proposition that in so far as the commission acts within the scope of its powers, its activity is free from any control by the council; that is to say, the court was not considering the scope of the powers of the commission, but rather the exclusive character of the powers given it.

The construction which we now give to the statute is the one given to it, with one possible exception, since 1928. Numerous sessions of the legislature have met since that time and, apparently acquiescing in the practical interpretation which the statute has received, have not changed the law. This contemporaneous construction is entitled to great weight.

In our opinion the council and not the commission is the proper body to execute the contract for the purchase of electrical energy. This conclusion may not be the most desirable from the viewpoint of the apparent legislative desire to create a commission to handle all such matters exclusively, but it is most consonant with the legislative expression of its wishes.

EDWARD J. DEVITT,
Assistant Attorney General.

September 5, 1941. 624-C-2

249

Electricity—Authority of water and light board to promulgate regulations controlling distribution—Right of owner of building to retail electric current.

City Attorney, Willmar.

Facts

The City of Willmar is a city of the fourth class operating under a home-rule charter.

Chapter VI of the charter gives the city power to operate a water and light department and to furnish water and light for all municipal purposes and also to the inhabitants of the city.

The control, management and operation of the water and light plant is committed to a board known as the "Water & Light Commission."

Section 103 of Chapter VI of said home-rule charter provides as follows:

> "Said board is hereby vested with full power to make and enforce such by-laws, rules and regulations as may be necessary to carry into effect the object and intent of this charter."

Said board is further given the power to fix and maintain the rents and rates for light and water furnished by it and it is further provided that said board shall regulate the distribution and use of water and light in all places and for all purposes where the same shall be required for either public or private use and shall fix the price and rates therefor.

Now it appears that a property owner living in the City of Willmar who owns a large business block with a large number of tenants has installed in said building a master electric meter and we are informed that this owner intends to pay the city for all current used in said building and that the said owner intends to install separate meters for each tenant and to sell them electric energy so furnished by the City of Willmar to each of said tenants at a price higher than the city charges the owner of the building.

Question

Does the owner of said building have any such right to retail electric current purchased from the city to his tenants at a price greater than the city charges therefor when the owner of such building has no permission so to do and no franchise or authority to distribute electric energy to anyone?

Also would beg to inquire if the Water and Light Commission can make rules and regulations forbidding such practice by the owner of a building and if they cannot refuse to furnish current to said building if the owner persists in attempting to make such distribution to his tenants and to make a profit.

Answer

You are advised that it is well-settled that a municipality may promulgate and enforce any reasonable rule regulating the distribution of water or electricity. City of East Grand Forks v. Luck, 97 Minn. 373, 107 N. W. 393; Reed v. Anoka, 85 Minn. 294, 88 N. W. 981; Powell v. City of Duluth, 91 Minn. 53, 97 N. W. 450.

In view of the fact that your board is vested with the charter authority to fix and maintain the rents and rates for light and power, and to regulate the distribution and use of water and light, I am of the opinion that a rule or regulation forbidding the described practice and providing as a penalty for violation thereof that the city would refuse to furnish current to said building, would be sustained as a reasonable regulation.

It is doubtful if, under the terms of your charter, the owner of the building in question has the right to retail electric current in the manner stated, especially without the consent of the Water and Light Commission. However, in view of the fact that you now have no express regulation prohibiting the practice described, I would advise that the commission first enact a rule or regulation prohibiting the distribution of current for profit in the manner stated and then, in the event of violation of such rule, enforce the penalties prescribed.

EDWARD J. DEVITT,
Assistant Attorney General.

December 20, 1941. 624-C-11

250

Poles—Water, light, power and building commission and local telephone company—Authority of to execute joint use contract for use of—M27 §§ 1852, et seq.; M40 § 1865; M41 §§ 1857, 1865; (MS41 §§ 453.01, 453.04, 457.13).

Madelia Village Attorney.

Facts

The Village of Madelia has a water, light, power and building commission created under authority granted by Mason's Minnesota Statutes of 1927, Sections 1852, et seq. The village owns the municipal light and distribution plant and maintains poles to distribute light and power. The local telephone company has its own poles. In order to do away with so many poles in the village, it is the desire of the commission and the telephone company to enter into a joint use contract by the terms of which the telephone company and commission will make joint use of each others poles, and thus do away with about half of the existing poles.

Question

Whether or not the commission has authority to enter into such a joint use agreement, and if such an agreement is a "lease" within the meaning of Mason's Supplement 1940, Section 1865, which provides that if any part of a municipal light plant is to be sold, leased, or abandoned, the proposition for such sale, lease, or abandonment must first be submitted to the legal voters of such village for a favorable two-thirds vote as a condition precedent to such sale, lease, or abandonment.

Answer

1. Mason's Supplement 1941, Section 1857, gives the commission full, absolute, and exclusive control and power over the water, light, and power plants of the village, including the power and authority to operate the same and extend, add to, change or modify the same, and to do any and all things

in and about the same which they deem necessary for the proper economical operation of the plant. See State ex rel. Briggs v. McIlraith, 113 Minn. 237.

It is, therefore, our opinion that the commission is authorized by this section to enter into such a contract.

2. There is no requirement that a vote of the electors be secured as a necessary condition precedent to entering into such a joint use contract, unless it is contained in Mason's Supplement 1941, Section 1865, which provides that before any resolution or ordinance authorizing the commission to "sell, lease, or abandon any such plant or specific part thereof" shall become effective, the same shall be submitted to the legal voters of such village, and approved by a two-thirds vote of the electors voting thereon.

It is apparent from your statement of facts that the proposed joint use contract is not a "sale" or "abandonment" or "lease" of the plant, or any part thereof, within the meaning of the above statute. When the legislature required a vote of the electors as a condition to the leasing of such plant, I do not believe it contemplated including a joint use contract such as is proposed here. The term is ordinarily interpreted in statutes according to the legislative intent apparent from a reading of the statute itself.

In so far as a former opinion dated September 19, 1935, is at variance herewith, it is hereby superseded.

J. A. A. BURNQUIST,
Attorney General.

November 5, 1941. 624-C-14

251

Replacements—Purchase of—Contract obligating commission to make payments after completion of replacements—M27 § 2070; M40 §§ 1860-½c, et seq., 2066-8 (MS41 §§ 275.27, 275.44, 453.11, et seq.).

Village Attorney, Hibbing.

Facts

The utility commission, organized under Mason's Supp. 1940, Sections 1860-½c through 1860-½g, now has about $44,000 in its reserve fund, and that every month approximately $8,000 more is added thereto in compliance with reserve requirements.

Question

Whether or not said commission may enter into a contract for the purchase of replacements for its cooling system, estimated to cost $98,000, under the terms of which the commission would be obligated to pay therefor in monthly installments extending into October, 1942, notwithstanding the fact that all replacements would be installed and complete in June, 1942. In other words, could the commission lawfully obligate itself to pay for part of the replacements four months after their installation?

Answer

While the provisions cited require a percentage of the gross receipts from patrons to be set aside in a reserve fund, and also restrict the use of that fund to expenditures for replacements, they do not in express terms impose any limitation upon the amount of the reserve fund that may be expended for replacements, nor do they prohibit the commission from incurring obligations for replacements in excess of the reserve fund. In fact, Section 1860-½d, id., expressly authorizes, "the village and commission to provide replacements, additions or extensions to these systems **from other funds.**" Consequently, unless there are other statutory provisions forbidding the proposed transaction, it would appear to be lawful.

The only other statutory provisions which might apply are found in Mason's Minn. Stat. 1927, Section 2070, which prohibits municipal authorities from incurring obligations which will necessitate the levying of a rate of taxes higher than that prescribed by law, and Mason's Supp. 1940, Section 2066-8, the so-called "per capita tax law."

According to your statement all payments for these replacements, including the down payment and the monthly installments, will be paid out of the "reserve fund," which is composed of a percentage of the gross receipts for water, light, heat, power, gas and rent charges from patrons. Under such circumstances, the obligation incurred cannot necessitate the levying of any tax. Consequently there can be no violation of law.

In other words, you are advised that unless the contract in question will result in the incurring by the village of an obligation which will necessitate the levying of a tax in excess of the statutory rate, it is not unlawful.

ROLLIN L. SMITH,
Special Assistant Attorney General.

January 29, 1942. 624-C-5

252

Sewer and water mains—Right of city to control privately installed and financed sewer and water mains.

City Attorney, Rushford.

Facts

Several private sewers and water lines have been installed in the streets of the city of Rushford. The installations have been made with the informal consent of the council, and the resident desiring sewer and water service has paid the cost of installation himself. The abutting owners on such private sewer and water lines have, by agreement with the person installing the lines, connected their sewer and water lines to this private system. The city is now asked to stand the cost of necessary repairs to this privately financed system of sewers and water lines.

Questions

1. Does the City of Rushford have the right to assume control of all of these privately installed sewer and water lines in so far as they run under the city streets?

2. Does the City of Rushford have the obligation and duty to pay for the cost of maintaining such sewer and water lines in its streets?

3. For the purpose of fire protection, may the city assume control of such privately installed water lines and extend them as far as may seem proper, so as to extend the water supply and provide better protection against fire in the city?

4. May the city, without the consent of at least 51% of the abutting owners on the street, lay water mains on that street which are necessary for fire protection in that portion of the city, and assess the costs of such mains against the abutting owners?

Answer

It is difficult to give a categorical answer to your questions. In the first instance, there was apparently no authority, either under the law or under your charter, under which the sewers and water mains were installed. There is no provision in the law or in your charter for the repair and maintenance of such a system. The only provision which we can find in your charter governing local improvements is that contained in Chapter 5, Section 46, which authorizes the council to prepare and adopt a comprehensive ordinance governing the installation of local improvements. This section reads as follows:

> "After this charter takes effect all local improvements shall continue for the time being to be made under the laws previously applicable thereto as far as possible. The council shall prepare and adopt a comprehensive ordinance, prescribing the procedure which shall be followed thereafter in making all local improvements, and such ordinance when adopted shall supplant all other provisions of the law on the same subject and may be amended only by a vote of four-fifths of all of the members of the council. Such ordinance shall provide for such notice and hearing in the ordering of improvements and the making of assessments therefor as shall be necessary to meet constitutional requirements."

You do not indicate whether or not your city council has adopted such an ordinance. If it has, we have not been furnished with a copy thereof.

It is axiomatic that a municipality has a right to regulate sewer and water mains located in the public streets. But, I do not believe that it follows that the city is obligated to pay for the cost of maintaining such a system of sewer and water mains. If it is the desire of the city to repair the system, and extend it, with the view of furnishing adequate fire protection, it seems to me that the proper course for the city to pursue is to make an agreement

with all interested persons who have paid for the installation of the system by the terms of which the city will assume absolute control and supervision of the sewer and water lines, and then to cause them to be repaired and extended according to the terms of the ordinance for local improvements adopted pursuant to the authority granted by Section 46 of your city charter.

EDWARD J. DEVITT,
Assistant Attorney General.

October 28, 1941. 59-B-12

PUBLIC WORKS

253

Municipal buildings—Hotels—City council may not purchase or construct. City Attorney, Tracy.

Question

May the city council for the City of Tracy construct or purchase a municipal hotel and if they may so do, whether the city may rent out a substantial part of the same?

Answer

Chapter 4, Section 13, of the charter of the City of Tracy states as follows:

> "The city council shall have the power by a ⅘ vote of all the members thereof to erect, provide for, improve and repair all public buildings * * * as may be necessary for the transaction of the business of the city * * *; and to acquire * * * all lands necessary as sites for said buildings or works to be used in connection therewith; and to acquire by purchase, gift, or condemnation, real property for municipal purposes, and to sell or authorize the sale of any of said property."

Your city council would not have the power under your charter to expend public funds for the purchase or construction of a hotel as the same could not properly be called a public building within the meaning of the term as set forth in said Section 13.

Likewise, the operation of a hotel by a municipality could not be called a proper municipal function.

J. A. A. BURNQUIST,
Attorney General.

August 11, 1941. 59-B-10

REAL ESTATE

254

Council—Authority to sell unused portion of park—1905 villages—M27 §§ 1117, 1186-5, 1198; (MS41 §§ 412.075, 412.23, 426.08).

Keewatin Village Attorney.

Facts

The Village of Keewatin, operating under the 1905 Village Act, purchased a tract of land for tourist park purposes. No tourist cabins were ever built. The council has now designated a part of the land so acquired as a park area and has no use for the other part.

Question

Whether or not the council may sell that portion of the tract which is not included in the newly designated park.

Answer

We are of the opinion that the council may sell real estate when no longer needed for village purposes without a vote of the people. The council may sell the unused portion of the park area described.

ROLLIN L. SMITH,
Special Assistant Attorney General.

April 21, 1941. 469-A-15

255

Detachment of land from village—Unplatted land—Twenty rod requirement—Twenty rods from platted portion requirement not applicable to unplatted lands—M40 § 1120½; (MS41 § 413.29).

Mower County Attorney.

Facts

You state that a petition has been filed with the Board of County Commissioners under Mason's Supplement 1940, Section 1120½, asking for the detachment of certain unplatted real estate situated in the Village of Waltham. The land sought to be detached from the village is less than twenty rods from the platted portion of the village, and you ask our interpretation as to whether Mason's Supplement 1940, Section 1120½, requiring that certain lands in order to be detached be located more than twenty rods from the platted portion of the village, is applicable to unplatted land.

The statute in so far as it is pertinent reads as follows:

"The owner or owners of any unplatted tract or tracts of land constituting a compact and contiguous tract of not less than 30 acres,

situated within the corporate limits of any village in this state, occupied and used solely for agricultural purposes, or the owner of any platted lands occupied and used solely for agricultural purposes constituting a compact and contiguous tract of not less than 10 acres not within 20 rods of the platted portion of such village and situated within its limits, may petition singly, or if there be more than one such owner, jointly, the board of county commissioners of the county in which said tract or tracts of land is situated, for an order detaching said tract or tracts from said village."

Answer

It is our opinion the owners of two types of land may petition the Board of County Commissioners for detachment, to-wit:

1. The owner or owners of any unplatted tract or tracts of land constituting a compact and contiguous tract of not less than 30 acres situated within the corporate limits of any village in this state, occupied and used solely for agricultural purposes,

Or,

2. The owner of any platted lands occupied and used solely for agricultural purposes constituting a compact and contiguous tract of not less than 10 acres not within 20 rods of the platted portion of such village and situated within its limits.

That is to say, it is not necessary that unplatted lands be located more than twenty rods from the platted portion of the village before a petition for detachment may be filed under Section 1120½ supra. The twenty rod requirement is only applicable to platted lands. This view is consonant with an opinion dated December 18, 1936.

We have given consideration to the argument you advance to the effect that the legislative history of the act, especially the amendment made by Laws 1933, Chapter 433, evidences an intention on the part of the legislature to make the twenty rod requirement applicable to both platted and unplatted lands. What you say with reference to the intention and action of the legislature in this regard by the 1933 amendment is perhaps true. At all events, their action in changing the statute by Laws 1935, Chapter 90, evidences a clear intention to do away with the twenty rod requirement as to unplatted lands. The statute as it reads now is quite clear.

Question

1. "Does the 20 rod limitation apply only to platted land?"

Answer

Yes.

Question

2. "In cases where unplatted land has heretofore been detached from villages, a portion of which is within 20 rods of the platted portion of the village, are those proceedings valid?"

Answer

Yes, at least as to such proceedings as were taken after the enactment of Laws 1935, Chapter 90, to-wit: April 1, 1935.

EDWARD J. DEVITT,
Assistant Attorney General.

September 4, 1941. 484-E-2

256

Gift—Recreational purposes—Authority of village to accept land—(MS41 §§ 448.01, 450.19, 459.06, 465.03, 471.15).

Butterfield Village Attorney.

Question

Whether or not the Village of Butterfield may accept a gift of 240 acres of land contiguous to the village. This land contains 20 acres of trees, and also a small lake. The donor desires to give it to the village for park purposes.

Answer

There are certain sections of the statute under which the village without question is authorized to accept a donation of this quantity of land.

Minnesota Statutes 1941, Section 471.15 (Mason's Supplement 1940, Section 1933-9-a), authorizes such a village to acquire land for recreational purposes. No limit is placed on the acreage which may be so acquired. If this land contains a lake suitable for boating, fishing, swimming, skating, bathing or hunting, it may very well be acquired for recreational purposes under this section of the statute by donation of the owner.

Minnesota Statutes 1941, Section 450.19 (Mason's Supplement 1940, Section 1933-9), authorizes villages to acquire land by gift for tourist parks. There is no limit to the acreage which may be so acquired.

Minnesota Statutes 1941, Section 459.06 (Mason's Minnesota Statutes 1927, Section 1933), authorizes villages to acquire land by donation for forest purposes where the land is better adapted for the production of trees than for any other purpose. No acreage limit is placed on the amount of land that may be so given to and acquired by a village.

Again, Minnesota Statutes 1941, Section 465.03 (Mason's Minnesota Statutes 1927, Section 1830), contains a broad grant of power to accept gifts. This section reads as follows:

"Any city or village may accept a grant or devise of real or personal property and maintain and administer such property for the benefit of its citizens in accordance with the terms prescribed by the donor. Nothing herein shall authorize such acceptance or use for religious or sectarian purposes. Every such acceptance shall be by resolution of the council adopted by a two-thirds majority of its members, expressing such terms in full."

Here is a grant of power sufficient to authorize the acceptance of the gift of the 240 acres, unless there is a prohibitive limitation upon the power found in Section 448.01, Minnesota Statutes 1941 (Mason's Supplement 1940, Section 1264-3). That statute is quoted thus:

"The council of any village in the state may, by resolution or ordinance, acquire, by gift, condemnation, or purchase, for or in the name of the village a tract of land, either within or without the corporate limits of the village, for park purposes and may appropriate money from the general revenue fund of the village for the purpose of purchasing this tract of land, not exceeding the sum of $2,000. No tract of land so acquired by purchase or condemnation shall exceed 80 acres in area. No village can acquire more than 40 acres unless the question of issuing bonds for acquiring a park shall have been submitted to the voters of the village prior to January 1, 1936, and carried by more than five-eighths majority."

In my opinion the last sentence of the statute last above quoted does not mean that a village cannot acquire for park purposes more than 40 acres of land. It means that a village cannot bond itself to purchase more than 40 acres for park purposes. That there is power to acquire more than 40 acres is shown by the sentence reading: "No tract of land so acquired by purchase or condemnation shall exceed 80 acres in area." So long as bonds are not to be issued, the village may acquire by purchase or condemnation as much as 80 acres.

But neither of the sentences just mentioned (contained in the last quoted statute) denies to the village the power granted by said Section 465.03 to acquire by donation any amount of land.

In so far as this opinion is inconsistent with that of January 12, 1942, the latter opinion may be disregarded. (File 476-B-10.)

Whether it is good policy to accept the gift is not a question which it is within the province of this office to answer. That is a question for the village council. I have indicated that if the village desires to do so, it may legally acquire the acreage by gift.

J. A. A. BURNQUIST,
Attorney General.

December 22, 1942. 476-B-10

257

Parking lot—Authority of city to purchase under city charter.

Owatonna City Attorney.

Facts

The city council of Owatonna contemplates the possible purchase of property in the business district for use as a free public parking grounds.

Question

Whether such purchase would be legal and proper and direct attention to Chapter IV, Section 14 of the city charter.

Answer

Chapter I, Section 1, of the Owatonna city charter, provides that the city may purchase real estate "as the purposes of said corporation may require, or the exigencies of said corporation may render convenient." Chapter IV, Section 14, vests in the city council the power to purchase "such private property as may be necessary for the sites for public * * * grounds for the use of the city," provided that a purchase amounting to $3,000 or more must be submitted to a vote of the city electors.

If the city council, in the exercise of its discretion, deems the purchase of the ground for a parking lot necessary, the foregoing charter provisions are a sufficient authorization for the purchase.

If the council determines that the purchase of a parking ground is necessary, the condemnation provisions of Chapter VII, Section 4, of the charter are applicable.

FREDERICK O. ARNESON,
Special Assistant Attorney General.

April 21, 1941. 59-A-40

STREETS

258

Obstruction—Temporary—To aid war work—M27 § 10241; (MS41 § 616.01).

City Attorney, Mankato.

Facts

A certain company operating in Mankato has asked the city council for a permit to erect an enclosed platform over the public street at the street entrance to its premises on a side street. By so doing the company will increase its floor space and it will serve the convenience of the company and hasten its work in loading trucks which would stop opposite the platform

in the street. The company needs the additional floor space in connection with its war work. Likewise its work will be speeded up by the added convenience which the platform would perform. If the platform should be permitted and erected, the company trucks would drive up alongside the platform for loading. At present, as I understand the situation, these trucks are loaded by driving them up to the side door of the platform on this street. There is no sidewalk. The entire street is open for vehicular traffic. The pavement which is traveled by vehicles extends up to the side wall of the plant where the side door is. This side of the street has never been used by pedestrians.

The applicant for the platform will agree to remove the obstruction from the street at the close of the war.

Question

Whether the city council is vested with discretion to permit the erection of a temporary enclosed platform as indicated—the same to be taken away after the war.

Answer

What constitutes an unlawful encroachment and obstruction in a public street is in most cases a perplexing problem.

Your charter grants to the council the power to prevent encroachments upon or obstructions in the streets or city. See Charter, page 28, Section 69 (18). So far as I can find, your charter grants no express authority to permit encroachments in streets.

Mason's Minnesota Statutes 1927, Section 10241, provides that it shall be a public nuisance to "unlawfully interfere with, obstruct, or render dangerous for passage * * * a street." It is my understanding that it is the opinion of the council that the street in question will not be rendered dangerous for passage by the erection of the platform.

This question has been the subject of much consideration by the courts and text writers. Perhaps a proper manner in which to treat it is to quote briefly what some of the authorities have said. The law is summarized thus in 45 C. J., p. 946:

> "The right of the public to use the streets for purposes of travel and transportation is the paramount one, and that of the abutter to occupy them for other purposes is a permissive and subordinate one. The general rule is that, while abutters may use the streets in the manner not inconsistent with the rights of the public, they cannot so use it as to obstruct, or encroach upon, the public easement or the rights of other abutting owners. While abutting owners have a right temporarily to obstruct the street for purposes pertaining to their business, or their occupancy or ownership of the premises, they have no right to appropriate any portion of the street to their exclusive use in carrying on their business, although sufficient space is left for use or passage of

the public. And it is generally held that, without legislative or municipal authority, abutting owners cannot encroach upon the street, even at a height above the space necessary for public travel."

The following excerpts are taken from Vol. 4, McQuillin Municipal Corporations, at the pages indicated:

Page 82. "Thus, it will be noticed hereafter that the abutter has no right, and cannot, ordinarily be granted the right, to encroach permanently on the street by a building extending into the street or other permanent and substantial erections. On the other hand, subject to proper municipal regulations enacted in pursuance of the police power, the municipality either has power expressly to permit minor permanent encroachments on the street such as bay windows, cornices, awnings, signs, steps, hitching posts, stepping stones, and the like, or else the municipality considers that such encroachments are so trifling that they are not interfered with."

Page 107. "Except where the use is temporary, or the power has been specifically delegated by the legislature, a municipality may not authorize the use of streets for private purposes from which neither the city nor the public derive any consideration or benefit."

Page 110. "In many cities the streets have been subjected to a great number of invasions for the benefit and use of private owners, but in recent years it has been more and more realized by the courts how dangerous such invasions have been and how if one person is permitted to use the street others will likewise have to be accorded equal privileges, with the result that, sooner or later, especially in the larger cities, the rights of the public and adjacent land owners to use the streets, will be seriously interfered with. Unquestionably many permits to encroach on the street are gained by nearly every municipality of any considerable size which, if the question were litigated, would be held to be entirely beyond the power of the municipality."

Page 110. "A municipality cannot authorize a permanent encroachment, i.e., cannot confer power on abutters or others to occupy permanently a part of the street for a private use, unless such power has been expressly delegated by the legislature, and even then the property rights of abutters and nearby owners of adjoining property must not be infringed upon. If the municipality has no power to permit such use of the streets, it necessarily follows, that where it has not authorized the encroachment or obstruction, and could not authorize it, such a use of the street is unlawful and constitutes a nuisance."

Our courts have declined to state any definite rule for determining the limit to which an abutting owner may put a street for the purpose of access to his premises. See Gustafson v. Hamm, 56 Minn. 334, 339, from which the following quotation is taken:

"The right of an abutting owner, under certain municipal regulations, to use a part of the street or areas, for purposes of access to base-

ments, for the temporary storage of building material, for laying underground pipes to connect with water and gas mains, stands on a different principle. These are all really included in the general right to use a street for purposes of access to the abutting premises, and have been long sanctioned as legitimate street uses. It is not necessary to consider here just what is the precise limit to the uses to which an abutting owner may put a street for purposes of access to his premises."

In the case of People ex rel. v. Western Cold Storage Company, 287 Ill. 612, 123 N. E. 43, an ordinance permitted the cold storage company to build a permanent elevated platform over the sidewalk in front of its premises. This compelled pedestrians to climb four steps on one end and go down an incline 15 feet long on the other. The purpose of the platform was to enable the company to load its goods. This platform was held an unlawful obstruction. The platform built here was a permanent one.

Whether your situation presents conditions under which it would be held that the council would be justified in granting a temporary permit is not a question which we are able to answer. It is a mixed question of law and fact. As long as there is a factual situation involved, we would not attempt a categorical answer.

It is our opinion that the mayor and members of the city council would not necessarily subject themselves to civil or criminal liability if in their discretion they determine that the welfare of the city and its inhabitants will be served and that the war effort will be helped by aiding the company in the performance of its work and for that purpose permit temporarily the erection of the enclosed platform, but no one can say that a question as to the violation of their duty by the councilmen might not be raised. If permission is granted, it should be upon the condition that the city may revoke the permit without notice at any time. The platform should not be allowed to remain longer than it is necessary for the war work in which this company is engaged. No public hazard should be created and suitable precautions should be taken. It may be understood that the platform will be removed at the end of the war or when the work is concluded, unless the permission is sooner revoked. Provision should also be made for indemnification of the city and its officers against liability for damages for both personal injuries and to property, and this indemnification should be secured by bond. Of course no such permit should be granted if it might cause a competitor to complain of discrimination or that the permittee was being favored to the prejudice of the competitor.

RALPH A. STONE,
Assistant Attorney General.

December 28, 1942. 396-C-3

259

Railroad grade crossings—Order of Railroad and Warehouse Commission superior to local ordinance.

City Attorney, Waseca.

Facts

Referring to the order of the Railroad and Warehouse Commission of this State dated the 13th day of February, 1941, relative to the installation by the Railroad Company of Minnesota Standard Automatic Highway Grade Crossing signals where Elm Street crosses the tracks of the Minneapolis & St. Louis Railroad Company in the City of Waseca; and the fact that the City of Waseca has on its books an ordinance providing for 24-hour gate service at such intersection and grade crossing.

Attention is called to the fact that the order of the Commission above mentioned was entered as the result of a hearing before the Commission on the petition of the Railroad Company involving this crossing, also designated as U. S. Highway 14, and that at such hearing the City of Waseca was a party; that service of the order of the Commission was made upon the City of Waseca and that no appeal has ever been taken from the order.

Also that the Railroad Company pursuant to the order of the Commission, recently commenced the installation of the equipment described in the order; and that thereupon the city objected thereto and called the attention of the Railroad Company to the ordinance above mentioned.

Questions

1. Is the order of the Commission above mentioned superior to such ordinance of the City of Waseca?

2. Does the failure of the City of Waseca to appeal from such order constitute an implied or tacit consent on the part of the City to the installation by the Railroad Company of the Standard Automatic Highway Grade Crossing signals provided for by the order of the Commission?

Answer

Your attention is called to the case of **Olson v. Chicago, Great Western R. R. Co.**, 193 Minn. 533, in which the Court at page 537, referring to **State v. Northern Pacific R. R. Co.**, 176 Minn. 501, said:

> "We reach the conclusion that the Legislature intended to and did confer upon the Commission power to determine all questions relating to the matter of railroad crossings."

Subsequent to the opinion just mentioned, the Court in the case of **Licha v. Northern Pacific Ry. Co.**, 201 Minn. 427, therein affirmed the doctrine of the Olson case, so far as here material, saying:

"If it meant that the Legislature has conferred upon the Railroad and Warehouse Commission the power to provide for the installation of signs, safety devices, stationing of flagmen and other similar measures, the statement concededly is correct."

While there are dissenting opinions in each of these cases, such dissents do not reach the questions suggested by you.

Your first inquiry is, therefore, in my opinion, properly answered in the affirmative.

Having thus answered your first inquiry, it would seem unnecessary to answer the second question which you suggest, but it may be said that where a person served with notice in a proceeding before any tribunal, appears therein and fails to object to the jurisdiction, and when an order is made determining the rights of such person fails to appeal from such order within the statutory period, such person is bound thereby and cannot question the jurisdiction of the tribunal, at least, collaterally.

You may be interested, however, in knowing that the exact question as to whether a city organized under a home rule charter may by ordinance compel the Railroad Company to install a safety device at a street crossing therein, was answered in the affirmative but **with the express limitation that such device shall have the approval of the Railroad and Warehouse Commission.** (See opinion April 16, 1929, § 82, 1930 Report.)

GEORGE T. SIMPSON,
Special Counsel.

May 21, 1941. 369-M

TAX LEVY

260

Recreational Fund—Establishment of—Right to levy taxes in support of—Ely Home Rule Charter.

City Attorney, Ely.

Facts

The City of Ely is a city of the fourth class operating under a home rule charter. Section 72 of the charter provides that the council by a majority vote of its members may levy an annual tax for the support of certain specified funds. The last paragraph of said section provides as follows: "The council may in its discretion establish any other fund which it may consider necessary."

Questions

1. May the council of the City of Ely establish a Recreational Fund and levy a tax for its support under the above charter provision?

2. May the Council of the City of Ely levy a tax for recreational purposes under any statute?

Answer

The rule is that a municipal corporation can levy no taxes, general or special, upon the inhabitants, or their property, unless the power be plainly and unmistakably conferred. The authority may be in express words, or by necessary or unmistakable implication. 4 Dillon Mun. Corp. (5 Ed.) Section 1377, p. 2398.

An examination of Section 72 of your charter, found in Chapter 9 headed "Finances and Taxation," discloses that certain designated funds are required to be maintained in the city treasury. The council, by a majority vote, is authorized to levy an annual tax in support of the funds specified. The funds thus enumerated are: 1. interest; 2. sinking; 3. fire department; 4. courts and police; 5. permanent improvement; 6. general; 7. permanent improvement revolving; 8. library and armory; 9. light and water; and 10. Mayor's contingent expenses. This enumeration of special funds is followed by a final paragraph of general words reading: **"The council may in its discretion establish any other fund which it may consider necessary."**

Construing this last paragraph in connection with other provisions of the charter, we believe it empowers the council to establish a fund for any purpose for which the council is authorized to expend public money. IV Dillon Mun. Corp. (5 Ed.) Section 1379, p. 2401.

Referring to Chapter 8 of your charter, which states the council's powers, we find in Section 65 power conferred on the council:

> "to acquire by purchase, condemnation or otherwise, and to establish, maintain, equip, own and operate libraries, reading rooms, art galleries, museums, parks, playgrounds, **places of recreation * * *** and all other public buildings, places, works, and institutions necessary for the good of the city."

The word "parks" has been given a broad construction by our courts. Hobart v. Minneapolis, 139 Minn. 368. It has been defined as "a pleasure ground for the recreation of the public to promote its health and enjoyment." Booth v. Minneapolis, 163 Minn. 223. The power to provide recreation for the public is almost uniformly granted municipalities. 3 McQuillin Mun. Corp. (2d Ed.), Sections 1217, 1255-1259; 5 McQuillin Mun. Corp. (2d Ed.), Section 1961; 4 Dunnell's Digest, Section 6608-a. Public funds cannot, of course, be expended for any purpose not essentially of a public nature. Burns v. Essling, 156 Minn. 171; 4 Dunnell's Digest, 6551.

You do not state precisely what the contemplated recreational fund is to be used for. Assuming it is to be used for providing public recreation as recognized by our court, to-wit:

> "by indulgence in tennis, pitching horseshoes, croquet, baseball, kittenball, golf, walking, horseback riding, picnicking, skating, bathing, and general outdoor exercise, band concerts, maintenance of botanical and zoological gardens, and other recreations,"

then it would appear to be a proper use of public funds. See Booth v. Minneapolis, supra.

It being a proper use of public funds, and authorized by your charter, then a special fund may be established therefor, as provided in said Section 72.

ROLLIN L. SMITH,
Special Assistant Attorney General.

August 26, 1941. 519-C

TOWNS.

261

Powers—Requisites for the exercise of such powers—Funds for the exercise of such powers—M27 §§ 1003, 1004, 1186; (MS41 §§ 368.01, 412.19).

Village Attorney, New Brighton.

Facts

"Section 1003 Mason's Minnesota Statutes for 1927, provides that any township therein having a platted portion on which there reside 1200 or more people shall have and possess the same power and the same authority now possessed by villages under the laws of this state, in so far as such powers are enumerated in Section 727 Revised Laws of 1905, and also Subdivisions 1, 7, 8, 9, 10, 11, 12, 16, 17, 18 and 22 of said Section 727. Also have powers enumerated in Sections 729 and 735 Revised Laws of 1905. Sections, 727, 729 and 735 being known as Sections 1186, 1196 and 1205 Mason's Minnesota Statutes for 1927. Section 1004 Mason's Minnesota Statutes for 1927, provides that any township having a platted portion on which there reside 1200 or more inhabitants, shall have and possess the same power and authority now possessed by villages of the 4th class under the laws of this state, in so far as such powers are enumerated in Subdivisions 7, 8, 9, 12 and 17 of Section 727 Revised Laws of 1905. Section 1003 appears to have been Chapter 193, Laws of 1907, Paragraph 1, and Section 1004, appears to be Chapter 397, Laws of 1907, Paragraph 1.

"The Township of Rose, next immediately adjacent to the City of St. Paul, is a township in which there are platted areas on which there reside more than 1200 people."

Question 1.

1. Under the Sections above cited, is it necessary that the 1200 people reside in one contiguous platted area, or is it sufficient if there are 1200 people residing upon platted areas which when added together, would exceed 1200?

Answer

Any township in this state having therein a platted portion on which there resides 1,200 or more people * * *" is the phraseology used in Laws 1907, Chapter 193, which, for reasons hereinafter stated, I regard as the controlling law in this matter rather than Chapter 397 of the same session laws.

The statute does not say that the platted portion should consist of contiguous areas. Although the singular is used in the law in question, the rule of construction to be applied, unless inconsistent with the manifest intent of the legislature or repugnant to the context of the statute, is the following: "Words importing the singular number may extend and be applied to several persons or things * * *."

Therefore, it is my opinion that the words, "a platted portion" may be construed to include the total of the platted areas within the township, whether such areas are contiguous or not, as such construction appears consistent with the object to be attained by the statute. Mason's Minnesota Statutes of 1927, Section 10932, subdivision 2. Laws 1941, Chapter 492, Section 16, subdivision 4.

This opinion is not in conformity to earlier opinions issued from this office under a former Attorney General. (Opinion of July 13, 1935, and opinion of May 10, 1935, 434-a-6).

Question 2

2. What sort of qualifying certificate or evidence should be made and filed to show that such township qualifies under said sections?

Answer

The law makes no provision for the filing of any qualifying certificate. Therefore, any certificate that is filed would not be official nor would it be prima facie evidence of the facts therein stated, nor would it be binding upon anyone who might attack in any manner the right of the town to exercise the powers in question.

Questions 3 and 4

3. After qualification, would such township have the powers of a village only with relation to the subdivisions mentioned in Chapter 1004, or would they have all of the powers of any village as designated in Section 1003? Incidentally, Section 1004 refers to a village of the 4th class. I assume that this was meant to read a city of the 4th class.

4. Would the fact that Section 1004, being Chapter 397, Laws of 1907, was passed subsequent to Section 1003, which is Chapter 193, Laws of 1907, restrict the powers of such a qualifying township to the provisions of Section 1004?

Answers

The two laws do not agree as to the powers intended to be vested in such a town, but, as above stated, the controlling law in my opinion is Laws 1907, Chapter 193.

Your fourth question assumes that Chapter 193 was the first law passed. However, Laws 1907, Chapter 397, was approved April 8, 1907. Laws 1907, Chapter 193, was approved April 15, 1907. In so far as the two are inconsis-

tent, the latter law would control. The first law passed (Laws 1907, Chapter 397) provides that such towns "* * * shall have and possess the same power and same authority now possessed by the villages of the fourth class under the laws of this state, * * *." The law as worded attempted to confer the power vested only in a certain classification of villages, which class did not exist as such. Apparently that is the reason for the later act, or Chapter 193, which probably was passed to rectify the uncertainty and doubt created by the first act. If the words "villages of the fourth class" in Chapter 397 were intended to refer to cities of the fourth class, a still greater uncertainty would result.

Therefore, it is my opinion that a township which complies with the conditions specified in the later law (Mason's Minnesota Statutes of 1927, Section 1003) may exercise the powers therein enumerated. Such powers are not restricted by Laws 1907, Chapter 397 (Mason's Minnesota Statutes of 1927, Section 1004) because it is superseded by Laws 1907, Chapter 193 (Mason's Minnesota Statutes of 1927, Section 1003).

Question 5

5. Would such a qualifying township have sufficient authority under Section 1186, paragraph 1, to set up the necessary departments to carry out the authority given by paragraphs 7, 8, 9, 11, 12, 16, 17, 18 and 22, of said Section 1186?

Answer

The power granted is to adopt ordinances, rules, and by-laws for the enumerated purposes. The powers granted specifically cover the establishment of a fire department (Mason's Minnesota Statutes of 1927, Section 1186, subsection 7), a park board (id., Section 11), and a board of health (id., Section 17). It occurs to me that the other powers conferred can be exercised by the enactment of proper ordinances without the necessity of establishing departments.

Question 6

6. Would it be necessary to submit the proposition of qualifying under these sections, to a vote of the people of the town, or the levying and expenditure of money to accomplish the purpose authorized under these sections?

Answer

The statute confers the powers enumerated in the law (Laws 1907, Chapter 193; Mason's Minnesota Statutes of 1927, Section 1003) upon all towns wherein the specified conditions exist. It is not necessary that these powers be adopted by a vote of the people. The town possesses these powers by virtue of the statute, and a vote of the people is unnecessary. The amounts to be raised by taxation must be voted at a town meeting. A town meeting alone possesses the power to vote sums for the town expenses. See Mason's Minnesota Statutes of 1927, Sections 1002-6, 1093 and 1098.

The last sentence above, however, does not mean that the town board could not levy special assessments upon benefited property for street and sewer improvements.

J. A. A. BURNQUIST,
Attorney General.

April 16, 1942. 434-A-6

WEEDS

262

Destruction—Use of sodium chlorate—M27 §§ 6153, 6158, 6161, 6162; (MS41 §§ 20.07, 20.12, 20.15, 20.28).

Morrison County Attorney.

Facts

A local weed inspector properly appointed and authorized serves a notice pursuant to 6158 Mason's Minnesota Statutes 1927, on the occupant of resident lands, ordering him to destroy through the use of a sodium chlorate solution, a patch of leafy spurge which is located nearby the dwelling of the occupant, but which is not a part of growing crops. The occupant refuses to use sodium chlorate solution, claiming that use of the same would be dangerous to humans, particularly children.

As may be seen from the above, the occupant does not object to destruction of the weed. What he objects to is the use of a sodium chlorate solution. The weed inspector proposes to use sodium chlorate solution on the patch and to entirely fence the same with snow fencing, the weed inspector claiming that this leafy spurge can only be completely destroyed through the use of a sodium chlorate solution.

Question 1

Does the local weed inspector have the authority to order the occupant to use sodium chlorate solution in the destruction of this noxious weed?

Answer

The answer depends upon a construction of the applicable statutes to which reference is now made.

Section 6153, Mason's Minnesota Statutes 1927, makes it the duty of every occupant of land to "cut down, otherwise destroy or eradicate all noxious weeds * * * in such manner and at such times as may be directed or ordered by the commissioner or by a local weed inspector having jurisdiction."

Section 6158 id. authorizes the local weed inspector to give a notice in writing to the owner or occupant requiring him to cause noxious weeds to

be "cut down, otherwise destroyed or eradicated * * * in the manner and within the times specified in the notice."

Section 6161 id. authorizes the weed inspector in case the notice goes unheeded, to cause the weeds to be "cut down, otherwise destroyed or eradicated." It provides a procedure whereby the cost of so doing may be spread in taxes against the land.

Section 6162 id. provides that any person "who neglects, fails or refuses to comply with any notice duly issued hereunder by the commissioner or local weed inspector * * * or who fails, refuses or neglects to perform any duty imposed upon him * * * shall be deemed guilty of a misdemeanor."

The power of the weed inspector to say in what manner the weeds shall be eradicated is emphasized by the repeated use of the words "in the manner and at the times" specified by the said inspector. These words appear in Sections 6153, 6158 and 6161. It is clear to me that the weed inspector is given authority to specify what method of eradication or destruction shall be adopted. Therefore in my opinion the answer to your first question shall be in the affirmative.

Question 2

If the occupant cuts the weed plant above the surface of the ground and distributes on said surface salt and crankcase oil, is it within the power of the local weed inspector to declare that such methods are not sufficient to destroy the noxious weed and to enter thereon pursuant to 6161 Mason's Minnesota Statutes 1927, and spread a sodium chlorate solution on said noxious weed?

Answer

The answer to this question necessarily follows the foregoing. If the weed inspector has power to designate the method of eradication which is to be used, then under the statute he has authority to see that such method is adopted and used under Section 6161.

I will qualify what has been said by this statement, however. If there is danger of injury to human beings in the use of sodium chlorate specified by the weed inspector when used at the time and in the manner specified by him, then the occupant is not obliged to adopt that method, and the weed inspector has no right to order it. This, however, is a question of fact upon which this office can not pass.

RALPH A. STONE,
Special Assistant Attorney General.

July 20, 1942. 322-G

SOCIAL WELFARE

CHILDREN

263

Delinquent—Settlement—Court proceedings—L 41, C 158, § 5; (MS41 § 260.30).

Sherburne County Attorney.

Facts

A family with three minor children, who are still minors, lived in county B from 1935 until October, 1940. They received no relief in county B. In October, 1940, the family, including the three minor children, moved to county A, where they have been residents ever since. During the time they have lived in county A, medical attention was required on the part of the minor children, and county B acknowledged residence for poor relief purposes and reimbursed county A for such expenses. None of the minors have been emancipated. Lately, a petition to have these minors judged delinquent has been filed at the Probate Court, and the question arises under Section five of the Laws of 1941.

Questions

Whether the matter should be heard in county A or county B.

* * * does a settlement for pauper purposes mean the same thing as legal settlement for such proceedings as are contemplated under the law above stated, section five? * * *

Answer

Laws 1941, Chapter 158, Section 5, reads in part as follows:

"In any proceeding relating to a dependent, neglected or delinquent child, if it appears that the child has a legal settlement in another county, the court may continue the case and forward to the clerk of the juvenile court of the county in which it appears the child has a legal settlement a certified copy of all papers filed together with an order of transfer of the case to the county of legal settlement. Whenever the judge of the juvenile court of the county in which the case has been transferred denies that such child has a legal settlement in his county, he shall send such order of transfer with his statement of facts as to settlement of the child to the director of social welfare who shall immediately investigate and determine the question of legal settlement and certify his findings to the juvenile judge of each of said counties. Such decision shall be final and complied with unless within 30 days thereafter action is taken in the district court as provided in Mason's Minnesota Statutes of 1927, Section 3161-1 and 3161-2 as amended.

"When the legal settlement of the child has been determined the judge of the juvenile court of the county of legal settlement shall pro-

ceed to hear and determine the disposition of the case. The judge may accept the findings of the juvenile court where the petition was filed or he may in his discretion direct the filing of a new petition and hear the case de novo."

In our opinion the delinquency proceedings should be heard in B county —the place of the parents' legal settlement—because they have not acquired a new settlement in A county. The same rule controls as is provided in Section 3161. See

City of Minneapolis v. Village of Hanover, 297 N. W. 27.
In re Galow, Lac qui Parle County v. Edison Township et al., 297 N. W. 743.
City of Minneapolis v. County of Beltrami et al., 206 Minn. 371.

VICTOR H. GRAN,
Assistant Attorney General.

September 24, 1941. 840-A-5

264

Settlement—Stepfather not liable for support—M40 § 3161; (MS41 § 261.07).

Big Stone County Attorney.

Facts

A resident of Big Stone County moved to B. County. He there married a woman who had four children, all residents of B. County. They lived there long enough so that the resident from Big Stone County acquired settlement in B. County for poor purposes. B. County paid the mother of the children mother's aid. The family then moved back to Big Stone County, and the mother, at the present time, is receiving mother's aid for two of the children.

Question

Whether the stepfather of the children and the woman whom he married, after two years' residence in Big Stone County, will acquire a settlement for poor purposes if, during that time, the family is in reality being partly supported by B. County.

Answer

The rule is well established that the settlement of the wife is the settlement of the husband. But, exceptional circumstances must be considered in this case. The dates of removal to Big Stone County are not stated in your letter. Mason's Supplement 1940, Section 3161, is Laws 1939, Chapter 398, Section 1, adopted April 22, 1939. That date is important as changing the rule. That section provides:

"* * * The time during which a person has received * * * aid to dependent children * * * shall be excluded in determining the time of

residence hereunder * * *."

It is, therefore, my opinion that, under the rule established in this section, if the wife and children reside two years continuously in Big Stone County **without receiving any of the relief** mentioned in Section 3161, **supra,** from either county or from the federal government, they become charges upon Big Stone County if in need of relief. After two years residence in Big Stone County, the husband has a settlement there for poor relief purposes, with the same rule as to deductions in computed time.

You further inquire whether the stepfather is liable for the support of the stepchildren. Upon the facts as stated, I would say no.

CHARLES E. HOUSTON,
Assistant Attorney General.

March 5, 1942. 339-O-4

840 a-6

266

Claims—Against estate of deceased recipients should be allowed and the full amount of the assistance paid—42 USCA 303-b-2; M40 § 3199-27; (MS41 § 256.27).

Judge of Probate.

Facts and Question

In an estate now in the process of probating in this county, the deceased was an Old Age Assistance recipient. The local agency has filed a claim for the full amount of assistance received by the deceased. The attorney for the estate has raised the question that the lien for the amount received by the deceased is only effective in so far as the county's proportionate share is concerned, and that the share of the State and the Federal Government is not a lien against the deceased recipient's real property in this county.

My contention is, that in view of the fact that it is the duty of the local agency to file a claim against a deceased recipient's estate for the total amount of assistance received that the total amount received by the deceased recipient is the total amount of the lien.

Answer

Your contention is correct. I am not sure from your statement whether the claim filed was filed under Section 3199-25 or Section 3199-26-5, Mason's Supplement 1940. However, in either event the entire **claim, if proper, should** be allowed. Section 3199-25 ibid. provides that "the total amount paid as Old Age Assistance shall be allowed as a claim against the estate * * *." Section 3199-26-3 and 5 also refer to the claim as including the total amount of assistance paid. The total amount includes the contribution of the federal, state, and county governments. If our act were to provide that the amount furnished by the county only should be allowed as a claim, then in all probability our act would not conform to the requirements of the Federal Social

Security Act, with the result that the federal government would no longer contribute to our Old Age Assistance program. The Federal Social Security Act provides "that the money furnished by the federal government shall be reduced by one-half of the sums recovered by the state or any political subdivision thereof." 42 U.S.C.A., Section 303-b-2. Consequently, assuming the court should allow only one-sixth of this claim, the state would then be obliged to pay one-half of this amount to the federal government. This would be in accordance with Section 3199-27 which provides, "Whenever any amount shall be recovered from any source for assistance furnished under the provisions of this act, there shall be paid to the United States the amount which shall be due under the terms of the Social Security Act and the balance thereof shall be paid to the treasurer of the state, county, township, village, borough, or city in the proportion in which that recipient contributed toward the total assistance paid."

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

April 4, 1941. 521-g

267

Liens—Enforceability against homestead after sale thereof—M27 §§ 8336, 8342; M40 § 3199-26; (MS41 §§ 256.26, 510.01, 510.07)

Brown County Attorney.

Facts

A recipient of old age assistance in Brown County is a widow who owns a life estate in a residence property in which she has been living and which came to her through her husband's estate. The remainder is owned by her children.

Arrangements have been made by the children and the mother to sell the property at a figure of $2,800.00. It has been determined among them that the value of the life estate is one-third of the total selling price.

Question

Whether the lien for old age assistance arising under Mason's Supplement 1940, Section 3199-26, attaches to the life estate and is enforceable upon the sale of the property.

Answer

Subsection (2) of the statute cited provides that no person shall be paid old age assistance without first giving the state a lien on all his property situate within the state.

Subsection (3) provides that the total amount of old age assistance paid a recipient shall be a lien in favor of the state upon all real property belonging to such recipient.

Subsection (5) provides that the lien shall arise upon the filing of the certificate provided for. I assume that the certificate as to the widow and her property has been filed as required by law.

Subsection (8) provides that the lien shall not be enforceable against the homestead of the lienor while occupied by his surviving spouse. This Subsection (8) does not fit the situation you present. This homestead is not occupied by the surviving spouse of the lienor. The surviving spouse is the lienor. The lien arises against the life estate which she inherited from her deceased husband.

The law exempting the homestead is Mason's Minnesota Statutes 1927, Section 8336, which reads:

> "The house owned and occupied by a debtor as his dwelling place, together with the land upon which it is situated * * *, shall constitute the homestead of such debtor and his family, and shall be exempt from seizure or sale under legal process on account of any debt not lawfully charged thereon in writing, * * *."

We believe that the old age assistance lien is a debt "lawfully charged thereon" within the intent of this law, but am unable to reach the conclusion that this construction would permit the enforcement of the lien during the occupancy of the recipient who is a life tenant. The policy of the lawmakers becomes apparent from a consideration of Subsection (8) above referred to. If the homestead of a lienor is exempt while occupied by his surviving spouse, certainly the homestead of a lienor must be exempt while occupied by the lienor herself.

But does it follow therefrom that the recipient can sell the homestead free and clear of the lien as provided by Mason's Minnesota Statutes 1927, Section 8342, reading as follows:

> "The owner may sell and convey the homestead without subjecting it, or the proceeds of such sale for the period of one year after sale, to any judgment or debt from which it was exempt in his hands. * * *"

As pointed out, the lien is lawfully charged upon the homestead. It is a lien thereon, but it is immature or unenforceable as long as the recipient occupies it. It cannot be said that the property in the hands of the recipient is exempt from the lien as required by Section 8342. It might be more accurate to say that while occupied by the recipient the homestead is subject to a dormant lien. Therefore, I am of the opinion that the homestead may not be sold by the recipient free and clear of the lien. The situation might be made more clear if it were assumed that instead of a life estate, the recipient owned a fee in the homestead.

It does not seem probable that the legislature intended that a recipient could defeat the lien so given by the simple expedient of selling the property. In that case he could sell the fee exempt from the lien, reserving a life estate, and defeat entirely any collection of assistance paid the recipient so far as the homestead is concerned.

It is our opinion that while the recipient can live as long as she desires in the homestead property, and the lien cannot reach it while so occupied, yet the minute she sells her interest in the homestead and abandons it, the lien springs from a state of dormancy to a state of enforceable vitality, and that it is effective from the date when the first assistance was paid, and is superior to the rights of a purchaser from the recipient. This may seem at first blush to be contrary to the holding in Dimke v. Finke, 209 Minn. 29. The court said in that case:

> "The lien does not in fact infringe the homestead immunity, for the amendment expressly limits its enforcement until after the death of both spouses."

We find nothing in the law which "expressly limits its enforcement until after the death of both spouses." The law nowhere says that the lien cannot be foreclosed during the life of the lienor. Subsection (8) does provide that no such lien shall be enforced against the homestead of the lienor "while occupied by his surviving spouse, or minor children." The period of non-enforcement of the lien is limited to the time of occupancy as a homestead and not for the life of the recipient.

The further language of the opinion cited, following that last above quoted, indicates that there was no intention of holding that the homestead was immune from lien foreclosure proceedings after abandonment by the recipient or after sale by her. "Upon the death of both spouses, **or upon alienation of the land,** the property ceases to be a homestead." The inference flowing from that language is that after alienation, the lien can be enforced against the homestead. And the court then approves a Kansas case holding in substance that enforcement of the lien was possible after alienation of the homestead.

Certainly the court did not intend to hold that in every case an action to foreclose the lien cannot be commenced until after the lienor dies. The only limitation upon actions to foreclose the lien is that it may not be foreclosed against the homestead of the lienor, while occupied as such by the lienor, or his surviving spouse or minor children.

Therefore, we hold that the old age assistance lien is enforceable as against an estate in the land for the life of the recipient after the recipient vacates the property, and that upon sale by her the interest acquired by the purchaser is subject to the state's lien.

RALPH A. STONE,
Special Assistant Attorney General.

April 18, 1942. 521-P-4

268

Lien—Release of—Discretion of County Welfare Board—Election of remedies—M40 § 3199-26; (MS41 § 256.26).

Mower County Attorney.

Facts and Question

An Old Age Assistance recipient in Mower County died leaving his homestead appraised at $2,200.00, and a small amount of personal property, the total amounting to about $2,400.00.

The real estate was subject to two mortgages given by the Old Age Assistance recipient in his lifetime amounting to about $1,670.00, and a subsequent Old Age Assistance lien of $215.00. These were the only liens against the real estate excepting taxes of about $65.00.

The estate is being probated and an Order of License was granted, and the real estate has been sold for $2,275.00, making total assets of about $2,400.00. It was discovered at the time the purchaser had an attorney examine the abstract that it would be necessary to quiet title to put the title in the property in shape so that it is acceptable.

The expense of administration, funeral expense, etc., and the mortgage indebtedness and Old Age Assistance lien of $215.00 exceed the assets in the estate by about $100.00. I might add that there were doctor bills and funeral expense that the county has not paid.

The purchaser will not accept the title, of course, unless the Old Age Assistance lien is discharged from record.

The question arises: Should the Welfare Board recommend to the State Agency that the lien of the state be released on payment to the county of the amount left in the estate after payment of the items mentioned in Section 5 of the statute above referred to?

You make reference to subdivisions (3) and (5) of Section 16 of the Old Age Assistance Law as amended (Mason's Supplement 1940, Section 3199-26 (3) and (5)), which read in part as follows:

> "The total amount of old age assistance paid a recipient including burial expenses, but without interest, shall be a lien in favor of the state upon all real property belonging to such recipient.
>
> "In case of the death of the recipient, the debt secured by such lien shall be a claim against his estate and after expenses of administration, funeral expenses, expenses of last illness, and debts having preference by the laws of the United States, and taxes shall have priority over all other debts."

Also involved is subdivision (9) of the same section, which provides in part as follows:

> "Whenever the county agency of the county granting assistance to a recipient is satisfied that the collection of the amount paid him as

old age assistance will not be jeopardized * * * it may, with the approval of the state agency, release such lien with respect to all or part of the real property of the recipient, and such release, or a certified copy thereof, shall be filed with the register of deeds of each county where the lien certificate is filed."

Answer

It is our opinion that under subdivision (9) above, the County Welfare Board is given broad discretion with respect to its release of the lien. This office has previously ruled that a county had the power of election as between foreclosing its lien and filing a claim in Probate Court. Opinions dated July 9, 1941, with reference to the power of a county agency to compromise a claim. We call your attention to the last paragraph of opinion dated Oct. 2, 1939, relating to the limitations upon a county's power to compromise, and the limitations upon its discretion.

We cannot say as a matter of law, on the facts you have presented, that a release of the lien would be so arbitrary or so unreasonable as to be beyond the limits of the discretion given the County Welfare Board.

WILLIAM W. WATSON,
Special Assistant Attorney General.

September 23, 1941. 521-P-4

269

Settlement—Receipt of poor relief does not toll the statute—County may not grant old age assistance to a person not having a settlement therein at the time of application—M40 § 3199-19; (MS41 § 256.19).

Yellow Medicine County Attorney.

Facts

Mrs. A., until eleven months ago, resided in Redwood County, where she has her settlement for poor relief purposes. After another month Mrs. A. will have acquired a residence for old age assistance purposes in Yellow Medicine County. She is now sixty-four years of age and will not be eligible for old age assistance until a month or more has elapsed.

Question

Whether there is any way in which your county can prevent her from acquiring a residence for old age assistance purposes in your county and whether Redwood County has the right or authority to make an agreement to pay her old age assistance notwithstanding the fact that at the time application will be made she will have a residence in Yellow Medicine County.

Answer

Mason's Supplement 1940, Section 3199-19, defines the conditions under which a person may acquire a residence for old age assistance purposes. The

time during which relief is received is not excluded by the terms of that section. The only period tolled under the provisions of this statute is the time during which a person has been an inmate of a hospital, poor house, jail, prison or other public institution. I do not understand from your letter that Mrs. A. is now an inmate of the county poor house or other public institution. Consequently, your first question is answered in the negative unless you believe Section 3162 of Mason's Minnesota Statutes of 1927, or some equivalent section, applicable.

Your second question is also answered in the negative. Section 3199-19 of Mason's Supplement 1940 provides that application for old age assistance must be made with the county welfare board of the county in which the applicant has his legal settlement for old age assistance purposes. In our opinion that section does not contemplate payment of old age assistance by a county except on the application of a person having his old age assistance settlement therein.

WILLIAM W. WATSON,
Special Assistant Attorney General.

November 19, 1941. 521-T-2

RELIEF

270

Burial—Liability of town or county—Right of relative of deceased to select funeral director—L 41, C 525 § 26.

Clay County Attorney.

Facts

The Village of Glyndon, in your county, is using a certain burial association for funeral services for deceased relief clients. Such association requires a membership fee of $5.00.

Question

Whether the relative of a deceased relief client has the right to pick a funeral director and undertaker, or whether the local authorities have that right.

Answer

There is no authority for a village buying a membership in such association, either for itself or for anyone else.

Laws 1941, Chapter 525, Section 26, provides that "recipients of public relief shall be permitted free choice of vendor for services and supplies." It is very doubtful if this provision would apply to burial services.

M. TEDD EVANS,
Assistant Attorney General.

December 11, 1941. 339-C

272

Commodity stamp fund—Establishment of food stamp plan—Resolution of County Board of Commissioners—M40 § 974-18; L 41, C 98 § 4; (MS41 §§ 261.204, 393.08).

Kanabec County Attorney.

Question

Concerning the creation and establishment of a commodity stamp fund under Chapter 98 of the 1941 Laws, generally known as the food stamp act. Section 4 (a) of that act provides in a general way that any county within the State of Minnesota is thereby authorized to create and establish a commodity stamp fund. The Kanabec County Welfare Board now has money under its control which it desires to transfer to the fund. Section 974-18 of Mason's Supplement 1940 provides in a general way that the budget of the County Welfare Board shall be subject to the control of the County Board.

Answer

In view of the two statutes cited above, it is necessary for the County Board to pass a resolution establishing and creating the food stamp fund. If this were not so, the County Board would lose its control over the budget of the County Welfare Board. This opinion is limited to the establishment of the fund and does not apply to its administration or operation.

WILLIAM W. WATSON,
Special Assistant Attorney General.

May 17, 1941. 339-I-1

273

Funds—Allocated by the governor and the legislative advisory committee—Responsibility for administering such relief funds rests with the county welfare board and not with the board of county commissioners—M40 § 974-17b; L 41, C 525 § 17; (MS41 § 393.07).

Division of Social Welfare.

Question

Whether the responsibility of administering state relief funds granted pursuant to Chapter 525, Laws 1941, is vested in the county welfare board or the county board.

Answer

Section 974-17b of Mason's Supplement 1940, as amended by Chapter 476 of Laws 1941, provides in part as follows:

"Subdivision 2. The county welfare board, except as provided in Section 1, Subdivision (b), shall be charged with the duties of adminis-

tration of all forms of public assistance and public welfare, both of children and adults, and shall supervise, in cooperation with the director of social welfare, the administration of all forms of public assistance which now are or hereafter may be imposed on the director of social welfare by law, including aid to dependent children, old age assistance, veterans aid, aid to the blind, and other public assistance or public welfare purposes. * * *"

Section 17 of Chapter 525, Laws 1941, provides as follows:

"Section 17. The director of social welfare is authorized and empowered to disburse and administer such funds as may be allocated to him by the governor to carry out the purposes of this act. The funds allocated by the governor to the director of social welfare for distribution to the counties and municipalities of the state shall be disbursed on a basis determined by the governor and in the manner as provided by Laws 1937, Chapter 343."

Chapter 343, Laws 1937, to which the last quoted provision above refers, is the county welfare board statute. Consequently, it is our opinion that the responsibility for the administration of the funds referred to rests with the county welfare board and not with the county board.

WILLIAM W. WATSON,
Special Assistant Attorney General.

June 20, 1941. 125-A-64

274

Hospitalization—Liability of village for cost of—Care and treatment outside of hospital—Bill first presented after treatment—Proof required—Power of social worker to bind village—Distinction between for (a) hospitalization; (b) care and treatment—L 41, C 473; M41 §§ 3164-19 to 3164-21; (MS41 §§ 261.21, 261.22, 261.23).

Attorney for Village of Golden Valley.

Questions

1. Golden Valley is a village organized under the Laws of 1885 and located in Hennepin County. Is it the primary responsibility of the village, or of the county, to provide care, treatment and hospitalization for the indigent sick or injured?

2. If it is the responsibility of the village, has it power to pay for such care, treatment, and hospitalization, post factum—its first notice of "liability" being a bill presented after treatment has been given and with no proof of the indigent status of the sick or injured person?

3. Again if it is the responsibility of the village, what proof of indigency can it require where the sick or injured person has not been on relief theretofore?

4. If the village is responsible, in general, is there any particularly binding force to the agreement that the village will pay made by a social worker employed on a per case basis, in the absence of proof of indigency?

5. Is any distinction to be made between the sick and the injured, insofar as the question of responsibility is concerned?

Answers

1. See Laws 1941, Chapter 473, Mason's Supplement 1941, Sections 3164-19 to 3164-21 and opinion dated June 17, 1940, which deals with these statutes in detail.

2. You will note from the foregoing that the village is not interested in those cases which are cases for hospitalization. It carries no part of that expense. But, the village officers, under Section 2 of the Act of 1941 have a duty to file with the county auditor the application for hospitalization. Before hospitalization takes place, the county officers have duties to perform under this section. Before hospitalization the right thereto is ascertained and determined. This is all subject to the proviso contained in the section which relates to emergency cases. In emergency cases, upon the certificate of a physician, such person is admitted to the hospital. The admission is on the order of the chairman of the county board, or the county commissioner of the district in which the indigent person resides, but the investigation must nevertheless be made after his admission.

There are cases requiring care and treatment outside of a hospital which are not dealt with in the foregoing. Such care and treatment is provided by the village as stated in Mr. van den Berg's opinion.

3. In those cases for which the village is responsible (care and treatment outside of a hospital) the village officers charged with the responsibility must determine to their own satisfaction that the person to whom it is proposed to furnish care and treatment is unable to furnish it for himself, and that he is otherwise entitled to relief at public expense. It is my opinion that this should be proof such as is ordinarily determinative of the decision of whether a person is entitled to general relief.

4. This question raises the issue whether the social worker has powers which supersede those of the governing body of the village. In other words, are the powers of the social worker greater than those granted by law to the governing body?

In respect to the cases eligible under the 1941 law for hospitalization, the law answers the question. We quote from Laws 1941, Chapter 473, Section 2, subdivision 2:

> "If upon filing of such report and a full investigation of the application the county board shall be satisfied that the case is one which could be remedied by hospital treatment and that such afflicted person is financially unable to secure or provide the same for himself, and that the persons legally charged with the support and maintenance of such person, if any there be, are financially unable to provide such hospitali-

zation, the county board may grant or approve said application. If the county board is not so satisfied, it may take additional testimony or make such further investigation as it shall deem proper and shall reject any application if it finds that the facts do not merit the expenditure of public money for the relief of such afflicted person."

This subdivision also contains other provisions relating to emergencies with which we are not dealing. You will observe that there is nothing in the quoted language which gives anyone but the county board the power of decision. The opinion of the social worker might be given as testimony before the county board the same as the testimony of any other person might be given. The law gives the testimony of the social worker no more effect than the testimony of any other person. It gives the worker no power of decision.

In respect to cases other than those involving hospitalization, it is my opinion that the applications of the village would be on a par with the village applications to furnish food, shelter, clothing, or other form of general relief. Certainly they could not be furnished in the absence of evidence that the person receiving them is entitled thereto. There must be proof that he is a poor person. The poor laws are for the benefit of the poor.

5. There is a distinction, as has been hereinbefore mentioned, between cases for hospitalization and cases for care and treatment outside a hospital. There is also a distinction in the liability of the village, as has been mentioned, in view of the fact that the village is not liable for hospitalization whereas it is liable for care and treatment outside the hospital.

CHARLES E. HOUSTON,
Assistant Attorney General.

May 15, 1942. 339-G-2

275

Hospitalization—Payment for—M40 §§ 3164-19 to 3164-21; L 41, C 473; (MS41 §§ 261.21, 261.22, 261.23).

Hennepin County Attorney.

Facts

As to the proper construction of the county hospitalization act, Laws 1935, Chapter 359, as amended by Laws 1941, Chapter 473, Mason's Supplement 1941, Sections 3164-19 to 3164-21.

The 1941 act is entitled:

"An act authorizing county boards to provide for hospitalization for the indigents of such counties; amending Mason's Supplement 1940, Sections 3164-19, 3164-20 and 3164-21."

It is to be noted that the title indicates the county board is authorized (not required) to do certain things:

Question

1. Is this so-called county hospitalization act mandatory upon the several county boards?

Answer

The language of Section 3164-19, as amended by Section 1 of Chapter 473, supra, is:

> "The county board of any county in this state is hereby authorized to provide for the hospitalization * * *."

It is my opinion that without this authority in this and preceding acts, the county board lacks definite authority to do the things by this act authorized. There is nothing in the language that indicates the county board is obliged to make the disbursements therein authorized. It is our opinion that the doing of the things authorized is permissive but not required. The statute specifically provides that "the county board shall reject any application if it finds that the facts do not merit the expenditure of public money for the relief of such afflicted person." This gives the county board wide discretion.

You call attention to the fact that an opinion was rendered by this office on March 8, 1940, wherein it is stated that the Laws of 1935, Chapter 359, was passed as a supplemental measure to Sections 4577 to 4585, and not to amend Section 4579, and gives the county an option of sending its indigent patients to the Minnesota General Hospital or to some other hospital. You further call attention to an opinion of the office 101, 1936 report (May 23, 1936), wherein it is stated:

> "The legislature, manifestly, contemplated at the time of enactment of said Chapter 359, that the county should not be charged more by private hospitals for the hospitalization of indigent persons than the rate fixed by the Minnesota General Hospital for the same class of service."

You call attention to Mason's Minnesota Statutes 1927, Section 4580, relating to the Minnesota General Hospital. It provides that:

> "* * * one-half of the expense charged against such patient while an inmate of the hospital shall be paid by the county of residence of said patient, and it shall be the duty of the Board of County Commissioners of said county to provide for such payment."

You then state:

> "Assume that the basic rate for room, board and general nursing at the Minnesota General Hospital is $3.75 per day, and that the cost of medication, X-rays, laboratory tests, etc., amount to an additional $2.25 per day, making the average cost $6.00 per day per patient."

Question

2. Is the county, in hospitalizing a patient under Sections 3164-19 to 3164-21, limited to an expenditure of $3.00 per day? Or, may the county expend upward to $6.00 per day per patient?

Answer

The language in the quoted section, "one-half of the expense charged against such patient while an inmate of the hospital" indicates the intent to include all the charges which you mention. But if a patient is hospitalized by authority of Chapter 473, supra, the county's liability excludes medical and surgical care and treatment. The cost to the county shall not exceed the full rate charged by the Minnesota General Hospital under the section mentioned for the **hospitalization** of indigent patients. Laws 1941, Chapter 473, Section 3, amending Mason's Supplement 1940, Section 3164-21. The question is thus raised whether charges of the hospital for X-rays, laboratory fees, and other extras are included within the term "hospitalization." We presume that this is not a question of law but one of fact to be decided perhaps in accordance with the rules of custom or practice.

Your letter states that Mason's Minnesota Statutes 1927, Section 4582, provides in effect that no physician employed by the Minnesota General Hospital shall charge a fee for services rendered to a county patient hospitalized therein.

Question

3. May a county, operating under the township system of poor relief, pay for medical and surgical treatment in addition to the cost of hospitalization under the provisions of Sections 3164-19 to 3164-21?

Answer

The purpose of the act which we are considering is not to provide for the services of a physician or surgeon but to provide the services of a hospital. Such services are quite distinct. It is our opinion that the act does not authorize a county operating under the township system to pay for medical or surgical treatment, but only for hospitalization. We must consider that the people of the county by the means authorized by law have determined that the burden resulting upon the government for the support of the poor is to be borne by the town, village or city rather than the county. This act creates an exception to the rule and the exception must be limited to the plain intent of the statute; the intent of burdening the county with the cost of hospitalization and not the cost of services of a physician.

Question

4. Under the last proviso to Section 3164-20, subdivision 2, may a physician obligate a county operating under the township system of poor relief to pay for hospitalization and surgical and medical treatment furnished an indigent patient for the 72-hour period on the physician's sole certificate without any action by the county board or any of its members?

Answer

The portion of the section to which you refer reads:

> "Provided further, that when a physician certifies in a case of an injury (or an emergency), that immediate surgical or medical treatment is necessary, the patient shall forthwith be admitted to any such hospital upon said certificate for a period not to exceed seventy-two (72) hours; and thereafter an investigation shall be certified and made in the manner hereinbefore provided."

It is our opinion that this proviso amounts to nothing more than making the certificate of a duly licensed physician prima facie evidence of the emergency. When the county bearing the burden shall determine either before or after the expiration of the seventy-two hour period that the emergency does not exist, and that the patient was improperly admitted, then, in our opinion, the certificate of a physician loses its force. The physician is not a public officer. He has no authority to bind the taxpayers. The only foundation for such a provision in the statute is the humanitarian principle that in an emergency the poor shall be cared for. But when it is discovered that there is no emergency, then the reason for the certificate is gone, it loses its force. It should be disregarded. I think that the certificate must be given a practical construction. It serves to admit the patient. But it must not serve to keep him there when the emergency does not exist. A fact question is involved. Consequently every case will depnd upon its own facts.

Question

5. If the above question is answered in the affirmative, may the county board at the expiration of the 72-hour period decline to pay for further hospitalization and treatment?

Answer

We believe that this question should be answered in the affirmative. The county board cannot be deprived of its discretionary power.

CHARLES E. HOUSTON,
Assistant Attorney General.

June 27, 1942. 1001-D

276

Settlement—Determination of legal settlement—Time spent in nursing home by self-supporting inmate excluded by Mason's Supplement 1940, Section 3161, in determining legal settlement—M40 § 3161; (MS41 § 261.07).

Benton County Attorney.

Facts

Two years ago a person having a settlement for poor relief purposes in "B" county moved to "A" county where he has since supported himself. He has spent the past six months in a rest home there.

Question

Whether he has gained a settlement for poor relief purposes in "A" county.

Answer

Chapter 398, Laws 1939, provides:

> "The time during which a person has . . . been the inmate of a hospital, old age home, or nursing home for the care of the invalid or aged, **whether public or private,** . . . shall be excluded in determining the time of residence hereunder . . ."

Whether or not the rest home you mention is a "hospital, old age home, or nursing home for the care of the invalid or aged" within the meaning of Mason's Supplement 1940, Section 3161, is a question of fact upon which we do not pass. If it is such, however, the person in question has not acquired a settlement in "A" county.

Private hospitals and nursing homes customarily charge to inmates their full proportionate share of the expenses of operation, plus in most instances a profit; accordingly, a large proportion of their patients are fully self-supporting. By including such private hospitals and nursing homes within the act, the legislature must have intended the exclusion of time there spent to apply in cases of self-sustaining inmates of such institutions.

Hospitals and nursing homes tend to draw to them for more or less temporary purposes the residents of other counties in which similar facilities are not available. If that period of residence were included in determining legal settlement, there would be imposed upon a county in which such an institution was located a great involuntary liability for the support of former inmates who had come from other counties and who upon their discharge or release or shortly thereafter should prove to be indigent. See opinion dated August 18, 1924. It is therefore our opinion that the legislative intent was to avoid the imposition of this involuntary liability and that consequently the statute must be literally construed.

FREDERICK O. ARNESON,
Special Assistant Attorney General.

June 27, 1941. 339-O-4

277

Settlement—PWA relief and surplus commodities.

Attorney for Township of Sharon.

Facts and Question

1. From 1924 to July 5th, 1933, the pauper resided in the Township of Kasota, Le Sueur County. The Kasota board concedes that he acquired settlement in their township during this time.

2. From July 6, 1933, to the 11th of June, 1936, the pauper resided at Ottawa, Le Sueur County. Their records show that in the months of October and November, 1933, and the months of March, April, May and December of 1934 the pauper was the recipient of direct relief from the Township but that after December, 1934, received no direct relief from the Township of Ottawa. There likewise was no attempt made by the Ottawa board to have the pauper move back to Kasota Township.

On February 26, 1934, the Ottawa Township record reveals that a meeting was held by the township board in which this case was discussed and an endeavor was made to get the pauper on some form of relief work. In this the Township was successful and records reveal that he was certified on the relief records and since the month of February, 1934, and each consecutive month thereafter has continuously been in the employment of such Government alphabetical agencies as SER, CWA, and PWA and has likewise been receiving surplus commodities. You will note that even since February, 1934 he has in addition occasionally drawn direct relief from the Township poor fund.

3. On the 12th of July, 1936, and until the 15th of March, 1938 the pauper lived in Sharon Township. He was furnished no aid from the poor fund of this Township though he did request the same. However, during all the time the pauper was in Sharon Township he worked for PWA and each month received money from PWA and likewise received surplus commodities each time the same were dispensed. There likewise is no question that the pauper during all the times above mentioned was certified on the relief rolls as a needy person and was doing the work on a relief basis and receiving surplus commodities in lieu of direct relief.

Answer

On the above facts, it is our opinion that the settlement of the person in question was, on March 15, 1938, in the Town of Ottawa. On July 5, 1933, it is conceded that settlement was within Kasota Township. Thereafter, and until January 24, 1936, the provisions of Laws 1933, Chapter 385, were applicable. This chapter excluded, in so far as relief is concerned, only "each month during which he has received relief from the poor fund of any county or municipality." On January 24, 1936, Chapter 68 of the Extra Session Laws 1935 went into effect, which, in addition, excluded each month during which relief was received "from funds supplied by the State of Minnesota or the United States or any department or departments thereof, supplied as direct relief or in providing work on a relief basis and in lieu of direct relief." This law is not retroactive. In re Settlement of Venteicher, 202 Minn. 331, 278 N. W. 581; In re Settlement of Wrobleski, 204 Minn. 264, 283 N. W. 399. Therefore, the months from February, 1934, until January, 1936, are not to be excluded by reason of SER, CWA or PWA aid received while in Ottawa Township. In re Settlement of Venteicher, above. After January, 1936, every month during which PWA aid was received would be excluded provided his employment was on a relief basis. See Attorney General's opinion dated February 10, 1939. The same is true of the receipt of surplus commodities. See opinion February 7, 1940.

For the purposes of this opinion, we shall assume that both the federal work relief aid and surplus commodities were received under such circumstances as to eliminate from computation any month during which either was obtained. In view of these considerations, the person in question acquired a new settlement in Ottawa Township. He was there a period of approximately thirty-five months. During the portion of that period from July to January 1, 1936, six months must be eliminated from computation. Of the portion from January, 1936, to June, 1936, six months must be eliminated by reason of the receipt of work relief and surplus commodities. Twelve months being eliminated from computation, there remains a period of twenty-three months of continuous residence in Ottawa Township, which would be sufficient to establish a settlement. On the same basis, every month of the period from July, 1936, to March 15, 1938, during which the person was in Sharon Township must be eliminated from computation. Consequently, it is our opinion that as of March 15, 1938, settlement was in Ottawa Township.

WILLIAM W. WATSON,
Special Assistant Attorney General.

August 27, 1941. 339-O-2

WELFARE BOARD

278

Authority—To make permanent improvements on poor farm—Appointment of overseer of the poor farm—Duties as to poor relief and direct relief— M38 § 974-17; L 41, C 370; L 41, C 476; (MS41 §§ 375.17, 393.07).

Nicollet County Attorney.

Questions

1. Has the County Welfare board (in place of the board of county commissioners) any authority to make permanent improvements upon this property owned and maintained by the county as a poor farm?

2. Has the power to appoint an overseer of the poor farm been taken from the board of county commissioners and given to the county welfare board?

3. Under Section 2 of Chapter 370 of the Laws of 1941 (amending Mason's 1940 Supplement to G. S. 974-17) the duties of the welfare board are given, then the act ends as follows: "The provisions of this act will not be construed to apply to poor relief or direct relief." Does this provision take from the county welfare board the administration of poor relief and direct relief, and if so is the duty to provide poor relief and direct relief returned to the board of county commissioners?

Answers

1. It is very doubtful whether the duties imposed by the law (Mason's Supplement 1938, Section 974-17) to-wit: "the duties of administration of

all forms of public assistance and public welfare" are broad enough to include power to make permanent improvements to a county poor farm. I pass by this question, however, as I do not think it would be proper for the county welfare board to expend county moneys for such permanent improvements except under the conditions stated in the following paragraph.

In the original act creating the county welfare boards, provision was made for the funds to be handled by that board. See Laws 1937, Chapter 343, Section 8, being Mason's Supplement 1938, Section 974-18. It was therein provided that on or before July 1, in each year, the county welfare board should submit to the board of commissioners an estimate of the amount needed by it to perform its duties; that the county board should consider the estimates so submitted and, if approved, should levy a tax as provided by law for said purposes. It is further provided that if the estimate is not approved, the county board of commissioners shall confer with the county welfare board and adjust a budget in accordance with the facts, and levy a tax for the amount required. The county welfare board has no authority to expend any county moneys except from the tax so levied. If the estimates for any year so submitted or approved, or the budget therefor so approved, should contain an item for permanent improvements to the county poor farm, it is my opinion (if the question mentioned in the paragraph last above should be resolved in favor of the existence of such power) that the county welfare board could make such improvements out of the funds so provided. If the budget of the county welfare board so approved, and for which a tax is levied, does not contain an item for permanent improvements to the poor farm, the county welfare boards have no authority to make such improvements out of any county funds.

2. See opinion dated August 1, 1939, rendered to the Blue Earth County Attorney, and opinion dated June 23, 1937, to the Brown County Attorney.

You will see from these opinions that it is the opinion of this office that the county welfare board and not the board of county commissioners should assume the responsibility for the operation and maintenance of the county poor farm. This being so, it naturally follows that in order to maintain and operate the poor farm, the county welfare board should have the power to appoint and remove the poor farm overseer. Otherwise, such overseer would not be subject to the control of the county welfare board and the welfare board might well be hampered and obstructed by the actions of an overseer of the poor farm whom they did not choose and did not have the power to remove. Of course, any actions taken by the county welfare board must conform to the rules and regulations, if any there be, adopted by the director of social welfare and applicable to such a matter.

3. Answer in the negative. It is true that Laws 1941, Chapter 370, Section 2(d), does conclude with the language "the provisions of this act will not be construed to apply to poor relief or direct relief." It is very doubtful whether it was the intention of the legislature by this concluding language to return all poor relief and direct relief to the county commissioners. At the same session of the legislature, however, and four days after Chapter 370 was adopted, the legislature enacted Laws 1941, Chapter

476. This later law reenacts the provision as to the duties of the county welfare board making them the same as they were at the time the act was originally adopted in 1937.

Laws 1941, Chapter 476, provides that the county welfare board "shall be charged with the duties of administration of all forms of public assistance and public welfare both of children and adults." No reference is made to Laws 1941, Chapter 370. It is my opinion that it was the plain intent of the legislature when Laws 1941, Chapter 476, was adopted to make and leave the duties of the county welfare board the same as they were under the original act, and it was not intended to return direct relief or poor relief to the jurisdiction of the county board of commissioners.

RALPH A. STONE,
Special Assistant Attorney General.

January 22, 1942. 125-A-64

STATE

AGENCIES

281

Liability—Political subdivisions—Counties—Municipal corporations—School districts—Immunity from liability for negligence of officers and employes engaged in governmental functions—Insurance.

University of Minnesota—Use of automobiles by staff members in university business—Liability of regents—Insurance at expense of university funds—M40 §§ 672-1, 672-2, 1920-1, 1920-2, 2816-8, 2816-9, 3139-3, 3139-4, 3139-5; (MS41 §§ 125.17, 137.02, 375.31, 375.32, 471.42, 471.43).

University of Minnesota.

Questions

What legal or other liability does the university assume when cars owned and operated by staff members are used in connection with recognized university business, with special reference to the following considerations:

(a) Whether or not reimbursement is made by the university for such use;

(b) Whether such use is with or without the knowledge and consent of the university administrative officials.

Answer

There is no legal liability on the part of the university (including in that term the Board of Regents as the governing body of the institution) for any injuries caused by the negligence of staff members while operating their cars in the course of their duties in connection with the functions of the university as a public educational institution. The university is an agency of the state. State ex rel. University v. Chase, 175 Minn. 259, 220 N. W. 951. In its primary activity, that of public education, the university is engaged in a governmental function. It is well settled that neither the state itself nor any of its agencies or political subdivisions is liable for injuries resulting from the negligence of public officers or employes while engaged in the performance of such a function. Dunnell's Digest, Sections 2286, 6809 and 8673.

The fact that the Board of Regents is made subject to suit by the fundamental statute prescribing its powers and duties, confirmed by the state constitution, does not render it liable for such injuries. Municipalities, school districts, and other governmental subdivisions are in a similar situation. They are subject to suit but are not liable for injuries caused by their officers or employes while engaged in governmental functions (with certain exceptions in the case of cities and villages not here pertinent).

The questions of reimbursement of university staff members for the use of their cars and of knowledge or consent of university administrative officials, to which you refer, are immaterial in this connection. These considera-

tions might have some bearing on the question whether a staff member was engaged in university business or not in a particular case, but if he was actually using his automobile on public university business, the university itself would be immune from liability, regardless of whether or not the university authorities had approved such use of automobiles or had allowed compensation therefor.

No question is presented as to whether the university would be liable in case it should engage in other than public educational activities, and this opinion does not apply to any other activities.

What has been said concerns only legal liability. In your question you refer also to "other liability." It is well established that when someone is injured in his person or property through the negligence of a public officer or employe engaged in a governmental function, there is a so-called moral or equitable liability on the part of the public agency concerned. State ex rel. Wharton v. Babcock, 181 Minn. 409, 232 N. W. 718. This liability cannot be enforced by legal action, for the reasons already stated, but the legislature may recognize it and award compensation accordingly, and so may governmental subdivisions, if authorized by law.

The question whether the Board of Regents, without express statutory authority, has power to recognize and award compensation for such moral liability has never previously been passed upon either by the courts or by this office, as far as I can discover. In the absence of an authoritative court decision on the matter, it is doubtful whether the board has such power. The power to assume and compensate for moral liability is essentially legislative, due to the fact that the immunity of the state and other public agencies from legal liability is based on grounds of public policy, the rules and principles of which can be modified or waived only by a legislative act. Under our state constitution all primary legislative power is vested in the legislature. Dunnell's Digest, Sections 1597, 1602. Within certain limits the legislature may delegate legislative functions to executive or administrative agencies, but the fundamental legislative power may not be delegated. Id. Sections 1597 to 1600, inclusive. Under the state constitution the Board of Regents, as governing body of the university, has broad powers which are beyond the reach of the legislature.

State v. Van Reed, 125 Minn. 194, 145 N. W. 967.

State v. Chase, 175 Minn. 259, 220 N. W. 951.

Fanning v. University of Minnesota, 183 Minn. 222, 236 N. W. 217.

State v. Quinlivan, 198 Minn. 65, 268 N. W. 858.

However, the Supreme Court has never gone so far as to hold that the Board of Regents possesses any legislative power in the primary or fundamental sense. In State v. Chase, above cited, the court said:

> "Generally, the distinction between the jurisdiction of the legislature and that of the regents is that between legislative and executive power.

"Fortunately for us, this case does not require the boundary to be run between the province of the general lawmaking power of the legislature and that of the special managerial function of the regents in respect to the university. It is enough to hold, as we do, without going farther, that the legislature cannot transfer any of their constitutionally confirmed power from the regents to any other board, commission, or officer whatsoever. Their appointment by the territorial legislature as sole members and directors of the university corporation was confirmed by the constitution. That put them in a position somewhat analogous to that of the governing board of the ordinary corporation."

Even assuming that the constitutional functions of the regents are to some extent legislative in character, they are strictly limited to those which are necessary or incident to the proper administration of the university.

This brings the situation of the university in respect of the matter here under consideration within the rule laid down in the case of State ex rel. Wharton v. Babcock, above cited. In that case, as already stated, the Supreme Court pointed out that the legislature may recognize a moral obligation of the state and grant compensation therefor. However, the court held further that the allowance of compensation for damages caused by negligence on the part of employes of the State Highway Department in no way furthered or contributed to the construction or maintenance of the highways, and therefore the legislature could not authorize payment of such compensation from the trunk highway fund, which was set aside by the constitution solely for trunk highway purposes. With equal force it may be said that in the absence of express enabling legislation compensation for damages caused by the negligence of university employes may not be paid by the Board of Regents, because its powers are confined to using the funds at its disposal for university purposes.

The legislature could undoubtedly appropriate money from any available general funds for payment of damages caused by negligence of university employes, and could authorize the regents, under proper conditions, to allow and pay claims under such appropriations, in accordance with the procedure that has been followed in the case of trunk highway claims and in various other cases. However, funds impressed with a trust or otherwise expressly dedicated for university purposes would be immune from such use, as in the case of the constitutional trunk highway fund.

By Laws 1935, Chapter 173, Mason's Supplement 1940, Sections 3139-3, 3139-4, and 3139-5, the legislature undertook, among other things, to authorize the regents of the university to indemnify officers or employes of the university against liability arising out of the operation of motor vehicles or other equipment by them while engaged in the performance of their duties, to compromise and settle claims or suits arising out of such liability, and to pay therefor out of public funds. However, the legislature made no appropriation for payment of such claims from the general revenue fund of the state or other funds at its disposal. Apparently it was contemplated that claims would be paid from university funds derived from other sources and in charge of the Board of Regents. For the reasons already stated, such

funds are not available for this purpose. Hence, in my opinion, the regents should not attempt to pay any claims under this statute unless and until the legislature shall appropriate money therefor from available funds.

There is another reason why the regents would be well advised to refrain from paying claims under the act above mentioned. As before pointed out, the actual recognition and payment of claims based on moral obligations is a legislative function. If the legislature undertakes to delegate that function at all to the regents or to any other public agency, it must be under such conditions prescribed in the law itself, as will secure reasonable and uniform exercise of the authority conferred. A provision like that contained in the act in question, which leaves it entirely to the discretion of the regents to distribute the bounty of the state in whatever cases of liability they may see fit to recognize, with no definition of prerequisite conditions and no limit on the amount of funds that may be so distributed in any case or in the aggregate, is of doubtful validity, to say the least.

2. You inquire as to the authority of the Board of Regents to procure liability insurance covering automobiles belonging to staff members when used by them in university business, and ask whether the placing of such insurance would create a legal or other liability on the part of the university not previously existing.

The 1935 act above cited, in addition to the provisions already discussed respecting payment of claims, authorized the regents to pay out of public funds premiums on indemnity insurance policies insuring "such governmental agency" (presumably meaning the university) against such liability, also to pay the premiums on such policies insuring such officers or employes against such liability, with the proviso that "such payment of insurance premiums out of public funds shall in no way impose on said regents of the University of Minnesota any liability whatever."

With respect to assumption of liability, this act is entirely different from most legislative acts providing for payment of moral obligations of the state. Usually such acts either appropriate money directly for payment of specific claims or else authorize the claimants to bring action thereon, thus, in effect, transforming the obligation from a moral into a legal one. The act here in question not only lacks any such provisions but it set up an affirmative bar against the imposition of liability upon the regents. Even without such a protective provision in the statute, the procurement of insurance by the regents would not in itself create any liability to injured persons where none existed before, because the latter would not be parties to the policies and would have no interest therein as beneficiaries in the legal sense. Consequently the regents may be assured that by effecting the proposed insurance they will not assume any new liability to injured persons.

The question occurs whether the spending of public money for insurance in cases where no legal liability can be enforced against the university is not objectionable for the same reasons as the use of such money to pay claims for damages. It is elementary that public funds may not be spent for purely private purposes. However, public liability is by no means the

only or even the main criterion in determining whether or not the purpose of an expenditure is public. The controlling consideration is public benefit. The basis of the decision in the Wharton case, above cited, was that payment of claims for damages for highway accidents actually contributed nothing to the construction or maintenance of highways, and, as already stated, the same rule is applicable to university affairs. However, the taking out of insurance stands on a different footing. Undoubtedly the use of automobiles by staff members expedites university business. At the same time it subjects the drivers of the cars to increased liability and apprehension of loss, and in case of an accident and consequent controversy over damage claims, to interruption of work and attendant distractions which impair their usefulness to the university. The Board of Regents may also be put to considerable trouble and perhaps to expense in dealing with accident claims, despite its immunity from liability. The board is subject to suit, and even though the action be a futile one, the board must arrange for legal representation and for the taking of such steps as may be necessary to protect itself against a possible judgment. These consequences may occur even in cases where the university staff members involved are in no way to blame. All this will be largely alleviated by the carrying of liability insurance. Hence, in my opinion, there is a possibility of benefit to the university from such insurance which might justify the use of public funds therefor. The legislature has expressly recognized that possibility by the act before cited, authorizing insurance against the liability of university employes. Whether the actual benefit from such insurance under given conditions would be sufficient to warrant payment of the cost from university funds is a matter which the board must determine in the exercise of its judgment and in the light of its knowledge of conditions. It goes without saying that the expenditure would not be justified unless there was a reasonable expectation of a commensurate benefit.

As to possible sources of money, I think that any funds at the disposal of the regents for general university maintenance or expenses, regardless of source, might properly be used for this purpose, though of course funds expressly set apart by trust provisions or otherwise dedicated or appropriated for other specific purposes, not comprising insurance, would not be available.

This should not be construed as holding that any other state department or public agency may use funds appropriated for general expense or maintenance to procure liability insurance on officers or employes without express statutory permission. The Board of Regents, under its constitutional powers, has broader authority and greater freedom from legislative control in matters of detail than other public agencies. The board may undertake any enterprise or activity within the proper general field of public university functions and may use therefor any money at its disposal which is not expressly restricted in some way to some special purpose. State v. Chase, before cited. Other state departments and public agencies are under direct legislative control in the expenditure of public money (subject, of course, to limitations imposed on the legislature by the constitution, as in case of the trunk highway fund). As before stated, the legislature has expressly

authorized the Board of Regents to take out insurance of the kind in question. It has also authorized counties, cities, villages, towns, and school districts to procure similar insurance. Mason's Supplement 1940, Sections 672-1, 672-2, 1920-1, 1920-2, 2816-8, and 2816-9. In view of these express provisions, it must be assumed that the legislature does not intend state departments and other public agencies not covered thereby to have authority to procure such insurance.

3. Certain special provisions will be necessary in an insurance policy of the kind in question due to the fact that protection is desired against the risks incurred both by the Board of Regents and by the staff members operating cars, and that these risks arise in connection with the performance of a governmental function. Every such policy should accordingly be framed so as to cover expressly both kinds of risks, including the defense of all actions involving any such risks, whether brought against the state, the university, the Board of Regents, or any officer or employe concerned, and should provide that the insurance company shall not be relieved from its obligation to pay any loss, defend any action, or comply with any other requirement of the policy on the ground that the insured or any of them were engaged in the performance of a governmental function. There should also be a proviso that neither the acceptance of the policy, the payment of premiums thereon, nor the acceptance of any benefits thereunder by the Board of Regents shall be deemed a waiver of any immunity on the part of the State of Minnesota, the university, or the Board of Regents from any liability in respect of any matter affected by the policy.

4. One of the points mentioned in your first question as to liability has some bearing on the matter of insurance. That is the question of approval by university administrative authorities of the use of cars owned by staff members in university business. Obviously, if such use were permitted without restriction or regulation, it would open the door for abuses and would make it difficult to secure insurance at reasonable rates. Hence it would be advisable for the board to prescribe appropriate rules on the subject, making it clear that if staff members should use their cars in connection with university business in violation of the rules they would do so at their own risk, without benefit of the protection afforded by any insurance that might be obtained by the Board of Regents.

CHESTER S. WILSON,
Deputy Attorney General.

January 26, 1942. 618-A-9

ACTIONS

282

State cannot be sued unless authorized by law—Proceedings affecting real estate in which state may be joined as defendant—County attorney—When disqualified from acting as attorney in action against state.

Clay County Attorney.

We received in due course your two letters of October 21, enclosing

copies of summonses and complaints in the above entitled matters. Both complaints are in the ordinary form of action to quiet title to lands occupied by plaintiffs, with no allegations of any special grounds.

The State of Minnesota is named as a defendant in both actions. I do not know how you intended to make proof of service on the state, as you made no request for admission of service. It is our practice, as an accommodation to attorneys, to admit service upon request in those cases where the state may properly be joined as a defendant. However, the state cannot be made a defendant in an ordinary action to quiet title, there being no statutory authority therefor. Neither the Attorney General nor any other agency can consent to joinder of the state as a defendant unless authorized by law.

Hence any judgment which might be taken against the state in a case of this kind would be a complete nullity, and would be ineffectual in determining or defining the interests of the state in the premises. Accordingly in order to prevent the entry and recording of the judgments against the state in such cases, which might mislead interested parties who were unaware of the legal inefficacy thereof, it has been our practice, whenever the state is named as a defendant in such a case, to remind plaintiff's attorney of the legal situation, as above indicated, and request a voluntary dismissal, or, failing that, to secure a dismissal of the state either through special appearance and motion or through demurrer.

Only last week we received such a dismissal from a Duluth attorney who had started action against the state, overlooking the absence of statutory authority, and a number of earlier cases have been disposed of in the same way.

Under the circumstances I trust that you will send us dismissals of the state in your actions.

The only proceedings affecting title to real estate in which the state may be joined as a defendant, so far as we know, are the following:

Torrens registration proceedings;

Partition proceedings;

Condemnation procedings;

Actions to set aside tax sales under Minnesota Statutes 1941, Section 280.33 (Mason's Section 2146);

Actions to quiet title to tax-forfeited land under Minnesota Statutes 1941, Section 284.08 (Mason's Supplement 1940, Section 2190-2).

The county attorney is disqualified from acting as attorney for plaintiffs in the two kinds of actions last mentioned, since the statute requires him to act as attorney for the state, and even without such an express requirement his position as adviser to county officers whose actions may be involved would make it improper for him to appear in behalf of an adverse party.

However, it has never been held improper for the county attorney to appear as attorney for plaintiff in any of the other kinds of proceedings above listed, unless he has been requested by the Attorney General to appear for the state or is under obligation to avoid bringing action against the state for some other special reason.

CHESTER S. WILSON,
Deputy Attorney General.

November 12, 1942. 374g

BOARDS

283

Hairdressing and Beauty Culture—Budget—M27 § 5846; L 41, C 490 § 4; (MS41 § 155.06).

Minnesota State Board of Hairdressing and Beauty Culture Examiners.

Question

Does the $15,000 budget include the following:

1. The Board Members per diem and their travel and subsistence.
2. Expenses such as office supplies, rent, use of schools for examinations and supplies, monitors, telephone, salaries of our inspectors and their travel and subsistence.

Answer

Undoubtedly, you refer to Mason's Minnesota Statutes of 1927, Section 5846-31, as amended by Laws 1941, Chapter 490, Section 4, which provided in part as follows:

> "* * * His (executive secretary) salary and necessary expenses incurred in the transaction of the business of said board, and the salaries and necessary expenses of assistants, inspectors and clerical help shall be fixed by the board; provided, however, that the total sum of money to be expended for the salary of the said executive secretary, assistants, inspectors and clerical help and other necessary expenses connected with said work shall not exceed the sum of $15,000 per annum."

An analysis of this provision indicates, although the language is somewhat ambiguous, that it is the duty of the Board (1) to select certain employees having certain qualifications, and (2) to fix the salaries of such individuals. It is our opinion that it was the intention of the legislature to limit the amount of money to be expended by the members of the Hairdressers' Board, and with respect to payrolls to the amount of $15,000, this sum to include the items included in the payroll and the travel and subsistence of the employees.

It is true that the words, "and other necessary expenses connected with said work" is included in this provision. However, this language refers only

to the personnel, and to the employees of the Board. It charges both its executive secretary and its employees with certain duties, and it is very doubtful whether any intent was to limit the amount to be expended by the Board in the performance of all of its functions to any said amount. Its purpose clearly was to limit the payroll, mileage and subsistence of the employees and that alone, and did not deal with such other problems as appear in your inquiry No. 1 or No. 2.

JOHN A. WEEKS,
Assistant Attorney General.

August 7, 1941. 33-B

284

Investment—Loans—Right of municipality to redeem bonds not yet due.
Renville County Attorney.

Facts

It appears that the County of Renville has heretofore obtained loans of state funds aggregating $262,000 represented by bonds held by the State Board of Investment which are not yet due, some of which bear 4% interest per annum and others 5%. The county is now able to borrow money at 2%.

Question

Whether or not the State Board of Investment can be compelled to accept full payment of the bonds now, that is, before they are due, so as to permit Renville County to obtain a lower interest rate by refinancing.

Answer

Former Attorneys General have advised the Board of Investment that it is generally without authority to accept payment of the entire amount owed to the state before the due date, if such acceptance means a loss of trust funds.

While it would be to the advantage of the county to retire these bonds, it would be to the disadvantage of the state. What the county would save in interest the state trust fund might lose. A trustee who surrendered a 5% investment knowing the money received could only be invested at a lower rate of interest would be open to criticism. The position of the State Board of Investment is that of a trustee. The Constitution requires it to preserve the trust fund "inviolate and undiminished."

The Board, I believe, has at times accepted before due date, in some cases, surplus on hand and paid into the county to be applied on bonds which are direct obligations to the state. As I understand it, your county has already reduced its bonded indebtedness to the state by the amount so collected and paid to the state.

For reasons herein stated, we are of the opinion that the Board of Investment cannot be forced by legal procedure to accept payment on the bonds in question.

ROLLIN L. SMITH,
Special Assistant Attorney General.

August 27, 1941. 37-a-7

CIVIL SERVICE

285

Employees—Salaries—Rule permitting unused vacation pay to heirs or estate of deceased employee valid—Civil Service Act.

Civil Service Director.

Question

Whether the rule adopted by the civil service board which authorizes the payment for the unused portion of the annual leave accumulated to the credit of a state employee at the time of his death to his widow, orphan or estate is valid. The following being an excerpt of rule 18.6 as amended:

> "* * * Any employee who is separated from the state service by lay off, resignation, death or otherwise shall be entitled upon separation to pay for any unused portion of his annual leave allowance. * * *"

Answer

Section 5 of the state civil service act authorizes the director to prepare and recommend to the board rules and regulations for the purpose of carrying out the provisions of the act, such rules to provide among other things for, "* * * leaves of absence with and without pay * * * vacations and hours of work; * * * and other conditions of employment."

Section 6 of the civil service act provides in part as follows:

> "It shall be the duty of the civil service board and it shall have power: a. to approve, modify, reject, or approve as modified, rules and regulations and amendments thereto prepared and recommended by the director for carrying out the purposes of this act. * * *"

Prior to the enactment of the state civil service law, there was nothing contained in the statutes of the state which either recognized or authorized the right of state employees to vacations or annual leaves of absence with pay. Such privileges were matters of grace which were dependent upon the discretion of the employee's department head. By the aforequoted statutory provisions, the legislature has delegated to the civil service board the power to make rules governing vacations. However, until the board has acted, the employee does not have a right to a vacation but is in the same position with respect thereto that he was prior to the passage of the civil service act. Under such situation, this office previously held in an opinion

to you dated July 29, 1941, that a deceased employee's heirs or estate were not entitled to pay for accumulated unused annual leave or vacation to which the employee was entitled at the time of his death. Field in his text on civil service, page 145, says:

> "Unless granted by law, leaves are not matters of right so far as the employee is concerned, but matters of grace. If leave is provided for by statute, the law may be phrased in such a way as to make it a matter of right. The legal theory of a leave is apparently that it promotes the efficiency of the employee to give him some time off, whether he is well or ill. Upon this theory, compensation may be given him during the period of the leave. However, if the leave is not a matter of right, but one of discretion, then it follows from this same theory that if the employee gets no leave, no claim can be made for compensation for an unused portion of the leave upon separation from the service."

In a note cited in support of such statement, the following citations are given:

> "13 Dec. Comp. Gen. 179 (1933). Cf. 7 Dec. Comp. Gen. 198 (1927).
>
> Example of departmental regulation, 4 Dec. Comp. Gen. 69, 161 (1924)."

Benefits which are conferred upon public employees in addition to the salary or compensation received by them at the time of the performance of their services, such as pensions, annuities, vacations, etc., have been referred to and viewed as deferred compensation for services previously rendered. If the employee at the time of his death had compensation due him for actual work, there would be no question of the right of his heirs or estate to such moneys. Laws 1941, Chapter 408. Therefore, where the legislature authorizes vacations, the employee's right thereto becomes absolute. This right, of course, may be withdrawn at any time by the power creating it (Hessian v. Irvin, 204 Minn. 287, 283 N. W. 484; Johnson v. State Employees Retirement Fund, 208 Minn. 111, 292 N. W. 767; Pennic v. Reis, 132 U. S. 464; Dodge v. Board, 302 U. S. 74) but until such is the case, it is not subject to the whim, caprice or discretion of the individual who may be the employee's superior. As to emloyee's right to vacation prior to adoption of rule see Nollet v. Hoffman, 210 Minn. 88, 297 N. W. 164, 134 A. L. R. 192.

You are advised that, in my opinion, the aforementioned rule is a valid exercise of the power bestowed upon the civil service board by the legislature, and that the same bestows authority to pay to the heirs or estate of a deceased employee such pay as he may be entitled to for any unused portion of his annual leave allowance.

JOHN A. WEEKS,
Assistant Attorney General.

November 6, 1941. 644-F

DEPARTMENT OF HIGHWAYS

286

Tax—Payment of on special use fuels—Exemption of state—L 41, C 495; (MS41 § 296.04).

Commissioner of Highways.

Facts

Laws 1941, Chapter 495, Section 10, subdivision 2, provides:

"Persons using special use fuel in motor vehicles shall * * * pay the tax * * * on special use fuel received in this state for use in motor vehicles."

Question

Whether it is subject to the tax imposed upon persons using special use fuel under the above quoted provision.

Answer

Our constitution exempts from taxation "public property used exclusively for any public purpose." Article 9, Section 1. Even if the said constitutional provision does not exempt the state from the tax in question, it would seem that the statute imposing such a tax is subject to the general legal principle set forth in the case, In Re Delinquent Real Estate Taxes, Polk County, 182, Minn. 437, where it is held that "while legally competent for a state in the absence of a constitutional obstacle to put some tax burden on its own property, it is presumed, nothing more appearing, that no legislature intends to do so." The Court in its opinion in that case quotes with approval the following statement:

> "Therefore, such property, even when not exempted from taxation by a constitutional or statutory provision, is exempted by necessary implication."

The persons upon whom the excise tax here considered is imposed are defined in Laws 1941, Chapter 495, Section 1, subdivision 5. The definition there given of "person" includes both public and private corporations but does not include governmental agencies other than public corporations. Therefore, it appears that said Section 10, subdivision 2, imposes the excise tax therein provided upon counties, cities, villages and other governmental subdivisions that are held to be public corporations but does not impose it upon any of the state governmental agencies such as the highway department that are not public corporations.

Previous holdings that state departments are subject to the gasoline tax are not inconsistent with this opinion in view of the fact that in the case of Arneson v. Barber Co., 297 N. W. 335, the Court held that "it seems clear that the legislature intended to levy the tax upon the distributor," and that "we think the legislative intent and purpose clearly show the tax to be one imposed upon the distributor." Section 10, subdivision 2, relative to taxing

special use fuel and above cited, does not impose a tax upon the distributor but directly upon the user of such special use fuel. Assuming, without expressing an opinion, that the constitution does not exempt the state from the latter excise tax, a statute imposing such a tax must by express enactment indicate that the legislature intended to tax the state. As above stated, the statute in question provides expressly for a tax on public corporations, but not upon the state or its governmental agencies that are not public corporations.

I am, therefore, of the opinion that the state highway department is not subject to the tax on the user of special use fuels under the statutory provision hereinabove cited.

J. A. A. BURNQUIST,
Attorney General.

October 28, 1941. 324-E

EMPLOYEES

287

State colleges—Teachers and pupils—Sales of supplies to—L41, C 58; (MS41 § 15.055).

Commissioner of Education.

Facts

Laws 1941, Chapter 58, provides:

> "No department or agency of the State of Minnesota, or any political subdivision thereof, or member or officer, acting in such capacity, of any town or county board or common council of any village or city, or any purchasing agent or purchasing agency of the state or any political subdivision thereof, **shall sell or procure for sale or have in its possession or under its control for sale to any employees of the state** or of any political subdivision thereof, any article, material, product or merchandise of whatsoever nature, except any article, material, product or merchandise, the sale or distribution of which is or may hereafter be specifically authorized by law or ordinance."

In one of the state teachers' colleges a college book store is maintained by the college; this store purchases and sells paper, pencils, ink and other school supplies to students and professors of the college.

Question

1. Does Chapter 58 prohibit the sale of merchandise to faculty members when the college book store is operated by the college itself?

Answer

Faculty members of a state teachers' college are paid their salaries out of state appropriations. They are state employees within the meaning of

the act cited. Hence the sale of merchandise to them by a store conducted by the college is clearly prohibited in Chapter 58.

However, the further question arises as to the right of the state through a state teachers' college, or some other state agency, to conduct a store of any kind. It is elementary that the state may not engage in private business. Lipinski v. Gould, 173 Minn. 559. Quoting from that case, which dealt with the game and fish laws: "We may concede that buying fish for the purpose of reselling them is a private business and that using public funds for that purpose is forbidden by the constitution."

It is true that the teachers' college board may, as an administrative matter, decide that some supplies shall be furnished to teachers, and perhaps also to students, for use in connection with college work, but this involves no sale of merchandise. It goes without saying that the board has no power to provide that such students and teachers be furnished with merchandise at state expense for private, non-school use. In any event, it is our opinion that the maintenance of a store as an official college activity for the sale of merchandise to anyone is without legal authority. This is not to say that all sales of merchandise by state agencies are illegal. However, we think it is clear that a state agency has no authority to engage in carrying on a line of business which is commonly conducted by private enterprise.

Question

2. Does Chapter 58 prohibit the sale of merchandise to students when the college book store is operated by the college itself?

Answer

Chapter 58 would not apply to a student who was not an employee of the state. However, for the reasons before stated, maintenance of a store by the college for sale of merchandise to students or others would be unlawful.

Question

3. Since Chapter 58 permits the sale of merchandise "which is or may hereafter be specifically authorized by law or ordinance," would the teachers' college board have authority to authorize the sale of such supplies within the meaning of this law?

Answer

This inquiry is largely answered by what has been said. The state teachers' college board has no power to authorize the sale of supplies to teachers and pupils in volation of Chapter 58. The board has power to adopt reasonable rules and regulations governing the conduct and administration of the various institutions committed to its care. An administrative regulation by it does not constitute "a law or ordinance" within the exception specified.

Question

4. Could such supplies be sold through a co-operative book store not directly under the control of the teachers' college board or its agent, the store being operated by permission in a state owned building?

Answer

This brings up the question of the right of the college authorities to permit a private commercial enterprise to use space in a state owned building. We give no opinion on this phase of the question at this time inasmuch as you do not submit it.

We are clear, however, that sales of school supplies to students and teachers by a co-operative book store not under the control of the college authorities are not within the prohibition of Chapter 58. This inquiry is, therefore, answered in the affirmative.

ROLLIN L. SMITH,
Special Assistant Attorney General.

October 16, 1941. 90-F

FORESTRY

288

"Fires for domestic purposes" not requiring burning permits defined—M27 § 4031-22; (MS41 § 88.16).

Division of Forestry.

Question

Mason's Minnesota Statutes of 1927, Section 4031-22, which prohibits the starting or having of any open fire **except for domestic purposes,** without a written permit from the Division of Forestry.

You ask our definition of the scope of the phrase "domestic purposes" as used in the above act.

Answer

The term "domestic" is derived from the Latin word "domus," meaning house or home.

The courts have had frequent occasions to interpret and define the meaning of the word as used in connection with the various uses or agencies, but never so far as we have found have the courts interpreted the meaning or extent of fires for "domestic purposes."

The word "domestic" is generally held to relate primarily to the house or home and excludes the idea of relationship to vocation, business, or means of obtaining a livelihood.

Henderson v. Shreveport Gas and Electric Light and Power Co., 134 La. 39, 63 So. 616. Mitchell v. Tulsa Water, Light and Power Co., 21 Okla. 243, Barres v. Watterson Hotel Co., 196 Ky. 100, 244 S. W. 308, Kimball v. Northwestern Harbor Water Co., 107 Me. 467, 78 Atl. 865.

The Minnesota Supreme Court, in defining a "domestic" servant, has held that it is a servant who resides in the same house with the master and does not extend to workmen or laborers employed out of doors.

Anderson v. Ueland, 197 Minn. 518, 267 N. W. 517.

If the term used, therefore, had been "except for domestic fires," we should be compelled to limit its application to fires within the house or home for household purposes.

However, the term as used in the statute, namely "fires for domestic purposes," must be given a somewhat broader meaning. A close analogy would appear proper from the interpretation by the courts of the meaning of a phrase frequently used in statutes and ordinances, "water for domestic purposes." The courts are in general agreement that the words "domestic purposes," as so used, include "all uses which contribute to the health, comfort and convenience of the family **in the enjoyment of their dwelling as a home."**

Crosby v. City Council of Montgomery, 108 Ala. 498, 18 So. 723.

Mitchell v. Tulsa Water, Light, Heat and Power Co., 21 Okla., 243, 95 Pac. 961, People v. Palasz, 191 Mich., 556, 158 N. W. 166.

Water for domestic uses has been held not to include water used for watering lawns.

Ward v. Birmingham Water Works Co., 152 Ala. 285, 44 So. 570.

It has been held not to authorize furnishing water for the creation of power for mechanical purposes.

Mayor, etc., of Town of Boonton v. United Water Supply Co., 70 N. J. Eq. 692, 64 Atl. 1064.

From these authorities and others examined, it is our conclusion that in using the phrase "except fires for domestic purpose," the legislature thereby intended to exempt from the requirement of a burning permit only those fires directly associated with uses essential or desirable for the enjoyment of the home or house as a dwelling. Illustrations readily at hand might be a cook fire in the yard, a fire for heating water for laundry purposes, or in a bath house.

It would not include fires for the purpose of burning grass, hay meadows, brush or slash, even though in connection with the operation of a farm. Such operations we deem to be in connection with the occupation or vocation of the owner. Under the decisions, it would appear that activities outside

of the home, even though for the purpose of beautifying or improving the appearance of the surrounding country or the grounds, are too far removed from the use of the home as a dwelling to be considered as being for domestic purposes.

MANDT TORRISON,
Special Assistant Attorney General.

May 13, 1942. 203-L-2

LEGISLATURE

290

Incompatible offices—Judicial Council—Eligibility of members—L 37, C 467.

Hon. Beldin H. Loftsgaarden.

Since advising you under date of November 16, 1940, that members of the legislature were not eligible to appointment to the Judicial Council, I have had occasion to again go into that question and I have come to the conclusion that such opinion should be reversed to hold that members of the legislature are eligible to appointment to the Judicial Council.

Upon a re-examination of Chapter 467, Laws of 1937, I find that this act does not involve the exercise of any power or discretion on the part of the council; that its chief function is advisory. It is created for the purpose of study and research of matters relating to the administration of the judicial system and it may, from time to time, make suggestions regarding the rules of practice and procedure and report the same to the Governor.

Members of the council would not fall within the category of either officers or employees, but are an advisory commission or council.

JOHN A. WEEKS,
Assistant Attorney General.

January 21, 1941. 280-h

291

Incompatible offices—Members of Legislature and members of Legislative Emergency Committee are—Minn. Const., Art III, § 1; Minn. Const., Art. IV, § 9; L 39, C 431.

Honorable C. Elmer Anderson,
President of the Senate.

Question

Whether or not the Constitution of the State of Minnesota permits regularly elected and qualified state senators and representatives to serve as members of the Legislative Emergency Committee, created under Laws 1939, Chapter 431.

Answer

The Constitution of Minnesota contains the following provisions:

Article 4, Section 9

"No senator or representative shall, during the time for which he is elected, hold any office under the authority of the United States or the State of Minnesota except that of postmaster * * *."

Article 3, Section 1

"The powers of the government shall be divided into three distinct departments, the legislative, executive, and judicial; and no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others, except in the instances expressly provided in this constitution."

The conferring by the legislature of governmental powers and executive functions upon members of a committee, as intended by Chapter 431, would render the position held by each of such members an office and would require the performance of administrative duties. The holding of such office or the exercise of such powers by a legislator would be in violation of the aforesaid constitutional provisions.

People v. Tremaine, 252 N. Y. 27; 168 N. E. 817.

In re Opinion of the Justices, 19 N. E. (2d) 807; 302 Mass. 605.

In re Opinion of the Justices, 21 N. E. (2d) 55; 303 Mass. 615

State ex rel. Nagle v. Kelsey, 55 Pac. (2d) 685.

In view of the foregoing, state senators and representatives may not constitutionally serve on the Legislative Emergency Committee.

J. A. A. BURNQUIST,
Attorney General.

April 7, 1941. 280-h

292

Legislator—Resignation of and holding other office—Construction of Minn. Const. Art. IV, Sec. 9, pertaining thereto—Minn. Const., Art. IV, § 9; M27 § 6952; (MS41 § 359.06).

Governor.

Questions

"* * *if a legislator is a member of the legislature during a session in which an office is created or the emoluments of an office are increased and then is reelected to serve in a subsequent session of the legislature during which the office in question is not affected by legisla-

tion, does the limitation in Section 9 apply until one year after the expiration of the subsequent term of office in the legislature or does it only apply to one year after the expiration of the term of office for the particular session in which the action affecting the office took place.

"* * * is it possible to resign from the legislature and have the term ended and thus become eligible for appointment either during a session with the acceptance of the resignation by the session or between sessions."

Answers

The portion of the constitutional provision pertaining to your first question reads as follows:

"§ 9. * * * no senator or representative shall hold an office under the state which has been created or the emoluments of which have been increased during the session of the legislature of which he was a member, until one year after the expiration of his term of office in the legislature."

In my opinion, the expiration of time referred to in the above quoted provision applies only to the year immediately succeeding the term in which the legislature created or increased the emoluments of the office in question.

The portion of the constitutional provision pertaining to your second question reads as follows:

"§ 9. No senator or representative shall, during the time for which he is elected, hold any office under the authority of the United States or the state of Minnesota, except that of postmaster * * *."

In construing the provision of the Constitution last quoted, the Supreme Court in its opinion in State v. Sutton, 63 Minn. 145, said:

"* * * There can be no serious question raised as to the right of a member of the legislature to resign his office; but, if he does so, it cannot enlarge his right to hold another office, in violation of this constitutional prohibition. The disability only ceases at the expiration of the full period of time for which he was elected."

Mason's Minnesota Statutes 1927, Section 6952, in so far as it pertains to members of the legislature, provides:

"6952. Resignations shall be made:

"1. By incumbents of elective offices, to the officer authorized by law * * * to order a special election to fill the vacancy. * * *"

Under the aforesaid decision and statutory section, it is apparent that a member of the legislature has a right to resign and that his resignation should be filed with the Governor, but if he does resign, he is still prohibited by the Constitution from holding any office during the time for which he was elected.

J. A. A. BURNQUIST,
Attorney General.

August 19, 1942. 280-D

OFFICERS

293

Auditor—Deputy—Right to serve on state executive council, boards and commissions in place of auditor while in military service—Minn. Const., Art. V, § 4; M27 § 66; L 41, C 120; (MS41 §§ 6.02, 192.26 to 192.264).

State Auditor.

Opinion

The Constitution of the State of Minnesota provides for the election of the state auditor, whose term shall be four years, and that, "his further duties * * *shall * * * be prescribed by law."

Mason's Minnesota Statutes of 1927, Section 66, directs the auditor to, "* * * appoint a deputy, who may perform all the duties of the office whenever the auditor is absent or disabled."

Among the duties of the auditor prescribed by law is membership of and service on various boards, commissions and the Executive Council.

Laws 1941, Chapter 120, provides that,

> "* * * any officer or employee * * * who engages in active service in time of war * * * shall be entitled to leave of absence from his public office * * * without pay during such service, with right of reinstatement * * *."

As the auditor is now on leave of absence and in the federal war service, as authorized by said Chapter 120, there is no such vacancy in the office of auditor as must be filled by an appointment by the Governor under the State Constitution, Article V, Section 4.

As the above referred to Section 66 authorizes the deputy auditor to perform all duties of the office in the auditor's absence, it is not necessary to appoint a substitute by the authority having power to fill a vacancy, as provided in Laws 1941, Chapter 120, Section 4.

Before the enactment of the law in 1941 providing for a leave of absence in time of war, it was the practice among state officers and, I believe, the intention of the legislature, that the elected incumbent of a constitutional office, and not his deputy, should serve on the Executive Council, boards and commissions of which the holder of such an office is by statute made a member.

However, in the present circumstances, it would be reasonable to assume that by enacting, at its last session, the law which makes possible a leave of absence by the state auditor, the legislature did not intend to create a vacancy on, and thus obstruct the business of the executive Council, boards and commissions of which he is an ex officio member.

Therefore, in my opinion, during the leave of absence of the state auditor authorized by said Chapter 120, his deputy is, in effect, the acting

auditor and as such he may, under the aforementioned Section 66, perform all the duties of the office, among which is the acting as a member of the official bodies on which the state auditor is by law required to serve.

J. A. A. BURNQUIST,
Attorney General.

April 8, 1942. 24-

294

Fire marshal—Authority of to condemn structures located on tax delinquent property—M27 § 5961; M40 § 2203; L 41, C 397; M41 §§ 2203-2, 2204, 2205, 5961-1; (MS41 §§ 73.09, 73.10, 272.38, 272.39, 272.40).

Kanabec County Attorney.

Facts

The state fire marshal has ordered the condemnation of a certain structure located on land against which back taxes are owing, and which are being paid under the confession of judgment law. The owner, pursuant to the condemnation order, has sold the building which is being removed from the premises. Mason's Supplement 1940, Section 2203, makes it a gross misdemeanor for any person to remove a structure from the lands against which taxes are "due and payable."

Question

As to the rights of the county.

Answer

The state fire marshal is authorized to condemn any structure which is a fire hazard or a life and limb hazard. Mason's Minnesota Statutes of 1927, Section 5961. The authority is a valid exercise of the police power. York v. Hargadine, 142 Minn. 219, 171 N. W. 773; State v. Fitzpatrick, 149 Minn. 203, 183 N. W. 141; State v. Sherman, 201 Minn. 594, 277 N. W. 249. It extends to all structures, even those owned by the state. Mason's Supplement 1941, Section 5961-1. The power may be exercised against structures located on property against which the taxes are delinquent. Opinion of the Attorney General, dated July 9, 1941.

The statutes authorizing the condemnation and prohibiting the removal of structures from tax delinquent property must be interpreted together.

The fact that the structure is condemned does not authorize the owner thereof to keep the proceeds from the sale of the structure or the debris. The owner of a condemned structure located on property against which taxes are due and payable, and not fully paid and discharged (and we view taxes being paid under the confession of judgment law in that class) should

enter into an agreement with the county auditor for the removal of such a structure, and the payment of the proceeds from the sale thereof to the county treasurer to be applied upon the taxes owing. This procedure is specifically authorized by Laws 1941, Chapter 397. See Mason's Supplement 1941, Section 2203, Subdivision 2.

In the event of the attempted removal of such a structure, absent an agreement to apply the proceeds of the sale to the payment of taxes due and payable, it

> "* * * may be seized by the state auditor, or by the county auditor, or by any person authorized by either of them in writing, and sold in the manner provided for the sale of personal property in satisfaction of taxes. * * *" Mason's Supplement 1941, Section 2204.

In addition to this right of seizure, it is also provided by Mason's Supplement 1941, Section 2205, that

> "Any person who shall remove or attempt to remove any structure, timber, minerals, sand, gravel, peat, subsoil or top-soil from any tract of land contrary to the provisions of this chapter, after such taxes become due and payable, and before the same have been fully paid and discharged, shall be guilty of a gross misdemeanor."

EDWARD J. DEVITT,
Assistant Attorney General.

October 29, 1941. 197-C

TAXATION

AUDITORS' PLATS

296

Platting for tax purposes—Platting does not necessarily change status of land from id. Section 1993, Class 3b to Class 3c—M27 §§ 1993-3b, 1993-3c, 2219; (MS41 §§ 272.19, 273.13, 510.09).

Blue Earth County Attorney.

Facts

The City of Mankato recently sold a tract of land to the Continental Can Company, part of which is in so-called acreage and part platted. The plat and land owned by the company cover several city blocks, and also extend into acreage in Mankato Township, adjacent to the city. The land is described by metes and bounds. This description includes portions of streets which have not been vacated. Reference is made to Mason's Minnesota Statutes of 1927, Section 2219, which authorizes the county auditor under certain conditions to make and file an auditor's plat of a tract of land of irregular shape. Some of the streets have been vacated by resolution of the city council, but some remain.

Questions

1. Can the auditor's plat overlie previously platted land, including streets which have not been vacated?

2. Can the auditor plat the land in question and thus change the status of the land for taxation from the 33⅓% class to the 40% class, resulting in increased taxes?

3. Must the auditor list the platted property for taxation by describing it by reference to lots and blocks of the existing plat?

4. May the auditor legally describe the entire tract of platted and unplatted land upon the assessment books by using a metes and bounds description?

5. Can the auditor make a plat of this property?

Answers

1. It is our opinion that the auditor, upon failure of the owner of certain real estate to make a plat as requested by the auditor under Section 2219, supra, may make an auditor's plat of a portion or portions of land previously platted, provided that the auditor's plat does not conflict with any dedication of streets or other public grounds therein, and provided further that the auditor has complied with all the requirements of said Section 2219.

2. The platting of land either by the auditor or the owner does not change the status of the land for taxation from Section 1993, Class 3b to Class 3c. The legislature employed the expression "unplatted land" to distinguish between urban and suburban property and the uses to which each materially is adapted, as agricultural and non-agricultural. State ex rel. Chase v. Minnesota Tax Commission, 135 Minn. 205, 207. This is the rule which determines whether property shall come within Class 3b or Class 3c. See also In the Matter of Certain Tax Proceedings, 149 Minn. 335.

3. The manner of describing a particular piece of real estate for tax purposes is to be determined by the county auditor in listing real estate for assessment as provided by Mason's Minnesota Statutes of 1927, Section 1986. It is his duty to use the shortest and simplest description which will identify the parcel of land which is to be taxed. If he deems it proper in his discretion to list that part of the land which has been platted by describing it by lot and block number, he may do so. He may list the balance or unplatted portion of the land by such metes and bounds description as he determines will adequately identify the land for tax purposes.

4. The auditor may, if he deems it proper, describe the entire tract of platted and unplatted land upon the assessment books by using a metes and bounds description, provided it properly describes the land which is to be taxed, having always in mind that the inclusion in the conveyance of streets still dedicated to the public use does not extinguish the dedication.

5. It appears from the letters received by this office that some of the streets have been vacated while others have not been so vacated. We assume that the proceedings for the vacation of the streets so vacated were in accordance with the requirements of Chapter 16 of the City Charter of Mankato. The land so vacated which we assume has become the property of the can company should be placed upon the assessment rolls by the county auditor for tax purposes. It does not appear from either letter why all of the streets involved in this matter were not so vacated. If they had all been vacated, the county auditor could have proceeded under Section 2219, supra, to require the making of a plat by the owner of all the land involved in this matter and, upon his failure to do so as required by such section, an auditor's plat could have been made. As the matter now stands, there appear to us to be two alternative courses of procedure. One is to complete the vacating of all streets involved in this matter by proceeding in the manner laid down in Chapter 16 of the Mankato City Charter and then having the auditor proceed under Section 2219 with the platting of the entire tract of land owned by the can company. The other method of procedure would be to vacate that portion of the original plat involved in the matter now before us by proceeding under Mason's Minnesota Statutes of 1927, Section 8244. There appears to be no provision in the City Charter of Mankato for the vacating of plats and therefore the foregoing section would control. Upon completion of such vacation proceedings, the county auditor could then require a plat under Section 2219, supra, and proceed accordingly thereunder.

GEO. B. SJOSELIUS,
Assistant Attorney General.

March 26, 1942. 18-D

DELINQUENT TAXES

297

Confession of judgment—Default—Owner may not pay delinquent taxes upon part of lands assessed—Ex. Sess. L. 35, C. 72; M27 §§ 2158, 2161, 2215; L 41, C 26, 108; (MS41 §§ 272.16, 281.08, 281.11, 281.47 to 281.51, 281.66, 281.67).

Mille Lacs County Attorney.

Facts

On February 27, 1937, a property owner in our county confessed judgment under the provisions of Chapter 72, Extra Session Laws of 1935. The delinquent taxes covered three 40-acre tracts in one assessment and all included in the judgment. The owner thereafter defaulted in the payments due in 1939 and 1940, and on September 12, 1940, the County Auditor served notice of the expiration of redemption. The owner now wishes to pay up the taxes on one of these 40-acre tracts.

Question

Is he entitled to do so?

Answer

We have held that when default occurs in payments due under a judgment confessed pursuant to Extra Session Laws 1935, Chapter 72, the penalties and interest accrued on the taxes placed within such confessed judgment are immediately reinstated. It therefore follows that when default occurred, the situation with reference to delinquent taxes upon said property became the same as though no confession of judgment had ever been made, except for crediting amounts actually paid under the judgment.

The question therefor is whether the county auditor has authority to make a division of three 40-acre tracts which were covered in one assessment so as to make it possible for the owner to pay the delinquent taxes on only a portion thereof. The answer to this question is in the negative.

We are assuming on the basis of your statement that the original delinquent tax judgment involved in the case was taken against the three forties together as a single parcel. Prior to judgment the taxpayer might have objected to the joinder, but he cannot raise such objections after the judgment has become final. State v. Aitkin County Farm Land Co., 204 Minn. 495, 284 N. W. 63. All subsequent proceedings must be based on the judgment against the entire property, unless a division is made upon a transfer under Mason's Minnesota Statutes of 1927, Section 2215. In that case payment of taxes on the different parts might be made by the respective owners under Section 2158. However, the owner of the whole may not avail himself of that privilege, unless there is some difference of interest as between the dscribed subdivisions. Statutes such as Section 2158 or 2161, providing for payment by the owner of a part, are not applicable. Attorney General's 1932 Opinion, No. 263.

We wish to call your attention to the fact that the owner of this parcel of land may reinstate his defaulted confession of judgment under the provisions of the statute enacted at the last session of the legislature, Laws 1941, Chapter 108; Laws 1941, Chapter 26.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

May 8, 1941. 412-A-10

298

Confession of judgment—Default—Procedure after default occurs—Ex. Sess. L. 35, C. 72; M40 § 2176-15; (MS41 § 281.51).

McLeod County Attorney.

You state:

We have a piece of real estate in this county upon which the taxes were delinquent for the years 1931 to 1936 inclusive, and on September 29th, 1938, a person interested in this tract came in and confessed a judgment pursuant to Extra Session Laws 1935-36, Chapter 72 and as amended.

The installment of ten per cent of the total delinquent taxes was paid at the time of the confession and an additional ten per cent plus the interest due was paid in September, 1939.

The installment due in 1940 has not been paid, and is past due.

You ask:

Will you kindly outline the procedure and steps to be taken to enforce payment of taxes of the forfeiture to the state for nonpayment of taxes.

Mason's Supplement 1940, Section 2176-15 (Chapter 72, supra, Section 5), provides as follows:

> "Laws 1935, Chapter 278 (Sections 2164-5 to 2164-18), 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 (2176-12) hereof shall be reinstated and the lands described in such confessed judgment shall thereupon be subject to forfeiture according to Laws 1935, Chapter 278."

We have heretofore held that when default occurs in payments due under the confessed judgment the penalties and interest accrued on the taxes placed within such confessed judgment are immediately reinstated. We have also expressed the opinion that it is necessary to give a new notice of expiration of redemption and that the property reverts to the same status which would have existed under the judgment for taxes if there had been no confession of judgment intervening. The amount paid by the owner under the confession of judgment will be credited by the clerk of the district court and will be distributed by the auditor in the manner provided by Section 2176-13, id. After the amounts paid have been so distributed, it becomes the duty of the county auditor to proceed in the proper manner with the forfeiture of these lands for the nonpayment of the taxes in the same manner as he would have proceeded if there had never been a confession of judgment entered affecting the taxes on this particular piece of property.

To answer your question, therefore, the auditor should first proceed, if he has not already done so, to distribute the taxes in the manner hereinabove described and after he has so done he should proceed to take appropriate steps to forfeit these lands to the state for nonpayment of the 1931 and subsequent taxes which may be in default.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

January 18, 1941. 412-A-10

299

Confession of judgment—Grace—60 days allowed under Laws 1941, Chapter 17, Section 6—Not applicable to confessions under prior laws, nor to reinstated confessions under Laws 1941, Chapter 26—L 41, C 17 § 6; L 41, C 26.

Polk County Attorney.

Question

Whether the provision of Laws 1941, Chapter 17, Section 6, allowing 60 days of grace before the taking effect of a default in a payment under a confession of judgment for delinquent taxes, applies to outstanding confessions of judgment made under prior laws.

Answer

In our opinion this provision applies only to confessions of judgment made under the 1941 act of which it is a part. Confessions under prior laws are governed with respect to default by the laws in force at the time they were made. No grace period was allowed in any of the acts providing for confession of judgment before the 1941 act.

A delinquent confession of judgment made under a prior law may be reinstated at any time prior to December 31, 1941, under Laws 1941, Chapter 26. However, any judgment so reinstated will remain subject to the law under which it was originally made.

CHESTER S. WILSON,
Deputy Attorney General.

October 22, 1941. 412-A-10

300

Confession of judgment — Soldiers' and Sailors' Relief Act of 1940 as amended — Effect upon real estate discussed — Effect upon confession of judgment determined.

Hennepin County Attorney.

Questions

The County Auditor submitted the following questions in connection with the collection of real estate taxes in cases where persons in military service, or someone on their behalf, filed affidavits pursuant to provisions of the Soldiers' and Sailors' Civil Relief Act of 1940:

1. What effect has such an affidavit upon a contract to pay taxes under a composite judgment?

2. (a) In cases where the 1941 taxes are permitted to become delinquent — is the land to be included in the list of lands remaining delinquent on the first Monday in January, 1943?

(b) If so, has the Auditor the right to sell such land at the 1943 May sale?

3. Where the affidavit discloses that the land is occupied by dependents of the service man, are the dependents, or someone on their behalf, required to file an affidavit each year showing the continuance of such occupancy?

Answer

The affidavits to which you refer were filed under Soldiers' and Sailors' Civil Relief Act of 1940, Section 500, paragraph 2. The filing of affidavits by soldiers and sailors to obtain the relief provided by Section 500 is no longer required. The burden of ascertaining if the property sought to be taxed is protected by Section 500 is now upon "the collector of taxes or other officer whose duty it is to enforce the collection of taxes or assessments." Soldiers' and Sailors' Civil Relief Act Amendments of 1942. For your information, we set out in full the amended paragraphs 1 and 2.

> "Sec. 500. (1) The provisions of this section shall apply when any taxes or assessments, whether general or special (other than taxes on income), whether falling due prior to or during the period of military service, in respect of personal property, money, or credits, or real property owned and occupied for dwelling, professional, business, or agricultural purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid.
>
> "(2) No sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon application made therefor by the collector of taxes or other officer whose duty it is to enforce the collection of taxes or assessments. The court thereupon, unless in its opinion the ability of the person in military service to pay such taxes or assessments is not materially affected by reason of such service, may stay such proceeding or such sale, as provided in this Act, for a period extending not more than six months after the termination of the period of military service of such person."

The composition of taxes under the several laws authorizing the entry of a composite judgment for delinquent taxes is not a contract. It is a privilege extended to the taxpayer by the state. Failure to comply with the conditions of the statute authorizing the entry of the composite judgment ipso facto reinstates all penalties and interest. The Soldiers' and Sailors' Civil Relief Act as amended by the Amendments of 1942 does not affect this operation nor prevent the reinstatement of the penalties and interest. This answers your first question.

If taxes for 1941 upon lands which are owned and occupied as set forth in paragraph 1, above quoted, become delinquent, they should not be included in the delinquent list under Minn. Stat. 1941, Section 279.05, et seq., unless a court order therefor is obtained as provided by paragraph 2, above quoted.

Whether the county auditor should apply for such an order or not in any given case is a matter for him to determine according to the circumstances. This answers your question 2 (a).

The above answer disposes of your question 2 (b).

Your third question is disposed of by the amendment deleting the provision for the filing of an affidavit.

GEO. B. SJOSELIUS,
Assistant Attorney General.

November 2, 1942. 310

301

Confession of judgment—Reinstatement act, Laws 1941, Chapter 26, does not suspend service of notice of expiration of redemption after default—Service of such notice does not prevent reinstatement within time limited —L 41, C 26.

Village Attorney, Hawley.

Opinion

You are advised that Laws 1941, Chapter 26, providing for reinstatement of confessed judgment for delinquent taxes after default does not operate to suspend the authority of the county auditor to serve a new notice of expiration of redemption upon the judgment for delinquent taxes which became reinstated upon the occurrence of the default. Under Section 3 of the act lands which have become absolutely forfeited for delinquent taxes are expressly excluded from the application of the act. It was clearly the intention of the legislature that this act should not interfere with the operation of the tax-forfeiture laws except in case of actual reinstatement before forfeiture or before the expiration of the time limited by the act itself, December 31, 1941.

Conversely, one who is entitled to reinstate a confession of judgment under Chapter 26 may do so even though a new notice of expiration of redemption has been served, provided he acts before absolute forfeiture occurs as a result of the notice or before the expiration of the time limit above mentioned at the close of December 31, 1941, whichever is earlier.

CHESTER S. WILSON,
Deputy Attorney General.

October 1, 1941. 412-A-10

303

Publication—Error—Probably invalidates proceedings—M27 §§ 2110, 2115; (MS41 §§ 279.09, 279.14).

Goodhue County Attorney.

Facts

Pursuant to Section 2110, Mason's Minnesota Statutes, Publication of Notice and list of delinquent taxes was submitted to a local paper for publication. The first publication was had on February 13, 1941, but the paper neglected to publish on February 20 and instead published for the second time on February 27.

Question

Whether a judgment rendered on this publication is valid.

Answer

Basically the question which is before us is whether the failure to publish the notice and list of delinquent real property for two successive weeks as required by Mason's Minnesota Statutes of 1927, Section 2110, has prevented the court from acquiring jurisdiction in the delinquent tax proceeding.

Mason's Minnesota Statutes of 1927, Section 2115, reads in part as follows:

> "Such jurisdiction shall not be affected by any error * * * in publishing the list, * * *."

If it were not for this provision of the statute the defect in publication would unquestionably be sufficient to defeat the jurisdiction of the court. It must be borne in mind that this notice is in effect a summons to the taxpayers whose property is involved in the delinquent list. It is well settled in this state that "The publication of the delinquent list and notice in strict conformity to the statute is a jurisdictional prerequisite of a valid judgment." Dunnell's Minnesota Digest, Section 9322. The question here involved is one which, of course, can only be finally determined by the courts. However, having in mind the statute quoted above and the settled law in this state, it is our conclusion that in all probability the courts would hold the defect in publication sufficient to defeat the jurisdiction of the court.

There are two courses of action open to the county board. It is for that board to determine which course it desires to pursue.

It may stand on the sufficiency of the publication as made. An action might then be brought by some person interested in having the validity of the proceedings finally determined. The final judgment rendered in such case after an appeal to the Supreme Court would, of course, be decisive.

The second course of procedure is that there be no further proceedings this year on these delinquent taxes. The proceedings would be deferred until the proceedings were taken next year upon delinquent taxes and the lands

which are delinquent this year would then be included in such delinquent tax proceedings for the next year. This, we believe, would be the safer course of the two.

As we have pointed out, the validity of the entire tax proceedings is dependent upon the courts obtaining jurisdiction through the medium of publishing the notice in the manner prescribed by statute. Inasmuch as we do not feel that the law is sufficiently clear to us to render an opinion that would be at all conclusive in this matter, it is a matter of discretion for the county board and the county auditor to determine the course which they wish to follow. We believe that we have made sufficiently clear the alternative courses and the possible effects of following either one of them.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

April 15, 1941. 412-A-13

304

Railroad rights of way—Gross earnings tax law—M27 § 2246; (MS41 § 295.02).

Ramsey County Attorney.

Facts

Upon certain parcels of land in your county the taxes have been delinquent for a number of years. Notice of expiration of time for redemption has been served, and the time for redemption is about to expire. "Upon these parcels there is railroad trackage, the railroad company having an easement for 99 years." The tax records did not note this easement or except it from the description; nor was the easement noted in the delinquent tax list upon which judgment was taken by default. The notice of expiration was served upon the railroad company as an occupant. It is unlikely that redemption will be made. I shall assume for the purposes of this opinion that the rights of the railroad company in the land in question are correctly described by you as an easement; that is, the right to use the surface of a strip of land across the land in question for the purpose of railroad tracks and railroad traffic, and that at the time of the assessment and before and since that time this strip of land has been continuously used by the Minnesota Transfer Railway Company for railroad purposes. I shall not discuss the rights of the railroad company in any other light. I shall not go into any questions which are suggested and might be discussed in answering your inquiry. I prefer to dispose of it under the provisions of the gross earnings tax law applicable to railroad companies. The railroad's right of way is an easement in gross and is so treated herein. This opinion should not be construed as applying to easements not enjoyed by railroad companies.

Discussion

The statute (Mason's Minnesota Statutes of 1927, Section 2246) provides that "Every railroad company owning or operating any line of railroad situated within or partly within this state shall * * * pay into the treasury of the state, in lieu of all taxes, upon all property within the state owned or **operated** for railroad purposes, by such company, including the 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 gross earnings tax is a tax on property, and by paying it the railroad company has paid all of the taxes that might be assessed against the rights it has in the land in question under its easement.

Under this statute, the right to use the surface of the strip of land across the taxed property so occupied and operated for railroad purposes is exempt from taxation on an ad valorem basis during the period that it may be so used and operated. It was not taxable, and the railroad company's right to the use, occupation or operation of this strip of land for railroad purposes cannot be acquired under the tax judgment and in the tax forfeiture proceedings.

This holding is not contrary to State v. Pequot Rural Telephone Co., 188 Minn. 520. That was a case where an entire property was occupied for two different purposes, the same area being occupied for both purposes. The question was whether the property, for tax purposes, could be divided on the basis of the proportionate use of the entire property for the two different uses. But here is a case of dividing the property upon the basis of area; the right to use the surface of a part of this area is exempt because it is devoted exclusively to railroad purposes. The tax forfeiture proceedings are void as against the railroad company's right to use the surface of this strip of land so used and occupied.

The case is more like Campbell v. Barry, 152 Minn. 13, 187 N. W. 967. In that case it appears that in the tax proceedings relative to a certain forty, the words, "less M. & I. R. of Way" follow the description in the assessment roll, but in the delinquent list, the tax judgment, the certificate of sale, the notice of expiration of redemption, and in the tax deed, the description was simply "SE¼ of NE¼," without any exception or reservation. The trial court held that the holder of the tax title acquired good title to the land except for the railroad right of way and a certain mineral reservation. This was affirmed by the Supreme Court. The tax title holder acquired title subject to the easement of the right of way of the railroad company. This case is in all respects similar to the case propounded by you with this difference: In the case cited, the tax list noted the exception of the right of way although that exception was omitted in the delinquent list in subsequent proceedings. In your case the description on the tax books does not except or take out the right of way. However, as the state could not tax the right of the railroad company to use the surface of the land covered by its right of way, I think it would be implied that the tax was levied against all the

interest which the state was empowered to tax, and that the right to operate over the surface of the area used by the railroad company for railroad purposes is exempt.

State v. Fawkes, 210 Minn. 587, is not inimical to the views herein expressed. In that case the court points out that as to express companies the statute does not in any way make the gross earnings tax paid by the express companies in lieu of all other taxes upon property **"operated,"** as distinguished from that **"owned"** by the express companies. In that respect it differs from the railroad gross earnings tax law. The court quite clearly intimated that if the gross earnings tax law applicable to express companies had read the same as it does with reference to railroad companies, the result would have been different.

Questions and Answers

1. Is the judgment valid?

Answer: Yes, the judgment is valid against the interest of the fee owners in the land subject to the railroad easement. The judgment does not affect nor is it enforcible against the railroad company's rights of occupancy for, and operation of the strip of land in question for, railroad purposes.

2. Is the forfeiture valid?

Answer: Yes, as against the interest of the fee owners, but it is not valid against the right of the railroad company to use the surface of the land occupied and operated by the railroad company for railroad purposes; i.e., against its easement. Upon the termination of the easement, by lapse of time or otherwise, the surface rights to the strip of land will revert to whoever is then the owner of the fee.

3. Should the auditor's certificate under Section F, Chapter 278, Laws 1935 (Mason's Supplement 1940, 2164-12-F), recite the description of the property as entered in the judgment or should it include the words "subject to railroad easement"?

Answer: The auditor's certificate should include the words, "subject to right of way easement of the Minnesota Transfer Railway Company," or other equivalent language.

4. May the words "subject to railroad easement" be legally added into the description at this time in the auditor's certificate of forfeiture?

Answer: In this question I understand that you refer to the same certificate mentioned in question 3, and the answer is yes, as above.

5. If the forfeiture is valid on the property as described in the judgment, how shall the land be sold by the land commissioner in view of the railroad easement which is of record?

Answer: The tax commissioner should sell the land subject to the easement. Should the railroad company cease to own its easement, either by

lapse of time or otherwise, whoever then owned the fee as a result of the tax forfeiture proceedings would own the surface of the land theretofore occupied by and subject to the easement.

6. Should the auditor insert upon the tax records railroad easements as indicated above, "subject to railway easements"?

Answer: Hereafter land which is crossed by the right of way of a railroad company should be described as, "subject to the right of way of the ..... Railroad Company."

7. What would be the effect in the event a forfeiture is valid in so far as the ties, rails, etc., of the railroad are concerned?

Answer: It is not necessary to answer this question inasmuch as the answers already given dispose of it.

RALPH A. STONE,
Special Assistant Attorney General.

June 16, 1942. 216-I

305

Second judgment for delinquent taxes—Invalid—Under facts stated—L 35, C 278.

Kanabec County Attorney.

Facts

A certain party owned the Northeast Quarter (NE¼) of Section Twenty-seven (27) in the Township of Blank. On May 1, 1932, the assessor assessed this property as the Northeast Quarter. It became delinquent for taxes in the year 1932; the sale was held May 14, 1934, and it was bid in for the state and judgment was entered against the Northeast Quarter (NE¼) of Section Twenty-seven (27).

On May 1, 1934, the assessor assessed this property as the East Half of the Northeast Quarter (E½ of NE¼) and the West Half of the Northeast Quarter (W½ of NE¼) of Section Twenty-seven (27) and these descriptions were taxed as two separate tracts.

The taxes for 1934 became delinquent and were bid in for the state at the sale held May 11, 1936, and a new judgment was entered for the year of 1934 on the separate tracts.

Question

Is it possible to serve notice on the judgments for the year 1934, pursuant to Chapter 278, Laws of 1935, and disregard serving notice on the judgment entered for the year of 1932?

Answer

The answer to your question is in the negative as the judgment obtained on the 1934 taxes is in our opinion invalid. We enclose herewith a copy of an opinion to County Attorney Grannis of Dakota County under date of May 10, 1941, in which this question is fully discussed.

As to the rights of the parties arising from the differences in description to which you refer, we suggest that you read the case of State v. Aitkin County Farm Land Company, 204 Minn. 495, in which you will find a full discussion of the question here involved.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

October 28, 1941. 412-A-10

306

Tax list—Forfeiture proceedings void for indefiniteness of description—M27 § 1985; L 39, C 312; L 41, C 441; (MS41 §§ 273.02, 279.33, 279.34).

Roseau County Attorney.

Facts

In this county we have several small tracts of land lying within or near some of our villages and which are described by metes and bounds making such descriptions in most cases rather lengthy. For taxation purposes, these tracts have been listed and described in the auditor's office, in order to shorten up the description in a typical manner, as follows:

Year Delinquent	Name of Owner	Description
1929	Mamie F. Anderson	Pt. NW¼ of SE¼, 2 acres Sec. 36, T. 162, R. 35

Notice was served on the above pursuant to Chapter 278, Laws 1935, and according to the records in the county auditor's office, it was forfeited to the State of Minnesota on October 6th, 1936.

You then give the metes and bounds descriptions of the property involved.

Question

1. Whether this tract of land has legally forfeited to the state.

2. If legal forfeiture has not taken place, how may the situation be remedied?

Answer

The court in National Bond & Security Company v. Board of County Commissioners, 91 Minn. 63, 68, said:

"The rule is that a description of land in a tax judgment must be so definite that by reading it the court can determine what land the judgment is against, and, if the description is not thus definite, it is inherently and fatally defective, and cannot be helped out by extrinsic evidence. But any description which distinctly points out the land in such a way as to leave no room for mistake as to what property is intended is sufficient, and evidence of extrinsic facts is admissible to apply the description and identify the land."

In Bidwell v. Coleman, 11 Minn. 45 (78), the court held that a description in a delinquent tax sale notice of a parcel of land as "two-thirds of block four, in Bass' out-lots * * * is not a description of any particular piece of land * * *. The sale was, therefore, void * * *."

It is our conclusion that the description submitted by you is not sufficiently definite to meet the requirements of the rule stated above and that the forfeiture proceedings as to this parcel of property are therefore void.

It is our suggestion that the auditor should make a petition under Laws 1939, Chapter 312 (Mason's Supplement 1940, Section 2164-12 a and b), as amended by Laws 1941, Chapter 441, for the cancellation of the certificate of forfeiture.

It is not clear from your letter (1) whether the metes and bounds descriptions which you give are the descriptions which are upon the assessment books but that these descriptions were not used in the delinquent tax list because of their length, or (2) whether the metes and bounds descriptions are the legal descriptions of the property according to the conveyances, but that such legal descriptions have not been used in any of the tax proceedings or records beginning with the assessment books. Assuming that situation (1) is correct, then the effect of the conclusion to which we have come is that the property here in question, though properly assessed, has never been legally included in the delinquent tax list. The auditor should include such property in the delinquent tax list which will be published in 1942 for the purpose of taking a new judgment for the taxes of the year 1929. On the other hand, if the circumstances stated in (2) are correct, then the entire tax proceedings are invalid. In that case the correct metes and bounds description of each parcel should be placed upon all of the tax records from the assessment books to and including all books of record in the county auditor's office, and the property should then be assessed and taxes levied for the proper years as in the case of omitted taxes. The omitted taxes for such years would then be payable without any penalty in the manner of current taxes during 1942. If they become delinquent they should be placed in the delinquent tax list which will be published in February, 1943, and a new judgment thus obtained for the taxes of such years. The omitted taxes should be placed upon the auditor's books in accordance with Mason's Minnesota Statutes of 1927, Section 1985.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

May 10, 1941. 412-A-13

EXEMPTION

307

Homestead—Soldier—Laws 1941, Chapter 438, subdivision 2, provides for continued exemption by soldier upon compliance with its provisions—M40 § 1993; L 41, C 438; (MS41 § 273.13).

Clay County Attorney.

Facts

The owner of certain real property was called into military service. At the time of his call, he resided in and owned a piece of platted property and obtained his homestead exemption under Mason's Minnesota Statutes 1927, Volume 3, Section 1993. After his call to the service, he is allowing his mother to occupy the premises.

Question

Whether the soldier in question can still claim his homestead exemption when he is away from the home and not occupying it?

Answer

The answer is in the affirmative if and when the soldier complies with the requirements of Laws 1941, Chapter 438, subdivision 2.

GEO. B. SJOSELIUS,
Assistant Attorney General.

May 23, 1942. 232-d

308

Religious and educational institutions — Lot used for parking purposes — Minn. Const., Art. IX, Sec. 1.

Ramsey County Attorney.

Questions

(1) Whether a lot adjoining, or across the street from, a church, the lot being used exclusively for parking purposes for members of the church who desire to attend worship, is exempt from taxation;

(2) Whether property used as a playground, situated across the street from a non-public school, is exempt from taxation.

Answers

Under the provisions of Article IX, Section 1 of the Minnesota Constitution, "academies, colleges, universities, and all seminaries of learning, all churches, church property and houses of worship," are exempt from taxation.

The exemption of church property was construed in State v. Church of Incarnation, 158 Minn. 48; State v. Union Congregational Church, 173 Minn. 40. By these cases it is settled that in determining whether property is exempt, the test is its use, and its relation to the purposes and activities of the church organization. If the property is not used for any purpose connected with or related to the church as a religious organization, it is not exempt; but if its use is related to or connected with the religious activities of the organization, it is exempt.

In accordance with this rule, opinions have been rendered by the Attorney General, exempting a residence furnished to a church janitor located several blocks from the church, opinion of December 31, 1938; likewise, an assembly hall maintained by a church on a parcel of land not adjoining or connected with the church, opinion of December 27, 1933.

The exemption of educational institutions is discussed in State v. Carleton College, 154 Minn. 280. It was there held that real estate owned by an educational institution devoted to and reasonably necessary for the accomplishment of educational purposes is exempt from taxation. In accordance with this rule the Attorney General held, in an opinion dated January 10, 1924, that farm land occupied some distance from the institution, used in part for an athletic field and in part to provide food for the institution, was exempt.

In State v. Union Congregational Church, supra, it was pointed out that with respect to educational institutions, all property "reasonably necessary for and primarily used and devoted to the proper purposes of the institution and so situated with reference to the main buildings or activities of the institution as to be reasonably suitable for such purposes, is exempt from taxation."

Assuming, therefore, that on the particular facts of each case, the use of the property, and its relation to the religious or educational institution, is within the rules above stated, the property is exempt. Property used exclusively for parking purposes by members of the congregation attending worship, and property used for playground purposes by a non-public school, would appear to be within the definitions of exempt property laid down by the Constitution and by the courts, notwithstanding the fact that the particular property may be across the street from the religious or educational institution.

P. F. SHERMAN,
Assistant Attorney General.

April 8, 1942. 414-D-6

FORFEITED LANDS

309

Assessments — For repair of drainage ditches — Upon facts stated, assessments were erroneously spread—L 35, C 386; L 41, C 394.

Lyon County Attorney.

Facts

Certain lands have been forfeited to the state for taxes. They have since been sold to private purchasers under Laws 1935, Chapter 386, as amended. After the forfeiture of the land to the state and in some instances after the sale to the private purchaser, it was discovered that assessments for repairs and maintenance performed upon the land before they were forfeited had not been assessed against such lands. The auditor thereupon spread such assessments upon his books.

Questions

1. Were such assessments properly spread upon his records by the auditor?

2. What action should now be taken relative thereto?

Answer

The forfeiture of the land to the state for the non-payment of taxes and assessments levied against it wiped out all liability of such land for any repairs or maintenance of ditches performed before the lands were forfeited. This is true if the assessments had already been spread upon the books of the county auditor or if they had not as yet been spread upon his books. If the assessments had already been entered, the auditor was required to cancel them by Laws 1935, Chapter 386, Section 7. If they had not been entered he had no authority to make an entry against the property of the State of Minnesota.

This answers your first question.

If the auditor has actually spread upon his records any assessments under the circumstances given by you, it was done by him in error and it is his duty to correct his error by making the proper entry upon his records to show that such entry was made in error and therefore cancelled.

If the land has been sold to a private purchaser, there is nothing that can be done about the collection of the amounts expended for such repairs and maintenance work. If the land is still held by the state, the legislature could pass an act authorizing the payment of such amounts out of the proceeds of the sale of the land when it shall be sold.

It appears that Laws 1941, Chapter 394, does not in the amendment therein made include assessments for drainage ditches. We have made a

note to call this to the attention of the legislature at the next session so that if it deems it proper the law may be amended so as to put assessments for drainage ditches upon the same basis as assessments for local improvements within municipalities.

GEO. B. SJOSELIUS,
Assistant Attorney General.

May 26, 1942. 425-C-3

310

Assessments—Special—Local improvements—Liability of tax-forfeited lands—Method of submitting amount of assessments to county board—L 41, C 394; L 41, C 511.

Minneapolis City Attorney.

Questions

1. If a parcel of land was forfeited to the State of Minnesota prior to the passage of Laws 1941, Chapter 394, and, subsequent thereto and before the passage of the act, the municipality in which it is located made a public improvement for which the property could have been assessed if the same had been privately owned, can the amount of such assessment be certified to the County Board by the City Clerk, and may the County Board include in the sale value a portion thereof in the same manner as if such improvement had been made subsequent to the passage of this act?

2. Under the charter of the City of Minneapolis, assessments may be made before or after the improvement. If any such improvement was made prior to the passage of this act and the assessment roll adopted after the passage of the act, may the city and county officials proceed under the provisions of this act by adding the appropriate amount to the sale value?

3. What are the mechanics involved in submitting to the County Auditor the amount of assessments against tax-forfeited lands?

Answers

Before passing upon the questions which you have submitted, it is necessary to determine the effect of Laws 1941, Chapter 511, which amends Mason's Supplement 1940, Section 2139-15, which is the same section amended by Chapter 394.

Laws 1941, Chapter 492, Section 33, lays down the following rule of statutory construction:

> "When two or more amendments to the same provision of law are enacted at the same or different sessions, one amendment overlooking and making no reference to the other or others, the amendments shall be construed together, if possible, and effect be given to each. If the amendments be irreconcilable, the latest in date of final enactment shall prevail."

There is nothing in the amendment contained in Chapter 394 which conflicts with any of the provisions contained in Chapter 511. Applying the above rule of construction, therefore, it is our opinion that full effect must be given to the amendments contained in both Chapters 394 and 511.

Chapter 394 is equally applicable to lands which were forfeited to the state prior to its enactment and to lands which may have been forfeited to the state since its enactment, provided that the land has not been sold by the state. It provides for the certification of the amount of the improvement "immediately upon the determination of the assessments for such improvement." The act applies to improvements which may have been made either before or after its passage, provided that the "determination of the assessments for such improvement" has not been made. This answers your first question.

For the reasons stated in answering your first question, it is our opinion that if the land in question had been forfeited to the state for nonpayment of taxes at the time of the passage of Chapter 394 and thereafter an improvement has been made, the cost of which was assessed against the property benefited, the city clerk may certify to the county auditor the amount that would have been assessed against such land if it had been subject to assessment even though the improvement was made prior to the passage of Chapter 394, provided that the assessment roll was not adopted until after the effective date of said Chapter 394. This answers your second question.

Answering your third question, it is our opinion that the following is the proper procedure to be followed to enable the county board to take into consideration the amount which would have been assessed against such tax-forfeited land for local improvements if it had been subject to assessment. The city council should adopt an assessment roll which should include a determination of the total amount that would have been assessed against each parcel of tax-forfeited land for such improvement if such parcels of land had been subject to assessment. Upon the adoption of this assessment roll, the city clerk should make an abstract showing the description of each parcel of land forfeited to the state for nonpayment of taxes and the total amount that would have been assessed against such parcel of land if it had been subject to assessment. This abstract should then be certified by the city clerk to the county auditor. Upon receipt of this certification from the city clerk, the county auditor, as clerk of the county board, should submit the same to the county board. The latter should then review the appraised value which had been fixed for each parcel of land contained in said abstract and include in such reappraisal such amount, if any, as a separate item as it shall determine the value of such parcel was enhanced by such improvement. If the property should thereafter be sold by the county auditor, the amount so determined shall be first apportioned to the municipal subdivision entitled thereto in accordance with the provisions of Mason's Supplement 1940, Section 2139-22, Paragraph (a), as amended by Chapter 394, Section 2.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

October 8, 1941. 425-C-15

311

Certificates—Forfeiture—Methods of invalidating or cancelling certificates discussed—L 39, C 312; L 39, C 341; L 41, C 441; (MS41 §§ 279.33, 279.34, 284.07 to 284.26).

Lac qui Parle County Attorney.

Facts

We have a number of cases in this county in which property forfeited to the state has been sold to purchasers, it later having developed that the proceedings were jurisdictionally defective by reason of the failure of the county auditor to file a certified copy of the resolution of the county board designating the official newspaper with the clerk of court.

In a number of these cases the amount involved is less than $200.00, and it would be expensive for the purchaser to bring a proper action in district court (under Laws 1939, Chapter 341), knowing that in the final analysis the former owner would prevail. The result would be that the purchaser would only recover the amount paid by him to the county and he would then be out the cost of maintaining his action and probably be required in addition to pay the defendant's costs.

Question

Whether the procedure prescribed by Chapter 341 is exclusive, and if not what steps can be taken by the parties to dispose of the matter amicably.

Answer

In approaching this question we must bear in mind that the owner could not have his action to set aside the certificate of forfeiture entertained by the court unless before filing his complaint or his answer, if he were contesting an action adversely brought, he had deposited with the clerk of court "a sum equal to the amount of the taxes and special assessments, with interest, penalties, and costs thereon, accrued against the land at the time of forfeiture, together with interest at the rate of four per cent per annum on said sum from the date of forfeiture to the date of filing the complaint or answer." Laws 1939, Chapter 341, Section 4. The purpose of this provision was to insure the payment of the taxes by the person claiming the forfeiture to be defective. The procedure in Chapter 341 is exclusive and unless the foregoing condition has been complied with the owner cannot attack the validity of the forfeiture proceedings.

We shall now consider the use of Laws 1939, Chapter 312, as amended by Laws 1941, Chapter 441, authorizing cancellation of erroneous certificates of tax-forfeiture upon application of the former owner or his representative. Assuming that the property in question has been sold by the state, after forfeiture, the purchaser has certain vested rights which cannot be impaired by proceedings under Chapter 312 as amended. The state has given him a deed, based upon the forfeiture, and he is entitled to his day in court before

the foundation of his title can be nullified. Chapter 312 makes no provision for notice to the purchaser in case of an application for cancellation by the former owner. Furthermore, a cancellation proceeding under Chapter 312 is not a judicial proceeding, hence could not avail to determine a controversy involving private rights. Accordingly it is our opinion that the procedure for cancellation of forfeiture under Chapter 312 should not be used in any case where the land has been sold by the state unless the interest of the purchaser has first been disposed of either by judicial action or voluntary settlement.

If it clearly appears in a case like the one here in question that the forfeiture proceedings are invalid, and the purchaser is willing to consent to cancellation thereof, the way will be clear for proceeding under Chapter 312 without previous court action. In such case, the purchaser could file a claim with the county board for a refund of the money which he has paid. The county board could allow the claim, to be paid from the forfeited tax sale fund upon completion of the cancellation.

We agree with you that the tax-forfeiture proceedings in the case which you submit were jurisdictionally defective. Foster v. Berg, 123 Minn. 208. The rights of the purchaser having in that manner been provided for, cancellation proceedings under Chapter 312 as amended could be had as in other cases.

If, however, the amount claimed by the purchaser should be more than the amount which he has paid in because of improvements made or other reasons, the procedure under Chapter 312 as amended could not be used. It would require judicial action under Laws 1939, Chapter 341, to adequately protect the rights of all parties concerned.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

June 5, 1941. 409-A-1

312

Contract for deed—County may not assign to third person.

Swift County Attorney.

Question

Whether the County Board has the right to assign its interest in the contracts for deed which they have given to purchasers of lands at tax forfeiture sales providing the purchaser of the contract from the county will pay all amounts due thereon.

Answer

I find no authority in the statutes which would permit the county to

assign a contract for deed on tax forfeited lands to a third person, upon payment by such third person of the amounts remaining unpaid on the contract.

RALPH A. STONE,
Special Assistant Attorney General.

May 29, 1942. 410-B

313

Conveyance—A tract of tax-forfeited land sold pursuant to Laws 1935, Chapter 386, as amended (Mason's 1940 Supplement, Section 2139-15, as amended), can only be conveyed as one tract upon compliance with all the terms of the contract of purchase—L 35, C 386; M40 § 2139-15.

Renville County Attorney.

Facts

Over a year ago certain real estate which had been theretofore forfeited to the State of Minnesota under tax forfeiture proceedings and described as the W½ of the NW¼ and NW¼ of the SW¼ of Section 18 was sold to a certain person pursuant to Laws 1935, Chapter 386, as amended. Before the sale the land was appraised as one tract and was classified as agricultural land and sold as such. The purchaser paid 20 per cent down and is paying the balance in ten annual installments. He is not now and never has been in default under the terms of his contract. Since he bought this land, the purchaser has sold 40 acres described as the NW¼ of the SW¼ to another person. The latter is now in a position to pay in full the purchase price of the 40 acres which he is buying from the purchaser. He has tendered the money to the county auditor and asked for a deed from the state.

Question

Whether this tract of land can be split up so that the county auditor can accept the money now tendered and have a deed issued directly to the person who has bought the 40 acres from the purchaser of the state.

Answer

You state that you have advised the county auditor that you knew of no law whereby the land could be split up and money accepted and the deed issued as requested.

We agree with the conclusion which you have reached. There is no statutory authority for the issuance of a deed to a tract of tax-forfeited land which has been sold by the state to a purchaser until the entire amount payable under the contract with the state has been paid.

GEO. B. SJOSELIUS,
Assistant Attorney General.

December 12, 1942. 425-C

314

Easements—For electric lines, roads, and other purposes—Powers of county boards — Powers of commissioner of conservation — M40 §§ 2139-15, 2139-18; L 41, C 145; (MS41 §§ 84.415, 282.01, 282.04).

Beltrami County Attorney.

Question

As to the authority of the county board to grant easements or permits for electric power lines over tax-forfeited lands.

Answer

An opinion rendered April 13, 1938, held that the Minnesota Tax Commission had no authority under then existing laws to grant to a county an easement for highway purposes over tax-forfeited land. This opinion was reviewed and adhered to by opinion of June 10, 1940, holding that the commissioner of taxation (to whom the powers of the former tax commission had been transferred by Laws 1939, Chapter 431) had no power to grant an easement for any purpose, the particular question being with respect to an electric power line. There can be no doubt as to the correctness of these opinions, limited as they are to the powers of the commission of taxation under the statutes in force when they were rendered.

Opinion of May 31, 1939, holds that the county board may grant to a city an easement for an alley over tax-forfeited land, under the provisions of Mason's Supplement 1938, Section 2139-15, as amended by Laws 1939, Chapter 328, Section 1, subdivision (a), which authorizes the sale of tax-forfeited lands to governmental subdivisions for public purposes at not less than their appraised value. This provision, however, applies only to sales to public governmental units. It does not authorize the granting of an easement for any purpose to a private corporation or individual. (Laws 1941, Chapter 511, amended this section by inserting further provisions relating to use of tax-forfeited land for public purposes, but these are not pertinent to the present question.)

The May 31, 1939, opinion also calls attention to the provisions of subdivision (c) of the same section, under which the county board may subdivide a tract of tax-forfeited land when deemed advantageous for the purposes of sale. Under this provision the county board might split off a strip of land required for an easement and order it sold separately. However, in order to warrant such action it must appear that the result will be advantageous to the sale of the land for the benefit of the forfeited tax sale fund. Practically this means that the strip which is separated must be appraised for the purpose of sale at a value which, together with the appraised value of the remainder, will bring more for the fund than if the tract were sold in its original condition.

In the case of a sale of right of way for a public road, street, or alley, the value of the remainder may be enhanced by the additional means of access provided, and such increase in value, if any, may be taken into con-

sideration in fixing the appraised value of the right of way and the remainder of the tract. However, it would be somewhat difficult to make any such allowance in the case of a strip of land sold to a private individual or corporation for an electric line or other purpose. Perhaps the proximity of an electric line, if it could be tapped for local use, might benefit the adjacent property to some extent, but under present laws there is no way whereby the future use of the property for the contemplated purpose could be assured. The county board has no authority to impose any restrictions as to use upon tax-forfeited land sold to private individuals or corporations, except the mineral reservations in favor of the state which are required by law.

Application of the splitting-off method to the granting of an easement to a private individual or corporation is complicated by the requirement of Section 2139-15 that before any tax-forfeited land may be sold to a private individual or corporation, it must be offered at public sale at not less than the appraised value, which is not required in case of sale to a governmental subdivision. Hence, if some one should outbid the interested utility company at the public sale of the strip of land desired for an electric line, the project would be blocked unless the successful bidder was willing to grant the company an easement.

Except as hereinbefore mentioned, existing laws contain no provisions authorizing the county board to grant easements or permits over tax-forfeited lands. It must be borne in mind that the county board is acting merely as the agency of the state as trustee for the taxing districts in dealing with tax-forfeited lands, and that it has no power to dispose of such lands or any interest therein except as authorized by law.

Mason's Supplement 1940, Section 2139-18, as amended by Laws 1941, Chapter 355, authorizes the county auditor, by direction of the county board, to lease tax-forfeited lands. However, such leases can be made only for limited terms, and are subject to sale. The leasing of a strip of land for an electric line under these conditions would hardly be satisfactory to a utility company because of the risk of having to remove the line if the land should be sold or if the county board should refuse to renew the lease upon expiration. Furthermore, such leases must first be offered at public sale, resulting in complications similar to those arising in connection with the sale of tax-forfeited lands, as hereinbefore pointed out.

You refer to Laws 1941, Chapter 145, authorizing the commissioner of conservation to lease or grant easements or permits over "unsold school, university, internal improvement, swamp, tax-forfeited or other lands subject to sale by or jurisdiction or control of the state" for telephone, telegraph, and electric power or light lines. This act imposes no limitation on the length of time for which easements may be granted, but provides that they shall be subject to sale and leasing of the land and that they may be cancelled at any time by the commissioner of conservation upon three months written notice. Obviously such conditional easements would be rather unsatisfactory except for electric lines of an inexpensive and temporary character.

There may be some question whether the legislature intended this act to apply to all tax-forfeited lands throughout the state, including those under

the control of the county boards, or only to such lands as may have been released from the trust in favor of the taxing districts and subjected to the exclusive control of the commissioner of conservation for state purposes, under Mason's Supplement 1940, Section 2139-15, as amended by Laws 1941, Chapter 511. No opinion has been rendered by this office on that question up to date.

CHESTER S. WILSON,
Deputy Attorney General.

August 21, 1941. 700-A-3

315

Liens—Old age assistance—Inferior to tax liens and become extinguished on tax-forfeiture—L 39, C 315; M40 § 3199-26; (MS41 § 256.26).

Itasca County Attorney.

Questions

Concerning the dispostiion of tax-forfeited lands which were subject to old age assistance liens before forfeiture:

1. What disposition must be made of these lands, and must they be sold subject to the old age assistance lien?

2. At what time do future old age assistance payments cease to be liens on such lands?

Answers

1. The answer to question one depends on whether or not the tax lien on which forfeiture is based is superior to the old age assistance lien created by Laws 1939, Chapter 315 (Mason's Supplement 1940, Section 3199-26), commonly known as the Old Age Lien Act. Under existing statutes aside from that act the lien for real estate taxes is superior to all other liens arising under state law. The Old Age Lien Act clearly recognizes that superiority. It provides that the old age assistance lien shall take priority over all other liens subsequently acquired, and then continues with the following qualification:

> "* * * 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."

This proviso obviously applies to taxes paid after the attachment of the old age assistance lien as well as before. It could hardly have been the intention of the legislature to give claims for such taxes in the hands of children of recipients priority over old age assistance liens unless the tax liens would have priority if still held by the state. The Old Age Lien Act also contains a provision expressly subordinating claims for old age assistance to taxes as against the estates of deceased recipients.

With respect to taxes the position of old age assistance liens is similar to that of state rural credit mortgages, the lien of which has been held by the Supreme Court to be inferior to that of taxes accruing on the mortgaged lands while still in private ownership. State Department of Rural Credit v. County of Washington, 207 Minn. 530, 292 N. W. 204.

Hence, in my opinion, the lien of all taxes levied on the property of a recipient of old age assistance while the property remains in private ownership will be superior to any liens which may accrue for old age assistance, whether before or after the imposition of the tax liens, and upon the forfeiture of the property for delinquent taxes the old age assistance liens will be extinguished. Consequently the disposition of tax-forfeited lands is not affected in any way by old age assistance liens which may have accrued before forfeiture. It is the duty of the county auditor and other officials concerned with such lands to proceed therewith as if the old age assistance liens had never arisen.

Of course it is possible that in case of repurchase of such property by the recipient of old age assistance who formerly owned it, or by any one claiming under him, the lien for such assistance might be revived. However, that would not affect the disposition of the tax-forfeited land by the authorities in charge thereof.

It should be noted that until lands begin to forfeit in 1946 for taxes for 1939, all tax-forfeitures will be based on taxes levied before the passage of the Old Age Lien Act, April 20, 1939, and that the liens for such taxes will be prior in point of time to any old age assistance liens that may accrue in the meantime. However, as before stated, under present laws tax liens are superior regardless of priority in time with respect to old age assistance liens.

The question of priority between old age assistance liens and other liens is not affected by the possible interest of the federal government in reimbursement for old age assistance payments which may be recovered, mentioned in your letter. The old age assistance lien rests entirely upon the state statute. The federal law merely requires adjustment with the federal government according to its contributions in case the state actually recovers any money on account of old age assistance payments. Federal Social Security Act of August 4, 1935, Chapter 531, Title I, Section 3, as amended by act of August 10, 1939, Chapter 666, Title I, Section 102 (U.S.C.A., Title 42, Section 303).

2. What has already been said answers question two, as to when old age assistance payments cease to be liens.

Such liens are extinguished upon forfeiture of the property for delinquent taxes, subject to possible revival in case of repurchase of the property by the former owner or someone claiming under him.

CHESTER S. WILSON,
Deputy Attorney General.

October 7, 1941. 425-C-13

316

Local improvements after forfeiture — Mason's Supplement 1940, Section 2139-15; Laws 1941, Chapters 394 and 511, construed and effect given to both—M40 § 2139-15; L 41, C 394; L 41, C 511; (MS41 §§ 282.01, 282.08).

Ramsey County Attorney.

Facts

You direct our attention to Mason's Supplement 1940, Section 2139-15, and to the fact that this section was amended by Laws 1941, Chapters 394 and 511. You further refer to the amendment contained in Chapter 394 relating to local special improvements which amendment is not to be found in Chapter 511, which was the law last enacted.

Question

What effect is to be given to the provisions contained in Chapters 394 and 511.

Answer

Mason's Supplement 1940, Section 2139-15, is a very broad section which establishes the procedure for the classification, appraisal, sale and conveyance of all tax-forfeited lands, except those "embraced within any game preserve, created by and established under authority of Laws 1929, Chapter 358, or any like act, or embraced within any reforestation or flood control project created by and established under authority of Laws 1931, Chapter 407, or Laws 1933, Chapter 402, except lands in villages and cities * * *." Mason's Supplement 1940, Section 2139-15, was originally Laws 1935, Chapter 386, Section 1, which was subsequently amended by Laws 1939, Chapter 328, Section 1. It was amended twice in the 1941 session of the legislature as to various distinct provisions, which might well have been dealt with in separate sections. First, Section 2139-15, was amended by Laws 1941, Chapter 394, by adding the following provision:

> "If any public improvement is made by a municipality after any parcel of land has been forfeited to the state for the non-payment of taxes and such improvement is assessed in whole or in part against the property benefited thereby, the clerk of such municipality shall certify to the county auditor immediately upon the determination of the assessments for such improvement the total amount that would have been assessed against such parcel of land if it had been subject to assessment. The county board shall determine the amount, if any, by which the value of such parcel was enhanced by such improvement and shall include such amount as a separate item in fixing the appraised value for the purposes of sale."

Second, by Laws 1941, Chapter 511. This chapter contains a comprehensive revision of the provisions contained in Section 2139-15. It not only revises the old provisions but also adds new features. Chapter 394 was approved on

April 23, 1941. Chapter 511 was approved on April 28, 1941. The new provisions added to Section 2139-15 by Chapter 394 are not to be found in the section as amended by Chapter 511.

The question therefore is, what effect, if any, would the enactment by Chapter 511 of the revised old language of Section 2139-15 have upon the amendment contained in Chapter 394?

The supreme court in the case of State v. Archibald, 43 Minn. 328, considered the effect of the passage of two laws in the same session dealing with the same subject-matter. On page 330 the court said:

> "To justify a court in holding that an act is repealed by one subsequently passed, it must appear that the later provision is certainly and clearly in hostility to the former. If by any reasonable construction the two statutes can stand together, they must so stand. If harmony is impossible, and it is only in that event, the earlier enactment is repealed."

Let us apply, therefore, the rule laid down above and attempt to construe the two chapters as one act. We would have as a part of one of the provisions the language quoted above from Chapter 394 which provides a method whereby municipalities may be reimbursed, at least in part, for the cost of public improvements made after a parcel of land has been forfeited to the state for the non-payment of taxes. The making of public improvements affecting parcels of land which have been forfeited to the state for non-payment of taxes has for years constituted a difficult and vexatious problem for municipalities. Until the enactment of the language quoted above from Chapter 394 there was no provision of law whereby a municipality could obtain even a partial return of the cost of such improvements. The legislature in the 1941 session, recognizing this problem, enacted the amendment to Section 2139-15 quoted above from Chapter 394 in an effort to solve it.

If we were to construe the action of the legislature in enacting Chapter 511, the revised old language of Section 2139-15, as constituting a repeal of the amendment of Section 2139-15 as found in Chapter 394, we would have as a result the legislature giving thorough consideration to an old problem and working out a solution of it and then immediately casting aside the results of its efforts by the omission of this language from that found in Chapter 511. This result would follow not because of any language in Chapter 511 directly indicating that the legislature had changed its mind as to the provision which it had enacted relating to public improvements, but because of its omission of that language from Chapter 511.

In the case of State v. Archibald, supra, on page 330 the court said:

> "Of course, repeal by implication can be effected by inconsistent enactments at the same session of the legislature; but it has been said that statutes enacted at the same session are to be construed to a certain extent as one act, and therefore in such a case there is a much stronger presumption against an intention to repeal which is not expressed than in case of statutes passed at different sessions; and in such cases there should be such an exposition as will give effect to what appears to be the main intent of the lawmaker."

Applying the rules laid down by the court to the matter before us, giving careful consideration to the results which would follow from a construction holding that Chapter 511 had repealed the provisions quoted above relating to public improvements, the conclusion appears to us inescapable that such repeal was not the intention of the legislature and that a reasonable construction permits the provisions quoted above of Chapter 394, relating to public improvements, and the provisions of Chapter 511 to be read together, giving full effect to both. We so hold.

The answer to your question is that Section 2139-15 must be considered to be as amended by Chapter 511 with the addition to paragraph (c) of the language contained in Chapter 394, which relates to public improvements affecting tax-forfeited lands, and which we have quoted in full above.

In arriving at our conclusion on this question we had in mind the case of State ex rel. Effertz v. Schimelphenig, 192 Minn. 55. For the reasons stated above the rule laid down in this case has no application to the case before us.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

June 23, 1941. 425-C

317

Mineral lands—Lease—County auditor under Laws 1941, Chapter 355, may not lease with right to prospect or mine minerals—Subject to lease by Executive Council under M.M.S. 1927, Section 6403—M27 § 6403; L 41, C 355; (MS41 §§ 93.14, 282.04).

Koochiching County Attorney.

Facts

Chapter 355, Laws of 1941, amending Section 2139-18, Mason's Minnesota Supplement 1940, gives the County Board the right to lease tax-forfeited lands both conservation and non-conservation. Section 2139-24 reserves all minerals. Under this latter section an attorney general's opinion has been rendered on June 1st, 1937 (928-C-13), which states that the Executive Council of the state has the right to lease land for mineral purposes.

Questions

1. Why does the Executive Council have anything to do with the handling of tax-forfeited land?

2. What is to prevent a person who wants to prospect for minerals from obtaining a general lease from the county board and then digging a hole or a well whereby minerals might be discovered?

Answers

We have examined the attorney general's opinion of June 1, 1937, to which you refer. The statute referred to therein as authorizing the Executive Council to execute permits to prospect for iron ore and other ores upon lands belonging to the state is Mason's Minnesota Statutes of 1927, Section 6403, et seq. The powers conferred upon the state auditor by the section just quoted were transferred to the Executive Council by the Reorganization Act of 1925. See id. Section 53-3. The original act of the legislature enacting these provisions was Laws 1921, Chapter 412. The title of that act is:

> "An act providing for the issue of permits to prospect for iron ore and other ores on lands belonging to the state, or in which the state has an interest, excepting lands situate under the waters of any public lake or river, and leases for the mining of such ore."

The language used in the title is sufficiently broad to include iron ore in land acquired through tax forfeiture proceedings.

Section 9 of the act, id. Section 6411, provides in part that "In case the land shall not belong to any class of land having a permanent fund, then all payments shall be credited to such fund as the legislature shall by law direct." This is a recognition by the legislature that there would be lands subject to the act other than those belonging to existing trust funds. The provisions for leasing iron ore or other ores to which the state may have acquired title as trustee through tax-forfeiture proceedings as found in Section 6403 et seq. are complete, except that the legislature has not directed to what fund the payments for iron ore shall be credited. Pending such direction the proceeds from the leases of iron ore or other ores held by the state as trustee for itself and the taxing subdivisions should be deposited in the state treasury and held in trust until the legislature directs the fund to which they are to be credited.

We have examined Laws 1941, Chapter 355, which amends Mason's Supplement 1940, Section 2139-18, and provides for the leasing of tax-forfeited land subject to sale as therein provided. This section makes no mention of leasing mineral rights, a matter involving many complications. All such rights are expressly reserved by Section 2139-24. If the legislature had intended to authorize the county officials to lease such rights, it would have made explicit provision therefor. The absence of any such provision indicates that the legislature thought best to leave that matter to the Executive Council under the existing laws above cited, setting up special procedure for mineral leases. We conclude that the leasing authority conferred on the county officials by Section 2139-18 pertains only to the surface of the land, and does not authorize any lease with reference to minerals or other things under the surface.

With reference to your query as to what is to stop a lessee from digging a hole or drilling a well, it is our opinion that a lessee under Section 2139-18, as amended by Chapter 355, has no right to either dig holes or drill wells in such manner as to cause any material alteration of or damage to the land, whatever his purpose may be. His lease merely entitles him to the use of the surface.

GEO. B. SJOSELIUS,
Assistant Attorney General.

March 20, 1942. 311-D-8

318

Mineral—Reservation not retained by state in land repurchased under L 39, C 283; M40 § 2176-47; (MS41 § 72.17).

St. Louis County Attorney.

Facts

A parcel of land believed to contain some iron ore was repurchased; that is, one-third interest of the land was repurchased by the owner under Section 2176-47, Mason's Supplement 1940 (Laws 1939, Chapter 283), and said purchase was made under an installment purchase plan as authorized by the county board. The land was forfeited to the state under Chapter 278, Laws 1935.

Question

Whether the repurchase of the land by the owner is subject to a reservation by the state of the minerals therein.

Answer

In determining the question which you submit, there are certain rules of statutory construction found in Laws 1941, Chapter 492, which must be applied.

> "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions."

The purpose of the legislature in enacting Laws 1939, Chapter 283 (Mason's Supplement 1940, Sections 2176-38 to 48), was to permit the owner of land who had lost it to the state through forfeiture for tax delinquency, an opportunity to reacquire through repurchase that which he had so lost. The provisions for repurchase found in id. Section 10, subdivision 1, are substantially the same as those found in Laws 1941, Chapter 43, which is also a repurchase act. This office has previously held, in construing said Chapter 43, that the state retains no mineral reservation in lands repurchased thereunder. See opinion to Commissioner of Taxation under date of September 8, 1941. Unless, therefore, there is some reason for distinguishing

between Chapter 43 and Chapter 283, it must be our conclusion, for the reasons stated in the opinion above referred to, that the state retains no mineral reservation in tax-forfeited lands repurchased by the owner pursuant to Chapter 283.

Laws 1939, Chapter 283, Section 10, subdivision 1, contains no provisions which distinguish it from Chapter 43. The conclusion which was reached with reference to Chapter 43, therefore, applies to sales made pursuant to id. subdivision 1.

Id. subdivision 2 provides for repurchase based upon the appraised value of the land instead of the amount of tax delinquency which is the basis for repurchase under subdivision 1. The method of appraisal and sale is provided in id. subdivision 3. The reference therein to Laws 1935, Chapter 386, which contains a provision reserving to the state the minerals in lands sold thereunder, raises the doubt in your mind as to the mineral reservation by the state in sales pursuant to id. subdivisions 2 and 3. It is our opinion that the provisions in subdivision 3 merely provide the manner of determining the appraised value of the land and the terms and conditions under which it may be sold the same as those provided in Chapter 386. In making the appraisal, the county board must, of course, give consideration to the value of the minerals, if any, upon the land in question. It was not, in our opinion, the intention of the legislature to retain the mineral rights in lands repurchased under the conditions prescribed in subdivisions 2 and 3. To hold otherwise would mean that the legislature intended one set of rights for one class of purchasers and another set of rights for another class of purchasers, both of whom were people in the same class, namely, those who had lost their land through tax-forfeiture. Obviously the provisions contained in subdivisions 2 and 3 were intended to afford the former owners an opportunity to repurchase at a price lower than the amount of the taxes against the land as provided in subdivision 1. Under these circumstances we cannot justify the conclusion that the legislature intended that purchasers under subdivisions 2 and 3 should lose the minerals in the lands which they had forfeited to the state.

The answer to your question is therefore that owners who repurchase tax-forfeited lands pursuant to the provisions of Laws 1939, Chapter 283, reacquired them free from any mineral reservation resulting from the tax-forfeiture.

GEO. B. SJOSELIUS,
Assistant Attorney General.

January 13, 1942. 311-F

319

Public utilities—Delinquent rent—Service to purchaser of delinquent lands cannot be refused until delinquent water bill incurred by prior owner is paid.

City Attorney, Stillwater.

Facts

The Board of Water Commissioners of the City of Stillwater has a rule that it will turn off water service to all property in Stillwater that is behind in the payment of water rent. They apply this rule in the cases of real estate which has been sold by the state for delinquent taxes.

The following situation arises in these cases: The purchaser at the tax sale gets a state deed to the property which gives the purchaser good title to the land. The Board of Water Commissioners doesn't question this at all, but when a land buyer requests the Board to turn on the water service, the Board refuses to do so unless the delinquent water rent is first paid up in full.

Question

Whether the Board's insistence upon payment of delinquent water rental in these cases before any water is furnished has a sound legal basis.

Answer

No. The purchaser from the state is the holder of a tax title to the premises so purchased. "A tax title is a new and original grant from the state as sovereign of title in fee, which is paramount as against the world and which supersedes and bars all other titles, claims, and equities." Hacklander v. Parker, 204 Minn. 262.

Any ordinance adopted under the provisions of your city charter to which you have called our attention would be invalid if it attempted to make the payment of the delinquent water bill incurred by the former owner of the tax-forfeited premises a condition precedent to the supplying of water to the purchaser from the state. Fortman v. City of Minneapolis, decided May 1, 1942. The classification so attempted would be discriminatory and such ordinance would be arbitrary and unconstitutional as class legislation. Dunnell's Digest, Sections 1668 and 1674.

GEO. B. SJOSELIUS,
Assistant Attorney General.

July 8, 1942. 624-D-5

320

Repurchase—By mortgagee—Old age assistance liens—Effect of repurchase
—L 39, C 315; L 41, C 43; M40 § 3199-26; (MS41 §§ 256.26, 282.24 to 282.32 incl.).

Stearns County Attorney.

Facts

It appears that in the case which you submit the mortgage was given before the old age assistance lien accrued.

Question

Whether in case the mortgagee repurchases under Laws 1941, Chapter 43, he will acquire the property free from the old age assistance lien, or whether he will simply be in the position of one who redeems subject to existing liens.

Answer

We have previously held that old age assistance liens upon real estate are extinguished by tax-forfeiture, subject to possible revival in case of repurchase of the property by the former owner who received the old age assistance or by someone claiming under him. Opinion of October 7, 1941, to the county attorney of Itasca County, file No. 425-c, of which a copy is enclosed. We have also ruled that when a repurchase of tax-forfeited land is made not by the owner at the time of forfeiture but by a person to whom the right to pay taxes is given by statute, mortgage, or other agreement, the conveyance should be made to the former owner, showing by whom the repurchase was actually made so as to protect the latter's rights. Opinion of September 19, 1939, to the county auditor of Aitkin County, file No. 412-a-23. This ruling was made in order to avoid any conflict with respect to priority among the various parties entitled to repurchase and in order to protect the rights of all of them, whatever they may be. Of course the public officials who act in the repurchase proceedings cannot determine any controversy between the former owner and the mortgagee or anyone else claiming under a repurchase. Neither can this office determine any question of private rights arising in such proceedings. Such determination can be made only by the courts.

Hence the only official answer we can give to your question is that if the mortgagee repurchases the property from tax-forfeiture, the auditor should certify the repurchase in the name of the owner at the time of forfeiture, reciting that the application for repurchase and payment of the repurchase price were made by the mortgagee. The latter will then be in a position to enforce his rights against the former owner, whatever they may be, by appropriate legal proceedings, as he may be advised by his own counsel.

It would be impossible to determine in advance what the status of the old age assistance lien would be in case of repurchase by the mortgagee, because that would depend in part upon the determination of the respective

rights of the former owner and the mortgagee and in part upon possible action by them after the repurchase. If it should be determined that the repurchase by the mortgagee gave him absolute title, resting upon the tax-forfeiture and the subsequent conveyance from the state, free from any interest on the part of the former owner, the old age assistance lien would be eliminated, having been extinguished by the tax-forfeiture with respect to everyone except the former owner and those claiming under him. If it should be determined that the repurchase by the mortgagee inured to the benefit of the former owner, subject to the mortgage, the mortgagee would simply be left to his legal remedies under the mortgage, and the effect of the old age assistance lien would depend on whether or not it was subordinate to the mortgage. There is no doubt that any interest in the property which might inure to the benefit of the former owner as a result of the repurchase would be subject to the old age assistance lien, either by revival or by new attachment, as might be determined. That lien, by the express terms of the law, applies to after-acquired property as well as that which is owned by the recipient at the time the lien accrued. Laws 1939, Chapter 315 (Mason's Supplement 1940, Section 3199-26). However, as between the mortgagee and the state as holder of the old age assistance lien, the issue would depend on the relative priority of their respective liens.

At any rate, these are matters which must be left to future determination in appropriate legal proceedings, as before stated.

CHESTER S. WILSON,
Deputy Attorney General.

October 9, 1941. 425-C-13

321

Repurchase—Determination by county auditor of right of heirs or representatives of deceased persons to repurchase—Procedure in various cases— L 41, C 43; (MS41 §§ 282.24 to 282.32 incl.).

Goodhue County Attorney.

Opinion

Relative to the repurchase of tax-forfeited land under Laws 1941, Chapter 43.

1. **Determination by County Auditor of Heir's Right to Repurchase Where Owner at Time of Forfeiture Dies Thereafter.**

Section 1 of the repurchase act provides, in part:

"The owner at the time of forfeiture or his heirs or representatives, or any person to whom the right to pay taxes was given by statute, mortgage or other agreement, may repurchase any parcel of land claimed by the state to be forfeited to the state for taxes, if such repurchase is made prior to November 1, 1941," * * *

You state that a person claiming to be an heir of a deceased former owner has offered to repurchase a tract of land pursuant to this chapter, and inquire what proof the auditor may or must demand as to the death of the former owner, who the heirs are, and the right of the applicant to make the proposed repurchase. I assume that the former owner in your case was the owner at time of forfeiture and died thereafter. For a discussion of the reverse of this case, see paragraph 2, below.

Since the right of repurchase under the act is limited to certain designated classes of persons, it is the duty of the county auditor in every case to determine whether or not the applicant is eligible. This involves questions of fact, to be decided by the auditor upon proper evidence.

In the case which you submit, where application to repurchase is made by an heir of a deceased former owner, the most satisfactory evidence of death and heirship is an appropriate decree of the probate court, or a certified copy of such decree. Death of the former owner may also be established by the official certificate of his death or a certified copy thereof, preferably accompanied by an affidavit of identification. Of course heirship cannot be determined by such a death certificate or affidavit. Only a proper judicial decree can authoritatively establish heirship. However, in the absence of such authenticated evidence, the auditor may accept other reliable evidence. What kind of evidence he will require in a given case is for him to determine according to the circumstances. Of course he should not act upon unreliable evidence.

Whether the auditor should require probate proceedings in a given case or not depends on whether the essential facts can be satisfactorily established by other evidence. It should be borne in mind that the auditor is acting in an administrative, not a judicial, capacity. His decision on a question of death or heirship is not conclusive. Only a court of competent jurisdiction can make a final determination in such a matter. Hence, if the auditor should err and permit the repurchase of tax-forfeited land by a person having no right thereto under the law, the error would be subject to correction by appropriate legal action. However, this would subject the aggrieved parties to inconvenience, expense, and delay. It is therefore important that the auditor should make a correct determination in the first instance. It follows that he should insist upon a probate proceeding in any case where the essential facts cannot be established with certainty by other evidence, unless he adopts the procedure hereinafter described.

For obvious reasons, a conveyance under the repurchase act should never be made to a named heir or heirs without a probate proceeding. In the absence of such a proceeding, there can be no certainty as to whether the deceased died testate or intestate or as to the identity of his heirs or devisees. However, in any case where it is satisfactorily proved that the owner at the time of forfeiture is dead, but no probate proceedings have been had, the auditor may permit repurchase to be made for the benefit of all the heirs, without naming them. In such case the receipt, certificate, and conveyance issued upon repurchase should run, for example, to "the heirs of John Anderson, deceased," reciting that the deceased was the owner at the time of for-

feiture, and also showing by whom the payment was actually made. Such a conveyance will inure to the benefit of those who may later be judicially determined to be the heirs or devisees of the deceased. In any such case the auditor should be reasonably assured that the person who makes the application and payment is one of the heirs, but this need not be established with the degree of certainty that is requisite where a conveyance to named heirs is desired.

For repurchase by representative where probate proceedings are pending, see paragraph 4, below.

2. Determination of Right to Repurchase Where Forfeiture Occurs After Death of Former Owner.

Care should be taken to distinguish between cases of the kind discussed in paragraph 1, above, where ownership at time of forfeiture was in one person who thereafter died, leaving heirs who merely share the right of repurchase, and cases where the former owner died before forfeiture, leaving heirs who shared the actual ownership of the property at the time of forfeiture. In a case of the latter class the heirs are entitled to repurchase, if at all, as owners of the property at the time of forfeiture in their own right, not merely as successors to the right of repurchase of the former owner. To entitle the heirs or any of them to repurchase, the auditor must be satisfied not only that they inherited the property upon the death of the former owner, but that their title has not been transferred or divested in any way since. To be really safe in such a case the auditor should insist on a probate decree determining the inheritance, supplemented by other evidence showing that there had been no transfer of title from the heirs.

For repurchase by representative where probate proceedings are pending, see paragraph 4, below.

Of course, if title to the property left by the deceased had been transferred before forfeiture by deed from the heirs or the representative or otherwise, neither the heirs nor the representative could repurchase. Repurchase could be made only by the party who had acquired the property and owned it at the time of forfeiture or by his heirs or representatives or others authorized by the repurchase act.

3. Repurchase by One Heir for Benefit of All Where Owner Dies After Forfeiture.

In any case where the owner at the time of forfeiture dies thereafter, leaving two or more heirs, no one of the heirs may repurchase the entire property in his own name, so as to cut out the other heirs, nor may he repurchase his undivided interest separately and let the others go. It is clear that the repurchase act was intended to permit the repurchase of property as it stood at the time of forfeiture. No provision is made for the separate repurchase of fractional interests resulting from subsequent division of ownership through inheritance or otherwise. The general laws governing tenancy in common would prohibit one heir from taking advantage of the repurchase privilege so as to eliminate the other heirs. However, any one of the heirs

may repurchase the entire property as it stood at the time of forfeiture for the benefit of himself and the other heirs. In such case the heir who pays the repurchase price may be entitled to reimbursement from the others, and to protect his rights the official records made and papers issued in the matter should show who made the payment. However, the public officials in charge of the matter have no further concern with proceedings for determination of the rights or liabilities of the respective heirs.

4. Repurchase by Representative of Estate of Deceased Former Owner.

If a representative (administrator or executor) of the estate of the deceased former owner has been appointed in probate court, but no decree determining the inheritance has been entered, the representative may repurchase tax-forfeited property for the benefit of the estate, whether forfeiture occurred before or after the death of the former owner, provided the entire property as it stood at the time of forfeiture would still belong to the estate but for the forfeiture. Of course the use of funds belonging to the estate for this purpose will be subject to the approval of the probate court. In case of such repurchase the conveyance should run to the representative in his official capacity, for example, to "John Smith, as administrator of the estate of William Smith, deceased." The representative will then hold the title subject to disposition as the court may determine.

5. Right to Repurchase Where Ownership Is Shared at Time of Forfeiture.

In any case where the property at the time of forfeiture was owned by two or more persons as tenants in common or as joint tenants (whether they acquired title by inheritance from a deceased former owner or otherwise), some questions may arise requiring special consideration.

(a) May one of the co-owners repurchase his own undivided interest in the property without repurchasing the remainder for the benefit of the others? In our opinion he may. Attorney general's opinion of September 19, 1939 (412-a-23). This conclusion is based on the fact that at and prior to forfeiture there was a sharing of ownership, under which any one of the co-owners might have paid taxes upon or redeemed his share separately at any time before forfeiture. Mason's Minnesota Statutes of 1927, Sections 2080, 2156. The repurchase act contemplates that one may repurchase what he actually owned at the time of forfeiture, whether it be an undivided interest or the whole estate. However, as stated in paragraph 3, above, where the entire title at the time of forfeiture was in one person, who thereafter died, repurchase of any interest less than the whole is not permissible.

(b) May one of the co-owners repurchase in his own name the undivided interest of any other co-owner? In our opinion he may not, because he was not the owner of the other interest at the time of forfeiture. Attorney general's opinion of August 13, 1937 (412-a-23). It follows that no co-owner may repurchase the entire property in his own name and thus cut out the others.

(c) May one of the co-owners repurchase the entire property for the benefit of himself and the others according to their respective interests? In our opinion he may. This is in accordance with the general rules of law governing tenancy in common or joint tenancy, whereby any of the co-owners may take action to preserve the common property for the benefit of all, with right of reimbursement from the others as their interests may appear. In such a case the co-owner making the repurchase would act as the representative of the others within the meaning of the repurchase act. The procedure would be governed by the same rules as hereinbefore stated in paragraph 3.

CHESTER S. WILSON,
Deputy Attorney General.

October 2, 1941. 425-C-13

322

Repurchase—Land released to the state for conservation uses not subject to repurchase by former owner—M40 § 2139-15 b; L 41, C 43; L 41, C 511; (MS41 §§ 282.01, 282.24 et seq.).

Carlton County Attorney.

Question

Whether tax-forfeited land which has been classified as conservation land and released to the state under the jurisdiction of the commissioner of conservation for conservation uses may be repurchased by the former owner under Laws 1941, Chapter 43.

Answer

Chapter 43, Section 1, provides that the owner at the time of forfeiture or certain others designated may repurchase tax-forfeited land prior to November 1, 1941, "unless prior to the time repurchase is made such parcel shall have been sold by the state as provided by law."

The provision for release of land to the state for conservation purposes is contained in a later act passed at the same session, Laws 1941, Chapter 511. Section 1 of that chapter, amending Mason's Supplement 1940, Section 2139-15 (b), authorizes the county board to submit tax-forfeited land which has been classified as conservation land to the commissioner of conservation for conservation uses, and provides that the title to all such land accepted by the commissioner of conservation "shall be held by the state free from any trust in favor of any and all taxing districts," and that such land shall be devoted thereafter to various specified conservation uses under the jurisdiction of the commissioner of conservation. It is further provided that all income from such land shall be paid into the general revenue fund of the state, whereas income from conservation land remaining under the jurisdiction of the county board is to be distributed as other income from ordinary tax-forfeited land. There is also a provision authorizing the commissioner of conservation to convey to governmental subdivisions land which has been released to the state under the provisions above mentioned.

Under these provisions, the effect of releasing land to the state for conservation uses is to make it the absolute property of the state, divesting all interests of the taxing districts and all power of control by the county authorities. To hold such land subject to repurchase upon application to the county auditor, as provided by Chapter 43, would produce a conflict of authority and might lead to embarrassing consequences. If the commissioner of conservation had proceeded to use a tract of released land for some project involving considerable labor or expense, and then should find that he must surrender it to the former owner under the repurchase act, the state might suffer substantial loss. It would be unreasonable to suppose that the law was designed to permit such a state of confusion. It is rather to be assumed that the legislature intended to give the commissioner of conservation complete and exclusive control over the released lands.

Such intent is manifest not only from the express language of Chapter 511 but from the fact that provision is made for conveyance of such land by the commissioner of conservation to governmental subdivisions in certain cases. If the legislature had intended to permit any other disposition of such land, such as repurchase by former owners, it would presumably have made provision for application therefor to the commissioner and for execution by him of the necessary conveyances.

Under the well settled rules of statutory construction, now set forth in Laws 1941, Chapter 492, Section 26, so far as there is any conflict between the repurchase act, Chapter 43, and the pertinent provisions of Chapter 511, the latter must control. The former deals with tax-forfeited land generally whereas the latter deals with a special class of such land, namely, that which has been released to the state. With respect to such land the provisions of Chapter 511 must therefore be held paramount.

Any claim that the repurchase act revived or extended the right of the former owner to redeem his land or otherwise gave him a vested right of repurchase would clearly be untenable. All private rights and interests in the land which were subject to taxation were extinguished on tax forfeiture, and any rights subsequently granted by the legislature, such as the right of repurchase, would be merely privileges, subject to modification or withdrawal at any time unless fully executed. State v. Aitkin County Farm Land Company, 204 Minn. 495, 284 N. W. 63.

I am therefore of the opinion that tax-forfeited land which has been released to the state for conservation uses pursuant to Chapter 511 is not subject to repurchase under Chapter 43.

CHESTER S. WILSON,
Deputy Attorney General.

October 27, 1941. 425-C-13

323

Sale—Cancellation—Lands sold on contract restores status as tax-forfeited land—Auditor authorized to cancel taxes levied after sale—L 35, C 386; (MS41 §§ 282.01 to 282.13).

Beltrami County Attorney.

Facts

Certain premises in Beltrami County forfeited to the State in 1936 and were appraised and offered for sale at auction and sold to a purchaser. Only the initial payment was made by the purchaser and the sale was cancelled in June of this year. In the meantime taxes for years 1938, 1939, 1940 and 1941 were placed of record.

Question

Whether the county auditor has authority to cancel these taxes subsequently placed of record.

Answer

Upon the cancellation of the contract for sale, the real estate therein sold immediately regained its character as tax-forfeited land. As tax-forfeited land held by the state in trust for the several taxing subdivisions, there can be no liens for taxes upon it.

It is our opinion that the liens for the taxes which were levied by the auditor upon said land after its sale upon contract pursuant to Laws 1935, Chapter 386, and before the cancellation of the contract, were extinguished by operation of law upon such cancellation. The auditor should make an appropriate entry upon his records showing that the tax lien has been extinguished by operation of law through cancellation of the contract of sale.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

October 18, 1941. 407-H

324

Cancellation—Sale—Law governing—Procedure thereunder—Extension of time for delinquent payments—L 35, C 386; (MS41 282.01 to 282.13 incl.).

Renville County Attorney.

Facts

On March 15, 1937, and March 18, 1938, two separate tracts of land were sold by the County Auditor of our county, under Chapter 386 of the Laws of 1935 as amended by Chapter 105 of the Extra Session Laws of 1935, on the basis of ten equal installments as provided by the Act.

In December of 1939 the purchaser being in default of his payment on the interest and principal, petitioned the County Board for an extension to April 1, 1940, of the delinquent interest and principal payments. This petition and application was approved by the County Board and later approved by the Tax Commission.

When April 1, 1940, came around, the purchaser made the interest and principal payment on the tract of land purchased by him on March 15, 1937, but made no payment on the delinquent interest and principal installment on the second tract of land purchased by him on March 18, 1938, and since April 1, 1940, he has made no payments whatsoever on the interest and principal on either of the two tracts of land, although he has paid and kept the taxes up to date.

This purchaser has recently appeared before the County Board asking for another extension to November 1, 1941, in which to pay the interest and principal installments which are now delinquent.

Questions

1. Does a default in payment of any of the interest and principal installments automatically cancel out any rights or interest that the purchaser has in lands purchased under Chapter 386 of the Laws of 1935 as amended?

2. If the purchaser's interest is not automatically cancelled, has the County Auditor authority to accept delinquent interest and principal payments after a default in payment of the installments, and before any action is taken by the County Board or the Tax Commission to cancel out the contract of purchase entered into between the County or State and the purchaser with reference to the lands?

3. Already having had one extension as previously noted, has the purchaser the right and has the County Board the authority to approve and the Tax Commission the authority to give another extension?

4. Are the rights of the purchaser governed by Chapter 386 of the Laws of 1935 as amended by Chapter 105 of the Extra Session Laws of 1936, or by the additional amendment which was made by Chapter 328 of the Laws of 1939, which latter amendment provides for certain duties to be performed by the County Auditor in notifying the Tax Commission as of October 31 of each year, of the status of all lands sold under these proceedings, and further provides the authority for the Tax Commission to cancel out the purchasers interest and order the land reappraised and sold?

5. Under the present circumstances, taking into consideration the facts as I have outlined them, can there be any action taken either by the purchaser or by the County Board with reference to giving the purchaser another extension within which to pay his delinquent installments of interest and principal before October 31, 1941, or must the matter stand in abeyance until the Auditor makes his annual report of all delinquencies to the Tax Commission and await the action taken by the Tax Commission as provided under Chapter 328 of the Laws of 1939?

Answers

We shall answer your questions seriatim.

The two separate contracts for the sale of tax-forfeited lands, to which you refer, were made under Laws of 1935, Chapter 386. The question which you submit is, therefore, governed, not by the law as it now stands since the amendments in 1939 and 1941, but by the law in force at the time of the sale, namely, Chapter 386, Section 1, which provides as follows:

> "* * * Such sale shall be immediately cancelled by the tax commission in the manner now or hereafter provided by law for the cancellation of contracts for the sale of real estate, if the purchaser shall fail to pay any of such deferred installments when due or the current taxes for any year thereafter, * * *."

This means that such sale shall be cancelled in accordance with Mason's Minnesota Statutes 1927, Section 9576. We enclose herewith a copy of an opinion to the Minnesota Tax Commission under date of May 24, 1939, in which a suggested form of notice of cancellation will be found. The answer to your first question is, therefore, in the negative.

The direction in the statute to cancel the contract in the manner provided by law for the cancellation of contracts for the sale of real estate, necessarily, implies that until the thirty day period after the service of the notice of cancellation has expired, the county auditor may accept delinquent interest and principal payments, together with the cost of serving the notice of cancellation, if such notice shall have been served. After the expiration of the thirty day period under the notice of cancellation, the county auditor may not accept delinquent interest and principal payments, unless the time for payment has been extended as provided by law. This answers your question numbered 2.

Under Laws 1935, Chapter 386, the Commissioner of Taxation, as successor to the Tax Commission, is given broad power to extend the time for payment of an annual installment for such period as he may deem warranted. Answering your third question, it is our opinion that if the county board recommends a further extension, and the Commissioner of Taxation after investigation deems it proper, the latter may again extend the time for the payment of an installment even though such time has been previously extended.

As stated in answering your first question, the rights of the purchaser are governed by Chapter 386, Section 1. This answers your fourth question.

Answering your fifth question, it is our opinion that the county board is not required to wait until it makes the report in October which is required by Laws 1939, Chapter 328. If the county board is to recommend an extension of the time for making the payment, such recommendation should be promptly transmitted to the Commissioner of Taxation for his action, so that the question of the need for cancellation may be immediately determined.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

September 12, 1941. 425-C-6

325

Sale—Erroneously made.

Aitkin County Attorney.

Facts

Some time ago a resident of our county who is of Finnish descent went to our County Auditor and apparently informed the clerk in charge of forfeited land sales that he wished to purchase some land in Township 45-22. The land in question had been appraised and had been offered for sale at public sale and no bid had been received therefor. The County Auditor's representative accordingly sold him the land in 45-22 and in due time a contract was delivered to him covering the land in 45-22 and in accordance with the receipt given him at the time the purchase was made which receipt also covered the land in 43-22.

The person in question apparently was mistaken as to the township in which he wished to purchase land and was under the impression that he had purchased land in 43-22 rather than in 45-22 and commenced the building of a house upon this land. The land in Township 43-22 was not tax-forfeited land but was State trust land and as such not subject to sale under the same procedure as the tax-forfeited land which the person in question actually bought.

The purchaser insists that he told the County Auditor that he wanted to buy land in 43-22 and not in 45-22. He insists that the County Auditor misunderstood him and that he, not being familiar with the English language, did not understand the writing on the receipt which he received or the contract which he later received. The member of the County Board from the district in question is of the opinion that the purchaser is telling the truth and is very anxious to have the County Board take action relieving him of his mistake by returning to him the money that he has already paid on the contract.

Question

Whether any action can be taken for a rescission of the contract and a repayment of the down payment to the purchaser.

Answer

The answer to your question depends upon whether the mistake was that of the purchaser or that of the county auditor.

If the mistake was the mistake of the purchaser, there is no statutory authority for any action which would help him. I believe that his relief under those circumstances can only come from legislative action.

If the mistake was the mistake of the county auditor, he has the power to correct his own error and to make the appropriate entry upon his books showing that the entries are cancelled because they were erroneously made. The purchaser should file a claim with the county board for the money taken

in error by the county auditor. The county board then may, if it finds the facts such as to warrant the action, adopt a resolution allowing the claim and ordering its payment.

The determination of whose mistake was responsible for the existing situation is one of fact to be made by the county auditor and the county board, and it cannot be determined by this office.

GEO. B. SJOSELIUS,
Assistant Attorney General.

October 21, 1942. 424-a-2

326

Sale—Notice of—Immaterial defect in reference to statute does not invalidate notice—L 39, C 320; L 41, C 59; M40 §§ 2139-27 b, et seq.; (MS41 §§ 282.14, et seq.).

Roseau County Attorney.

Question

As to the validity of a published notice of sale of tax-forfeited lands in a conservation area governed by Laws 1939, Chapter 320, being Mason's Supplement 1940, Sections 2139-27b to 2139-27k, inclusive, as amended by Laws 1941, Chapter 59, with respect to Section 2139-27d.

Answer

The notice in question follows substantially the form prescribed by Laws 1941, Chapter 59, above cited, with the following exceptions:

(1) The notice states "Said sale will be governed by Laws 1939, Chapter 230, as amended by Laws 1941, Chapter 59," * * * which was erroneous in that "Chapter 230" should have read "Chapter 320";

(2) In addition to the matter required by Chapter 59, the notice contains the following statements concerning the terms of sale:

> "All sales shall be for cash or on the following terms, but not for less than the appraised value, to-wit: The appraised value of all merchantable timber shall be paid for in full at the date of sale. At least 15 per cent of the purchase price of the land shall be paid in cash at the time of purchase, and the balance in not to exceed 20 equal annual installments with interest at the rate of four per cent per annum on the unpaid balance each year, both principal and interest to become due and payable on December 31st each year following that in which the purchase was made. The purchaser may pay any number of installment of principal and interest on or before their due date.

"BE IT RESOLVED, that the terms of sale on platted tracts in the Southwest Quarter of the Northwest Quarter, Section 9, Township 162 N., Range 38 W., shall be for cash only, and paid for in full at the date of sale.

"(All payments MUST be made on the day of the sale.)"

The first paragraph of this additional matter sets forth the terms of sale substantially as prescribed by Section 2139-27c. The second paragraph is evidently a quotation from a resolution of the county board, providing that sales in a certain area shall be for cash only, which was within the authority of the board.

Question

Whether the notice was vitiated by the error in referring to the chapter number of the 1939 laws.

Answer

The general rule with respect to notices in proceedings involving tax sales is that applicable statutes must be followed with reasonable strictness, but that immaterial errors may be disregarded.

In the present case the purpose of the notice is to apprise prospective purchasers of the terms of sale and of the legal status and description of the lands offered for sale. The question is whether the error in the chapter number might mislead purchasers so that they would not be correctly informed as to these matters.

The form of notice prescribed by Laws 1941, Chapter 59, contains the following clause:

"Said sale will be governed by Laws 1939, Chapter ....."

This provision contemplates that the auditor will insert the correct reference to the pertinent laws in force at the time of the sale, so that persons interested may know what laws govern the sale and may examine them if they desire. This is an essential requirement, because the prescribed form of notice does not set forth the conditions of sale in detail. In your case it might be contended that failure to comply with this requirement would be cured because the notice went beyond the statutory form and stated the terms of sale substantially as prescribed by Section 2139-27c. However, there are other important conditions affecting the sale besides those contained in that section, especially the provisions of Section 2139-27e, relating to cancellation of a contract of sale in case of default, and the provisions of Section 2139-27h, relating to mineral reservations. Hence a material error in referring to the governing statutes would invalidate the notice, in spite of the additional statement which was included concerning the terms of sale.

However, it is our opinion that the error in the chapter number appearing in the notice in question is not material, because it was followed immediately by a correct reference to the amendatory act, Laws 1941, Chapter 59. Upon examining this act any interested party would see that it amended Mason's Supplement 1940, Section 2139-27d, which was part of Laws 1939,

Chapter 320, and that the sale would necessarily be governed by the other applicable provisions of that chapter. Laws 1939, Chapter 230, which was erroneously referred to, pertained to water, light, power and building commissions in certain cities, and obviously could have no application to the sales of land in question.

From the foregoing it is evident that the notice contains sufficient information to apprise all interested persons of the laws governing the sale, and that no one could be misled by the erroneous chapter number. We therefore conclude that the notice is valid.

Of course it must be understood that an attorney general's opinion in a case of this kind, affecting the disposition of property, is not legally conclusive, but is only advisory. A final determination in case any question should be raised in the future as to the validity of a sale made pursuant to the notice in question could be made only by the courts. However, we find support for our opinion in the case of Towle v. St. Paul Permanent Loan Company, 84 Minn. 105, 86 N. W. 781, holding that certain omissions in a notice of tax judgment sale might be supplied by reference to the laws, which all persons are presumed to know. It is true that in Kenaston v. G. N. Ry. Co., 59 Minn. 35, 60 N. W. 813, and State v. Halden, 62 Minn. 246, 64 N. W. 568, it was held that certain defects in notices of expiration of redemption could not be aided by reference to the applicable statutes. However, in those cases the statute expressly required certain information which had been omitted to be stated in the notice, whereas in the case here in question the statute merely requires a reference to the applicable laws. Hence we think the rule laid down in the Towle case, above cited, is in point.

CHESTER S. WILSON,
Deputy Attorney General.

November 14, 1941. 419-B

327

Sale—State trust fund lands—Status—L 35, C 386; M40 § 2139-21; (MS41 § 282.07).

Renville County Attorney.

Facts

On October 2, 1885, certain school lands were sold to an individual living in Renville County. There now remains unpaid on the principal of the original purchase price the sum of $183.98 and interest and penalty to July 1, 1941, of $23.03, making a total due the school fund of the State of $207.01.

The tract of land described in the land certificate was sold and bid in by the State for delinquent real estate taxes for the year of 1931, and the State acquired absolute title through delinquent tax proceedings after the period of redemption expired on November 4, 1940.

This land was sold through proceedings in the County Auditor's office, under Chapter 386 of the Laws of 1935 as amended, to a third party, for the sum of $1,000. It was not until after the land was sold under Chapter 386 of the Laws of 1935 as amended that the matter was called to the attention of this office for consideration and an opinion as to the legality of the sale.

Questions

1. Under the existing law, can it be so interpreted that a new purchaser under Chapter 386 of the Laws of 1935 as amended could go ahead and pay off the amount due the state on the certificate and obtain a patent from the State, without obtaining an assignment thereof from the original holder and owner, if the County Auditor certifies on the back of the land certificate that the certificate has been paid in full with interest and he (the new purchaser) is the owner of said land by reason of purchase thereof under said Chapter 386?

2. Would the county have authority to pay off the amount owing on the land certificate out of the purchase price it received for the sale of the land under Chapter 386 to the new purchaser? In this connection I want to say that it is my opinion that it cannot, but the Auditor's office has asked me to submit the question to your office anyway.

3. What effect would the sale proceedings under Chapter 386 to the new purchaser have on his title if he did proceed to pay off the amount due on the land certificate, but the State did not issue to him a patent, he not being able to obtain an assignment of the original land certificate from the original holder and owner thereof?

Answers

When the lands in question were forfeited to the State for nonpayment of taxes, such forfeiture divested the vendee under the certificate of sale of all rights and interest in the lands described therein. Mason's Supplement 1940, Section 2139-21, provides in part as follows:

> "* * * When the interest of a purchaser of state trust fund land sold under certificate of sale, or of his heirs or assigns or successors in interest, shall by reason of tax delinquency be transferred to the state as provided by law, such interest shall pass to the state free from any trust obligation to any taxing district and free from all special assessments and such land shall become unsold trust fund land."

The land in question having again become unsold trust fund land by virtue of the statute above quoted, it can only be sold in the manner provided by statute for the sale of trust fund lands. It is not subject to sale as tax-forfeited lands as it does not have that status at any time.

The sale of this land under authority of Laws 1935, Chapter 386, as amended, is void. The purchaser may file a claim with the county board for

the return of the money which he has paid. The claim, if allowed, should be paid from the moneys in the forfeited tax sale fund. This discussion answers the three questions which you have submitted.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

July 11, 1941. 425-C-1

328

Conveyance to municipal subdivisions—Power of Commissioner of Taxation to convey by deed—L 41, C 511; (MS41 § 282.01).

City Attorney, Duluth.

Facts

Chapter 511, Laws of Minnesota 1941, contains this language:

"* * * The commissioner of taxation shall have power to convey by deed in the name of the state any tract of tax-forfeited land held in trust in favor of the taxing districts, to any governmental subdivision for any authorized public use, provided that an application therefor shall be submitted to the commissioner with a statement of facts as to the use to be made of such tract and the need therefor and the recommendation of the county board. The deed of conveyance shall be upon a form approved by the attorney general and shall be conditioned upon continued use for the purpose stated in the application."

Question

If the Commissioner of Taxation under this chapter has the power to convey by deed in the name of the State, **without money or other consideration to the State,** any tract of tax-forfeited land held in trust in favor of the taxing districts, to any governmental subdivision for any authorized public use.

Answer

Taking literally your assumption that such transfer would be made "without money or other consideration to the state," the categorical answer to your question would have to be "no." The law does not contemplate that a conveyance be made without any consideration whatever. However, it does not follow that a money consideration is required to support a conveyance. There are many benefits to the state other than the receipt of money which would be sufficient consideration to justify the transfer of the property in question. It is to be presumed that the officers concerned will act properly after being fully advised in the premises. The law certainly does not contemplate that any governmental subdivision has an absolute right to have conveyed to it such tax-forfeited lands as it may request without reasonable grounds. The statute vests discretion in the board of county commissioners

in determining what their recommendation shall be, and in the commissioner of taxation in determining whether he shall execute a conveyance to the governmental subdivision concerned. You will note that the deed will convey only conditional title and that upon use for any purpose other than that for which the property is conveyed, the title to such property will revert to the state.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

May 13, 1941. 130-B

329

Sale—Voidable—Where value of buildings is disregarded in appraisal—M40 § 2139-15c; (MS41 § 282.01.).

Polk County Attorney.

Opinion

This is in reference to the case of the sale of tax-forfeited land in your county, formerly owned by A.

It appears that an improved homestead, consisting of five platted lots, with a dwelling house and outbuildings, had become forfeited for delinquent taxes. In appraising the property for sale pursuant to Mason's Supplement 1940, Section 2139-15, subdivision (c), the five lots were listed as vacant and unoccupied, and were appraised at $5.00 each, the same as other vacant lots in the vicinity. At the public sale of tax-forfeited land held October 9, 1939, these five lots, together with some other vacant lots, were sold to an individual purchaser at the appraised value, $5.00 per lot.

In my opinion this sale is voidable for lack of a proper appraisal. The general rule is that a sale of public land may be set aside for manifest error amounting to a fraud by implication upon the public.

State v. Red River Lumber Co., 157 Minn. 7, 195 N. W. 495;

State v. Skelton, 167 Minn. 159, 208 N. W. 660;

Buckley v. Patterson, 39 Minn. 250, 39 N. W. 490;

Thwing v. Hall & Ducey Lumber Co., 40 Minn. 184, 41 N. W. 815;

Dunnell's Digest, Sections 1188 and 1192.

In the Red River Lumber Company case the main ground for cancellation was the complete disregard of an express provision of law requiring that the timber on pine lands should be sold and removed before the lands themselves were sold. In the present case the statute requiring an appraisal was not entirely disregarded, but certainly it was not substantially complied with. Appraisal of improved residence property at the same nominal value as adjacent vacant lots was a palpable error. Under the law it is clearly the

duty of the county board to make an actual appraisal, taking into consideration all material elements of value of the property. It is obvious that this was not done in the present case. For the purposes of the law the result is the same as if no appraisal had been made.

The information submitted does not show whether the erroneous appraisal was made by the county board deliberately or inadvertently, or whether the purchaser acted knowingly or in ignorance of the nature of the property. Possibly the county board may have committed an oversight, but it is hardly conceivable that the purchaser did not know what he was buying. At any rate, it is certain that there was a material and patent mistake of fact in the appraisal which would amount to a constructive fraud on the public, even if the county board and the purchaser were unaware of it before the sale, and if the purchaser knew of the error in the appraisal when he made the purchase, he committed a deliberate fraud on the public. In either event the sale would be subject to cancellation.

Even if the county board acted deliberately in making the erroneous appraisal, with full knowledge of the facts, it would not legalize the sale. A private individual may transfer his property upon any terms he pleases, but public authorities have no power to dispose of public property except upon compliance with the law. The rule is well established that the state cannot be bound or estopped by the unlawful acts of its officers.

Furthermore, to transfer public land to a private individual for a grossly inadequate consideration would amount to an improper appropriation of public property to private use.

It might be contended that since the county board was given discretionary power to make an appraisal, and had ostensibly done so in this case, the purchaser was entitled to rely on their action. Such was the argument in the Skelton case, above mentioned, wherein the court refused to set aside a sale. However, even discretionary powers must be exercised within reasonable limits, and when officials grossly and obviously exceed those limits, as in the present case, their action affords no protection to other parties concerned.

It follows that steps to set aside the sale should be undertaken as soon as possible. In some cases of defective sales which have come to our attention, the purchasers have consented to cancellation, and have voluntarily reconveyed the land to the state upon demand by the county attorney. I suggest that you first make such a demand upon the purchaser in the present case. If he complies he will, of course, be entitled to a refundment of the purchase money which he paid. If he refuses it will be necessary for you to bring an action for cancellation against him in the district court.

As a guide for drawing a complaint in such an action, we note that in the Red River Lumber Company case the complaint set forth the facts fully, alleging that the state auditor committed an inadvertent mistake and sold the land in ignorance of the fact that it bore pine timber, that the purchaser bought the land knowing that it was timbered, without advising the auditor of that fact, and that by reason thereof the sale and the certificates thereof

were void and the land was the property of the state. Judgment was prayed cancelling the certificates of sale and adjudging title to the land to be in the state, with other relief not here material. In general this form of complaint would be applicable to the present case, with such changes as may be necessary to conform with the facts.

CHESTER S. WILSON,
Deputy Attorney General.

February 1, 1941. 425-C

GASOLINE TAX

330

Gasoline tax not in lieu of personal property taxes—M27 § 2720-82; M40 § 2720-71; L 41, C 162; L 41, C 495.

City Attorney, Redwood Falls.

You inquire whether or not gasoline upon which the Minnesota state tax has been paid can be again assessed for personal property for the purpose of taxation when said gasoline is in storage as of May 1, 1941, in the corporate limits of the city.

We assume that the Minnesota state tax paid is the 3c gasoline tax imposed by Mason's Minnesota Statutes 1940 Supplement, Section 2720-71. (See Laws 1941, Chapter 162.)

Mason's Minnesota Statutes 1927, Section 2720-82 (Laws 1941, Chapter 495), provides that the state gasoline tax shall be "in lieu of all other taxes imposed upon the business of selling or dealing in gasoline, whether imposed by the state or by any of its political subdivisions, but shall be in addition to all ad valorem taxes now imposed by law." Under this provision of the statute it appears clear that gasoline held in storage on May first is subject to a personal property tax even though the gasoline tax has been paid.

FRANKLIN B. STEVENS,
Special Assistant Attorney General.

March 1, 1941. 325a

GROSS EARNINGS

331

Ad valorem tax—Recreation center of St. Paul Union Depot Co.—M27 § 2246; (MS41 § 295.02.).

Commissioner of Taxation.

Facts

Certain personal property of the St. Paul Union Depot Company, consisting of bowling alleys, tables, chairs, lockers, steam tables, ice cream

fountains, etc., is located in the depot building and is used in the operation of a recreation center on the second floor of the building.

Question

Whether the earnings of the recreation center should be reported by the proprietary lines of the depot company under the gross earnings law or whether the property enumerated is subject to the ad valorem tax.

Answer

It is my opinion that the property in question, assuming that it is personal property, is subject to the ad valorem tax.

Section 2246 of Mason's 1927 Minnesota Statutes provides:

> "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 St. Paul Union Depot Company is concededly engaged in the railroad transportation business, but because it is merely an agency of the proprietary lines, which pay gross earnings taxes upon all their earnings, it has been held to be not subject to payment of a gross earnings tax.

State v. St. Paul Union Depot Co., 1889, 42 Minn. 142.

It has been held that the proprietary lines of the depot company are liable to pay gross earnings taxes upon items of income from the depot company such as parcel room receipts.

State v. Chicago, Rock Island & Pacific Ry. Co., 1930, 181 Minn. 615; 232 N. W. 105, 233 N. W. 866.

The court in this case stated that the operation of a parcel checking room is quite clearly in aid of and a part of the transportation business of the proprietary lines and that the income therefrom is therefore taxable as gross income. But the court also made the following statement:

> "That there may be incidental income from the operation of the depot, which is so disconnected from the transportation business as not to be gross income from that business and not subject to the gross earnings tax, may be conceded."

The recreation center in question is located on the second floor of the depot building. To get to it, it is necessary to either use the stairs or the elevator off to one side of the front entrance to the main concourse used by the traveling public. The only sign visible on the ground floor is a small

sign "Bowling Alley" above the side elevator. The main attraction of the recreation center is its bowling alleys, of which there are twelve. The soda fountain is operated only in connection with the alleys. An examination of the league score sheets posted on the walls indicates that out of some thirty leagues, only six are composed of railroad employees. The others are composed of employees of various business enterprises in St. Paul. It is apparent that the center depends for its patronage in large part upon regular resident bowling teams in league competition. As the center is set up, only an occasional traveler with an hour to spare while waiting for his train would have occasion to use its facilities.

Under the circumstances of the case, in my opinion the operation of this recreation center is so disconnected from the transportation business of the proprietary lines that the income therefrom cannot be considered part of the gross income of the proprietary lines. The income from the operation of the recreation center is therefore not subject to the gross earnings tax. Not being subject to the gross earnings tax, the personal property used in the business properly is subject to the ad valorem tax.

CHARLES P. STONE,
Special Assistant Attorney General.

August 6, 1942. 216-I-3

332

Municipalities—Allowance from state for property subject to gross earnings taxes—Valuation of property and computation of allowance to be made as of May 1 in taxable year—When population change takes effect— M27 §§ 1984, 2002, 2087-1, et seq., 2191; M40 § 2199-1; (MS41 §§ 272.50, 273.01, 273.25, 272.31, 276.15, et seq.).

State Auditor.

Question

Whether the City of Brainerd, having attained a population of more than 12,000 according to the 1940 federal census, is entitled to the allowance from the state treasury made by Mason's Minnesota Statutes of 1927, Sections 2087-1 to 2087-4, to municipalities having certain amounts of property on which gross earnings taxes are paid and which is consequently exempt from local taxation. The benefits of this statute are limited to cities and villages containing not more than 12,000 inhabitants. Brainerd has previously been eligible, but the 1940 census showed its population as 12,071, slightly above the limit set by the above mentioned statute.

Answer

This population change became effective for the purposes of state laws on May 12, 1941, that being the date when the Governor, pursuant to Mason's Minnesota Statutes of 1927, Section 9892, filed with the Secretary of State

a certified copy of official 1940 census tables containing a report of the population of Brainerd. The question is, when does this change in population operate to cut off the right of the City of Brainerd to the allowance in question?

The purpose of the allowance is to compensate the cities and villages which come within the terms of the statute for loss of tax revenue on account of property which is exempt from local taxation by reason of payment of gross earnings taxes thereon. The amount payable is based upon the ratio between the property which is subject to local taxation and that which is exempt on account of gross earnings taxes.

The status of all property, real or personal, as to whether it is subject to local direct taxes or to gross earnings taxes, must be determined as of May 1 in the year for which the taxes are levied, that being the date with respect to which assessments are made and upon which tax liens attach. Mason's Minnesota Statutes of 1927, Sections 1984, 2002, and 2191, and Mason's Supplement 1940, Section 2199-1. State v. N. W. Telephone Exchange Company, 80 Minn. 17, 82 N. W. 1090. Hence it is clear that the amount which a municipality is entitled to receive for a given taxable year must relate to the ratio between ordinary taxable property and property whereon gross earnings taxes are paid as of May 1 in the year for which the taxes are levied.

The statute provides that the allowance shall be paid annually, but does not fix any particular date for payment. In view of the fact that the local direct taxes levied for a given taxable year are payable during the following year, it may be assumed that the allowance in question should be paid likewise. We are informed that such has always been the practice, as shown by the records of your office. Accordingly, the allowance paid to a municipality in any given year has been computed upon the ratio between the assessed value of ordinary real and personal property and property whereon gross earnings taxes are paid for the preceding year. This practice is clearly in accordance with the intent of the law.

Applying the foregoing conclusions to the case at hand, it is my opinion that the City of Brainerd will be entitled to the allowance payable in 1941 for the taxable year 1940, computed upon property valuations as of May 1, 1940. It will also be entitled to the allowance payable in 1942 for the taxable year 1941, computed upon property valuations as of May 1, 1941, because in contemplation of the state law Brainerd was still in the class of cities having not more than 12,000 population at the date with respect to which the allowance for that year must be computed. Thereafter it will be entitled to no allowance as long as it remains in the class of cities having over 12,000 population.

We are informed that in reporting the valuation of property subject to gross earnings taxes, as required by the statute, the Railroad & Warehouse Commission has been accustomed to state the value as of December 31, based upon the returns of the gross earnings taxpayers for the calendar year ending on that date. Strictly speaking, this is not correct. Of course it would

make no difference if the report for December 31 actually reflected the value of the property as of May 1 preceding. However, if the taxpayers had acquired or disposed of any property during the year, an adjustment might be necessary, depending on when the changes occurred with respect to May 1. In any event, the commission should value and report the property as it stood on May 1 of the taxable year for which the allowance is to be computed.

It appears that under the established practice payment of the allowance for a given taxable year is not made until some time after the 1st of July in the following year, due to the manner in which the legislature has made appropriations for the purpose. Hence there will always be ample time for the commission to make the required appraisals, taking into consideration the returns received from the gross earnings taxpayers in the meantime.

CHESTER S. WILSON,
Deputy Attorney General.

October 21, 1941. 454-E

INHERITANCE TAX

333

Homestead—Valuation—Mortgage on one tract consisting of homestead and non-homestead property—M40 § 2293; (MS41 §§ 291.02 to 291.09).

Nobles County Attorney.

Facts

The probate judge has referred to you the question of determining the valuation for inheritance tax purposes of 160 acres of farm land, 80 acres of which is a homestead, there being a mortgage against the entire quarter section. You state that the probate judge proposes to deduct half of the amount of the mortgage in determining the value of the homestead and the other half in determining the value of the non-exempt property; that the Department of Taxation has advised you that the mortgage should be deducted in the proportion that the value of each respective tract bears to the value of the entire tract; and that in your opinion the entire mortgage should first be applied against the non-homestead property.

Opinion

The method of determining valuation for inheritance tax purposes, under the circumstances above outlined, which has been the practice of the Department of Taxation for many years, is valid, and within the intention of the legislature.

The Inheritance Tax Statute now provides, Mason's 1940 Supplement, Section 2293:

> "The homestead of the decedent, and the proceeds thereof if sold during administration, transferred to the spouse or issue of a decedent,

shall be exempt, to the extent of $30,000 of the appraised value thereof."

The statute does not in terms provide the method of allocating a mortgage which is an encumbrance upon both homestead and non-homestead property. As a practical matter, both parties, in executing a mortgage, consider the value of the security. If a mortgage covers two tracts, one of which is more valuable than the other, it is fair, and within the intention of the parties, if the mortgage is allocated on the basis of value of the security, in a situation where it is necessary to separate the property encumbered into two tracts.

It is true, as you point out, that the theory of the law is that the homestead should descend without the payment of a tax; but the method of apportionment approved above is not in any way inconsistent with that theory, since it allows the homestead to descend without the payment of any tax whatsoever. It is true also, as you point out, that Mason's Minnesota Statutes 1927, Section 9649, provides that in the event of the foreclosure of a mortgage the owner may demand that non-homestead property be first sold. However, the fact that the legislature has specifically so provided in the case of mortgage foreclosures, and has failed to so provide in the case of valuation for inheritance tax purposes, would indicate a different intent in the latter situation. It seems also clear that the legislature may have considered the equities, in a situation where a creditor is attempting to satisfy a debt by foreclosure, as being entirely different from those in which the sole question is one of valuation for tax purposes, and in which there is no question of any loss of title nor any impairment of the right to a statutory exemption of homestead property.

In my opinion, the courts would uphold the method of valuation adopted by the Department of Taxation, that is, the apportionment of a mortgage covering both homestead and non-homestead property on the basis of value of the security.

P. F. SHERMAN,
Assistant Attorney General.

May 26, 1942. 232-D

LEVIES

334

Per capita tax—Laws 1941, Chapter 543, construed and applied—Limits of levy discussed—L 41, C 543; (MS41 §§ 275.11, et seq.).

City Attorney, Eveleth.

Facts

In October, 1941, in accordance with Sections 5, 6, of Article 8 of State Constitution, and Section 1958, of Mason's Minnesota Statutes of 1927, the 1940 Supplement, the City of Eveleth levied for 1942 the sum of $102,431.25,

representing 150% of the amount due for bonded debt retirement. The amount actually due was $68,287.50 and the amount 50% in excess thereof amounted to $34,143.75. It will mean that at the end of this year, 1942, when all taxes have been collected, that the sum of $34,143.75 (if 100% of levy collected) will be in the county treasury as excess levy. In previous years this excess was returned to our city's general fund in accordance with attorney general's opinion. However, by decision of Judge Edward Freeman, of District Court, at Virginia, copy of which is herewith enclosed, it appears that the excess must now remain in the county treasury to be applied in retirement of next future installments on bonded debt. Therefore, the City of Eveleth will have approximately $34,143.75 or some such sum depending upon amount collected, in the county treasury for the retirement of the 1943 installments of our bonded debt.

Under the present schedule, the city has due in 1943 one $45,000 bond; one $27,000 bond; and approximately $21,000 of interest, totaling $93,000. Section 2063, of Mason's Minnesota Statutes of 1927, 1941 Supplement, permits the city to levy within the $70.00 per capita of population and above the 1943 limit of $65.00 per capita of population, such sum to pay and discharge a valid indebtedness incurred "prior to the calendar year 1941." The entire indebtedness was incurred after 1933, or rather, i.e., after 1932. We now intend, pursuant to opinion of your office (44B-12), January 17, 1941, with permission of the Investment Board, to refund the $45,000 and $27,000 bonds due in 1943. The excess of $34,143.75 remaining in the county treasury at the end of this year will be more than sufficient to pay in full the interest of approximately $21,000 due July 1, 1943. Assuming these facts, you will see that in 1943 the city will not have to make any payments on bonded debt, it being our intention to make the refunding bonds due and payable in 1948 and 1949.

Question

With this situation, can the city legally in October of this year levy for 1943 the sum of $65.00 per capita of population plus another $5.00 per capita of population, the amount collected at $5.00 per capita of population to remain in * * * a sinking fund and such monies to be applied in payment of "next future installments"?

Answer

We hold that it may, under the conditions hereinafter set forth.

In reaching this conclusion we have reexamined several acts of the legislature dealing with the special tax problems of the range municipalities. We have also had before us the discussion of the per capita tax limits imposed by Laws 1941, Chapter 543, as found in our opinion of this date to City Attorney Everett P. Freeman of Chisholm, a copy of which is enclosed.

The first law passed by the legislature limiting tax levies by municipalities on a per capita basis was Laws 1921, Chapter 417. This act provided for a limitation of $100.00 per capita plus (and this is to be noted) such amount as was necessary to pay valid indebtedness incurred prior to

January 1, 1921. This act became Mason's Minnesota Statutes of 1927, Sections 2061 to 2066 inclusive. Section 2061 was amended in 1929 by Chapter 206, which reduced the per capita limitation progressively to $70.00 per capita. This time, however, the legislature provided for the payment of valid obligations incurred prior to January 1, 1929, by a separate act, Laws 1929, Chapter 208. This was in addition to the per capita limitation in Section 2061, as amended by Chapter 206. This continued to be the law until the 1941 legislature enacted Chapter 543.

For a discussion of Chapter 543, see opinion No. 335.

From these legislative acts, we believe the following conclusions may be drawn.

The legislature has established a policy of providing for the expeditious payment of valid outstanding indebtedness by the range municipalities. The provisions for the payment of such obligations have been dealt with separately from the provisions for the payment of current expenses of operation. Until the enactment of Laws 1941, Chapter 543, there was no per capita limitation upon levies for the payment of bonded indebtedness. Does this new provision indicate an intention on the part of the legislature to restrict further than specifically provided the levy of taxes for the retirement of valid bonded indebtedness? We think not. These laws are remedial acts. Giffin, Sr. v. Village of Hibbing, 178 Minn. 337, 341. As such, they are to be construed liberally. 6 Dunnell's Digest, Section 8986. In the absence of language clearly so providing, we should guard against a narrow construction which will prevent these municipalities from pursuing a financial policy, long recognized as wise and beneficial, of providing in advance through the medium of a sinking fund the moneys for the payment of obligations when they mature. The very language of the act in Section 3 recognizes the use of a sinking fund.

> "If, prior to the calendar year 1941, any such city * * * has incurred by proper authority a valid indebtedness including bonds, in excess of its cash on hand, plus any amount in any sinking fund for the payment of indebtedness, such city * * * within, but not above, the limits now permitted by law, in addition to the foregoing, may levy sufficient amounts to pay and discharge such excess indebtedness, bonds and interest thereon." (Boldface ours.) Chapter 543, Section 3.

There is nothing in this language to restrict the levy to amounts needed for the retirement of valid indebtedness due the following year. The restrictions imposed are (1) that any such additional sums shall be separately levied, (2) that such additional funds, when collected, shall be paid into a separate fund which is in effect a special sinking fund, and (3) that such additional sums shall be used only for the purpose of paying such excess indebtedness, bonds and interest thereon. It is our conclusion that in each year that the City of Eveleth has a valid indebtedness, including bonds, in excess of its cash on hand, plus any amount in any sinking fund for the payment of such indebtedness, the city may levy an amount not exceeding the difference between the per capita limitation for a given year and the

$70.00 per year per capita limitation, even though there may be no part of such indebtedness due and payable in the year next following that in which the levy is made.

We wish to point out to you the difference between levies made under Laws 1941, Chapter 543, and under Mason's Supplement 1940, Section 1958. Under Chapter 543, the levy for the retirement of the indebtedness is initiated by the city. As we have held above, the proceeds of such levies may be used to retire valid indebtedness in advance of its due date. If such valid indebtedness is held by the State of Minnesota and is not paid before the time for the state auditor to make his levy for the year preceding that in which the indebtedness is due, then it is the duty of the auditor to initiate the levy in accordance with the provisions of Section 1958.

GEO. B. SJOSELIUS,
Assistant Attorney General.

April 6, 1942. 519-I

335

Per capita tax—Laws 1941, Chapter 543, construed and applied—L 41, C 543; (MS41 §§ 275.11, et seq.).

City Attorney, Chisholm.

Facts

The City of Chisholm has no indebtedness incurred prior to January 1, 1929.

Question

What is the maximum per capita levy which may be made under Laws 1941, Chapter 543, by the City of Chisholm in 1942?

Answer

By Mason's Supplement 1940, Section 2061, as amended by Laws 1941, Chapter 543, Section 1, it was provided:

> "The total amount of taxes levied by or for any city or village, having a population of more than 3,000, for any and all general and special purposes whatsoever, exclusive of taxes levied for special assessments for local improvements on property specially benefited thereby, shall not exceed in any year the amount hereinafter indicated per capita of the population of such city or village: 1941, $67.50 per capita; 1942, $65.00 per capita; 1943, $62.50 per capita; 1944, $60.00 per capita; 1945, $57.50 per capita; 1946, $55.00 per capita; 1947, $52.50 per capita; 1948 and thereafter, $50.00 per capita. * * *"

By Mason's Minnesota Statutes of 1927, Section 2063, as amended by Laws 1941, Chapter 543, Section 3, it was provided, so far as pertains here:

"If, prior to the calendar year 1941, any such city, village or school district has incurred by proper authority a valid indebtedness, including bonds, in excess of its cash on hand, plus any amount in any sinking fund for the payment of indebtedness, such city, village or school district, within, but not above, the limits now permitted by law, in addition to the foregoing, may levy sufficient amounts to pay and discharge such excess indebtedness, bonds and interest thereon; * * *."

The limit for Chisholm permitted by law when Chapter 543 became effective was $70.00 per capita. Mason's Supplement 1940, Section 2061. This was not increased by the passage of Chapter 543. See id. Section 5.

The City of Chisholm, according to the 1940 census, has a population of 7,487. As a city of more than 3,000, the total levy by the City of Chisholm for 1942, for all purposes exclusive of taxes levied for special assessments for local improvements on property especially benefited thereby, must not exceed $70.00 per capita. This, however, is a permissive limit only, which embraces within it and is conditioned upon two other limits, which we shall point out. One of these is a limit for 1942 of $65.00 per capita on the total amount to be levied "for any and all general and special purposes whatsoever, exclusive of taxes levied for special assessments for local improvements on property especially benefited thereby, * * *." This limit increases at the rate of $2.50 per capita per year until it reaches a stationary level of $50.00 per capita for 1949 and subsequent years. The other limit in 1942 is the difference between $65.00 in 1942 and $70.00 (amounting to $5.00 per capita). This limit increases $2.50 per capita each year until it reaches a maximum of $20.00 per capita for 1949 and subsequent years. This levy, however, can only be made in order to provide for a sufficient amount to pay valid indebtedness incurred prior to January 1, 1941, which is in excess of the cash which Chisholm has on hand, plus any amount in any sinking fund for the payment of indebtedness. The amount collected under this limitation must be placed in a separate fund when collected as provided by Mason's Minnesota Statutes of 1927, Section 2063, as amended by Laws 1941, Chapter 543, Section 3. If the $5.00 per capita is not sufficient to pay all bonded indebtedness and judgments which must be paid in 1943, the auditor must extend in full within the $65.00 per capita the levy for the amounts needed to pay such bonded indebtedness and judgments, and he must reduce the remainder of the levies so that the total levy does not exceed the $65.00 per capita limitation. Mason's Minnesota Statutes of 1927, Section 2066, as amended by Laws 1941, Chapter 543, Section 4.

This answers your question.

GEO. B. SJOSELIUS,
Assistant Attorney General.

April 6, 1942. 519-I

MORTGAGE REGISTRY

336

Contract—Payable in deliveries of wheat—Ascertainment of amount secured —M27 § 2322; (MS41 §§ 287.01, et seq.).

Wilkin County Attorney.

Facts and Question

A party in this county bought a farm on contract for deed from a party in New York City, which contract is payable in No. 2 Spot Wheat delivered at Chicago, Ill. No purchase price is fixed in terms of dollars. The buyer made a down payment of 900 bushels of wheat and then agreed to pay 600 bushels of wheat on March 10th of each year until the entire purchase price of 10,000 bushels of wheat has been paid. The buyer as a practical matter will pay on each March 10th the money equivalent of 600 bushels of wheat as determined by the average daily price of the wheat in Chicago in the February preceding each payment date.

The buyer desires to record the contract and I would like an opinion as to how to figure the mortgage registration tax on same.

Answer

Although the statute (Mason's Minnesota Statutes 1927, Section 2322) requires that the amount of the indebtedness be expressed in any mortgage, yet our court has held (Farmers' Bank v. Woolery, 156 Minn. 193, 200) that a mortgage may be valid notwithstanding no such amount is stated therein. This instrument is not absolutely void because of the fact that no money consideration is expressed therein, but it does remain in a state of dormancy until the mortgage registry tax is paid. (First State Bank v. Hayden, 121 Minn. 45, 52.) Vitality may be infused into it by payment of the tax and thereupon the parties are entitled to have it recorded. Hence it becomes the duty of the county treasurer to compute the amount of the mortgage registration tax.

The value of the future deliveries of grain is impossible of accurate ascertainment at the present time. The treasurer cannot be expected to determine precisely what is humanly impossible of accurate computation. Therefore it must be left to the discretion of the treasurer to determine the worth of the unpaid installments of 9100 bushels of wheat in such manner and at such amount as appears to him as being most accurate.

One way to do it would be that suggested by you, namely, to take the price of spot wheat in Chicago on the date of the contract and apply that to 9100 bushels of grain.

Another method which might appeal to the officer as being reasonable would be to take the average value of spot wheat in Chicago on March 10 over a period of years past, say ten years, and use that as the basis for arriving at the amount of the tax.

Another method, and perhaps more accurate than any other, would be for the treasurer to determine the present fair market value of the land covered by the contract; then ninety-one hundred ten thousandths (9100/10,000) of that value could be logically considered to be the value of the unpaid installments or the amount secured by the contract.

The treasurer might require the parties themselves to submit their estimates as to the worth of the undelivered grain and as to the amount remaining unpaid on the contract.

Using one of these methods, or a combination thereof, or some other method considered by him to be indicative of the amount secured, the treasurer should determine what amount in his best judgment represents the balance secured by the contract, and certify the tax accordingly.

I believe that the registration of the contract would not be held invalid if the amount of the tax so ascertained by the treasurer in good faith has been paid.

You will note that I have referred to the "county treasurer" as the officer who is to determine the amount of the tax. I do so for convenience merely. This opinion should not be taken as determinative of whether it is the treasurer's or the auditor's duty to determine the amount of the tax, or whether such amount must be determined by them jointly. The statute does require the treasurer's receipt for the tax to be countersigned by the auditor.

RALPH A. STONE,
Special Assistant Attorney General.

May 28, 1942. 418-A

MONEY AND CREDITS

337

Postal savings certificates and accounts are subject to—31 USCA 742; 39 USCA 760.

Commissioner of Taxation.

Question

Whether postal savings certificates and accounts are subject to taxation as money and credits.

Answer

An opinion of the Attorney General dated May 23, 1933, holds that postal savings accounts and certificates are subject to the money and credits tax. We have reexamined the question and after further consideration see no reason for departing from the previous opinion.

Postal savings deposits are authorized under the provisions of Chapter 20, Title 39, U.S.C.A. Although that statute expressly exempts the bonds

which are issued in exchange for postal savings certificates, 39 U.S.C.A. 760, there is nothing in the statute which expressly exempts deposits from taxation.

31 U.S.C.A. 742 provides as follows:

> "Except as otherwise provided by law, all stocks, bonds, treasury notes, and other obligations of the United States shall be exempt from taxation by or under state or municipal or local authority."

This provision cannot be construed to exempt postal savings certificates and deposit accounts. Such deposits do not, like deposits in ordinary commercial and savings banks, create a relationship of debtor and creditor. Deposits in postal savings are trust funds which do not pass into or become the property of the U. S. Treasury. See U. S. v. Stewart, 30 Fed. Supp. 200, D. C. Nevada (1930).

In Hibernia Savings and Loan Society v. San Francisco, 200 U. S. 310, affirming 72 Pac. 920, it was held that a tax on checks issued by the Treasurer of the United States for interest on U. S. bonds was properly imposed by the State of California. The court pointed out that the exemption provided in 31 U.S.C.A. 742 does not extend to obligations available for immediate use and payable on demand. In the opinion of the lower court it was emphasized that the words "or other obligations" refer to obligations similar in nature to those specifically named, and given under the general power of the United States to borrow money and issue obligations upon credit. Amounts payable on demand were distinguished.

In Lutz v. Arnold, 193 N. E. 840, 851, petition for rehearing denied 196 N. E. 702 (Indiana 1935), a state tax on postal savings certificates was held valid. The court did not discuss 31 U.S.C.A. 742 but held the tax valid on the ground that no constitutional provisions were violated and that a tax on such certificates was in no way a burden upon or impaired the operation of the government or one of its agencies.

No authorities have been discovered in which postal savings deposits or anything similar thereto were held exempt from state taxation.

In my opinion, Congress intended to exempt only obligations in the nature of stocks and bonds and did not intend to include in the exemption amounts deposited under the Postal Savings law represented by certificates payable on demand.

P. F. SHERMAN,
Assistant Attorney General.

August 26, 1941. 614-G

338

Taxes omitted from delinquent personal property tax list may be placed in list for subsequent year.

Redwood County Attorney.

Facts

A certain moneys and credits tax was not assessed and was omitted for several years and the same was called to the Auditor's attention in the month of September and the same was duly placed upon the tax list as provided by law according to Section 1985. In due course the property owner came in and paid part of this tax for one year and objected to a part of it as being an illegal tax, and the Treasurer issued a partial receipt for the amount paid, the balance remaining delinquent.

Thereafter and the following year, by omission or oversight, the delinquent portion of this tax was omitted from the delinquent list and of course was not cancelled or abated in any manner.

Question

How should this delinquent portion of the tax be placed upon the delinquent tax list and be duly certified to the clerk?

Answer

There is so far as we know no authority for the acceptance by the treasurer of a partial payment of the personal property tax involved. The failure of the auditor to place the delinquent tax in the delinquent list does not cancel or discharge the taxes. "Payment alone discharges the obligation, and until payment the state may proceed by all proper means to compel performance of the obligation." State v. O'Connell, 170 Minn. 76, 79. Taxes which have been regularly assessed and levied and which are delinquent but were omitted from the delinquent list for the proper year may be included in the delinquent list for subsequent years. County of Brown v. Winona & St. Peter Land Co., 38 Minn. 397, 402.

The county auditor should place the full amount of the taxes which were omitted in the next delinquent personal property tax list. The part payment should not be deducted or shown on the delinquent list. Allowance may be made for the amount paid when final settlement is made.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

May 29, 1941. 614-L

PERSONAL PROPERTY

339

Agricultural products—How valued and assessed—Laws 1941, Chapters 436, 437 and 438 construed and effect of each determined—L 41, C 436, 437, 438.

Martin County Attorney.

Facts

Chapters 436, 437 and 438 of the 1941 Session Laws, having reference to subdivision 5, Class 3a of Chapter 436, which reads as follows: "All agricultural products in the hands of the producer shall constitute Class 3a and shall be valued and assessed at 10% of the full and true value thereof."

In Class 3a of Chapter 437, it appears that the words "and not held for sale" have been inserted and would change the meaning of the law, having reference to grains held by farmers for storage and sale.

Under Class 3a of Chapter 438, those same words "and not held for sale" have been inserted, but Section 20, Chapter 438, provides "nothing herein contained or omissions shall be construed as repealing any prior amendments to the foregoing sections by the 1941 session of the legislature."

Question

What rate are grains and other farm produce stored by farmers for sale now to be classified for taxation purposes?

Answer

Mason's Supplement 1940, Section 1993, Class 3a was amended at the 1941 session of the legislature by three separate and distinct acts of the legislature, namely, Chapters 436, 437 and 438. The provisions of these three chapters relating to Class 3a read as follows:

> 436. "All agricultural products in the hands of the producer shall constitute class three "a" and shall be valued and assesesd at ten per cent of the full and true value thereof."
>
> 437. "All agricultural products in the hands of the producer **and not held for sale,** all horses, mules and asses used exclusively for agricultural purposes, and all agricultural tools, implements and machinery used by the owner in any agricultural pursuit shall constitute class three "a" (3a) and shall be valued and assessed at ten (10) per cent of the full and true value thereof." (Boldface supplied.)
>
> 438. "All agricultural products in the hands of the producer **and not held for sale,** all horses, mules and asses used exclusively for agricultural purposes, and all agricultural tools, implements and machinery used by the owner in any agricultural pursuit shall constitute class three "a" (3a) and shall be valued and assessed at ten (10) per cent of the full and true value thereof." (Boldface supplied.)

An examination of the language of said Class 3a as found in Mason's Supplement 1940, Section 1993, before any action was taken by the legislature at the 1941 session discloses that it is the same as the language contained in Class 3a as found in Chapters 437 and 438 so far as such language relates to agricultural products. The question therefore is whether there has been a repeal by implication of the amended language found in Chapter 436 relating to Class 3a by the provisions contained in Chapters 437 and 438 relating to Class 3a. Our Supreme Court has said:

> "Of course, repeal by implication can be effected by inconsistent enactments at the same session of the legislature; but it has been said that statutes enacted at the same session are to be construed to a certain extent as one act, and therefore in such a case there is a much stronger presumption against an intention to repeal which is not expressed than in case of statutes passed at different sessions; and in such cases there should be such an exposition as will give effect to what appears to be the main intent of the lawmaker." State v. Archibald, 43 Minn. 328, 330.

This rule is substantially the same as that found in Laws 1941, Chapter 492, Section 26. Applying this rule of construction we find that until the enactment of Chapter 436 the test to determine whether agricultural products in the hands of the producer were to be valued and assessed at ten per cent was — were they held for sale? By the enactment of Chapter 436 it is clear that it was the intention of the legislature that the test to determine whether agricultural products should be valued at ten per cent was thenceforth to be — were such agricultural products in the hands of the producer? There is no language in either Chapters 437 or 438 which indicates either directly or indirectly that the legislature by the enactment of those statutes intended to effect a repeal of the amendment contained in Chapter 436. There was no attempt made by the legislature to amend Class 3a in either Chapters 437 or 438. There was, however, deliberate action on the part of the legislature in amending Class 3a in Chapter 436. The legislature not only amended the language relating to agricultural products, but it also struck out all of the remaining language in that class. It then created a new Class 3d in which it placed all the property which had formerly been in Class 3a but the language relating to which was stricken out by the amendment of that section. If we were to construe the action of the legislature in reenacting in Chapters 437 and 438 the old language contained in Class 3a as constituting a repeal of the amendment of Class 3a as found in Chapter 436, it would result in nullifying the deliberate act of the legislature in not only amending Class 3a but in creating Class 3d by subdivision 8 of Chapter 436.

Our court has said in State v. Archibald, supra:

> "To justify a court in holding that an act is repealed by one subsequently passed, it must appear that the later provision is certainly and clearly in hostility to the former. If by any reasonable construction the two statutes can stand together, they must so stand. If harmony is impossible, and it is only in that event, the earlier enactment is repealed."

Applying this rule of construction, we cannot come to the conclusion that the provisions contained in Chapter 436, subdivision 5, amending Class 3a

and in subdivision 8, creating Class 3d, are in hostility to Chapters 437 and 438. Full effect of the intention of the legislature to amend Section 1993 can be given by this construction as the amendment to Section 1993 in Chapter 437 is in Class 1 and the amendment to Chapter 438 is in Class 4.

It is our conclusion therefore that Chapters 436, 437 and 438 must be read together as if the provisions contained therein with regard to amendments were all found in one and the same act of the legislature. The result of this conclusion is that Mason's Supplement 1940, Section 1993, must, from the effective date of the various acts, which is April 25, 1941, be held to read as it is in Mason's Supplement 1940, except for the following amendments. There must be inserted the word and figure "subdivision 1" and the word and figure "subdivision 2" and so on through the various subdivisions as they are found in Chapter 436.

Class 3a of the amended Section 1993 will read as it was found in subdivision 5 of Chapter 436.

The amended Section 1993 will have a new class which will be Class 3d. This class will be as found in subdivision 8 of Chapter 436.

Class 1 of the amended Section 1993 will read as it is found in Chapter 437.

There will be a new and additional subdivision of the amended Section 1993, which it will be necessary to renumber as subdivision 10. This new subdivision will contain the language found in subdivision 2 of Chapter 438.

From the above construction of Chapters 436, 437 and 438, it necessarily follows that all agricultural products in the hands of the producer, whether held for sale or for private consumption, shall be valued and assessed at ten per cent of the full and true value thereof. The complement of this proposition is that all agricultural products held by any one who is not the producer of such agricultural products, whether held for sale or private consumption, fall in Class 3 and shall be valued and assessed at thirty-three and one-third per cent of the full and true value thereof.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

July 24, 1941. 421-C

340

Assessment—Place of—Property of adult incompetent ward not having fixed place of residence—M27 §§ 2003, 2015, 2017; (MS41 §§ 273.26, 273.45, 273.47).

City Attorney, Willmar.

Question

As to the place where property of an adult incompetent ward should be assessed. The ward lives with her three children in three separate munici-

palities in the county and can no longer be said to have a fixed place of residence.

Answer

Mason's Minnesota Statutes 1927, Section 2003, provides a general rule for assessment to the effect that property shall be assessed at the place of residence of the owner. Section 2015 specifically provides that the personal property of every person other than a minor under guardianship shall be listed where the ward resides. In the case which you cite, it is true that the ward does not have a fixed place of residence. However, on any given day, the residence of the ward can be determined. Section 2017 provides that in the case of an owner of personal property moving from one district to another between May 1 and July 1, the property shall be assessed in either district in which the person is first called upon by the assessor.

Under the circumstances of this case, we believe that the property must be assessed in the district in which the owner was residing at the time the assessment of the property was made.

You call our attention to 147 Minn. 342. That case is not in point, since it goes to the jurisdiction of the state to tax and not to the place or location at which property should be taxed. The place at which the property should be taxed is governed by statute as outlined above.

FRANKLIN B. STEVENS,
Special Assistant Attorney General.

September 26, 1941. 421-A-17

341

Gasoline—Tax not in lieu of personal property taxes—Motor vehicles used for highway construction—Minn. Const., Art. XVI, § 3.

Village Attorney, Lanesboro.

Question

Whether machinery used for highway construction is subject to a personal property tax when the gasoline used to operate such equipment has been subjected to the Minnesota gasoline tax which has been paid.

Answer

The payment of the Minnesota gasoline tax does not relieve equipment in which the tax paid gasoline is used from personal property taxation. Article 16, Section 3 of the State Constitution, provides that the taxation of motor vehicles used on the public streets and highways of the state may

be on a more onerous basis than any other personal property, and further provides that such tax on motor vehicles shall be in lieu of all other taxes except wheelage taxes which may be imposed by any borough, city or village.

This constitutional provision refers to the license fee paid for the operation of motor vehicles but does not refer to the gasoline tax. It may be that the taxpayer in question failed to make this distinction and therefore raised the present problem.

FRANKLIN B. STEVENS,
Special Assistant Attorney General.

March 3, 1941. 325

342

Grain—Mortgaged to Federal Government subject to tax—M27 §§ 1974, 1984; (MS41 §§ 272.01, 273.01).

Wilkin County Attorney.

Facts

Farmers have obtained loans on their wheat and the wheat is sealed by the Government on their farms. There is no foreclosure proceeding by the Government.

Question

Shall the assessor assess said grain?

Answer

All personal property in this state, and all personal property of persons residing therein, including the property of corporations, banks, banking companies, and bankers, is taxable except such as is by law exempt from taxation. Mason's Minnesota Statutes of 1927, Section 1974. Personal property shall be listed and assessed annually with reference to its value on May 1, and if acquired on that day, shall be listed by or for the person acquiring it. Id. 1984.

It appears from your statement of facts that the farmers to whom you refer were on May first the owners of the wheat in question. The title to the wheat remained in them although they may have encumbered it by obtaining a loan from the federal government. Until the federal government forecloses its lien and obtains title to the wheat, the owners thereof must pay the personal property taxes imposed upon it.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

June 21, 1941. 215-C-10

343

Hives of Bees—Owned by resident and temporarily outside state—M27 § 1974; (MS41 § 272.01).

Jackson County Attorney.

Question

Whether the State of Minnesota can assess a personal property tax upon a resident of the state who, on May 1st, was the owner of hives of bees which were temporarily outside the state on that date. You advise us that the owner of these bees customarily keeps them in Minnesota during a portion of the year, it being his practice to remove them from Minnesota during the month of November and bring them into the state approximately May 15th of each year.

Answer

Mason's Minnesota Statutes, 1927, Section 1974, imposes a tax upon all personal property in this state and all personal property of persons residing in this state, except such as is by law exempt from taxation. It is clear under the law that it is the intention of the legislature to tax personal property of a resident, even though that property may be outside the state. It is necessary to determine to what extent Minnesota has power to tax a resident's property when that property is outside the state for a portion of the year. In Union Refrigerator Transit Company v. Kentucky, 199 U. S. 194, 26 S. Ct. 36, it was held that the domiciliary state could not tax personal property permanently located outside the state; and the reason given for this rule was that the property enjoyed no protection of the state attempting to assess the tax. In that case, the court cited a line of decisions from Pennsylvania, holding that personal property permanently located outside the state could not be taxed; but, at the same time, cited a Pennsylvania case upholding the tax upon a Pennsylvania corporation imposed upon personal property which was not shown to be permanently located outside the state. The only purpose in citing these cases was to show the distinction drawn between a permanent situs outside the state and a temporary situs or use of personal property outside the state.

The taxation of ocean-going vessels at the domicile of the owner, when it does not appear that such vessels had acquired an actual situs elsewhere, does not deprive such owner of the property taxed without due process of law. Southern Pacific Company v. Kentucky, 222 U. S. 63, 32 S. Ct. 13. By way of dictum, in Johnson Oil Refining Company v. State of Oklahoma, 54 S. Ct. 152, 290 U. S. 158, the supreme court states that the state of domicile of the owner of personal property has jurisdiction to tax property which has not acquired an actual situs elsewhere.

In the recent decision of Curry v. McCanless, 307 U. S. 357, 59 S. Ct. 900; and Graves v. Elliott, 307 U. S. 383, 59 S. Ct. 913, the supreme court held, in relation to a transfer tax on intangibles, that two states may tax the transfer if each of those states has given the benefit and protection of its laws to the intangibles. The application of this rule would certainly allow

the state of the owner's domicile to tax personal property which had not acquired a fixed situs outside the state.

Therefore, bees owned by a Minnesota resident on May 1st may be taxed in Minnesota, even though at that date the bees are temporarily outside the state.

FRANKLIN B. STEVENS,
Special Assistant Attorney General.

April 7, 1941. 421-A-17

344

Judgment—May be cancelled only as provided by Mason's Minnesota Statutes of 1927, Section 2092, or abated only as provided by Id. 1983—M27 §§ 1983, 2092; (MS41 §§ 272.07, 277.05).

Cook County Attorney.

Facts

The facts are that a certain piece of road machinery known as a patrol grader was being rented on a monthly rental basis by the county and was assessed by the assessor against the owner and lessor, Lange Tractor and Equipment Company. That was the situation when the assessment was made under the law and thereafter, and in the summer of the same year, 1940, the County Board advertised for bids and bought said equipment. Thereafter, and at the February 10, 1941, meeting, the statement of taxes on said personal property in the amount of $179.42 against the said owner came on for discussion by the County Board, and as a result thereof, the following action was taken as revealed from the minutes of the meeting: "Moved by Kugler and seconded by Pecore, that the personal property tax of Lange Tractor and Equipment Company be cancelled. Ayes all."

Question

Whether the action taken by the county board is valid.

Answer

The discussion of the statutes involved by you in your request for an opinion has been very helpful.

The only authority which is vested in the board of county commissioners is found in Mason's Minnesota Statutes of 1927, Section 2092. The language of this statute is unambiguous and requires no construction. As a condition precedent to the cancellation of a personal property tax the steps which are prescribed in the statute must be taken by the sheriff, the clerk of court, and the county treasurer, before the county board may act. It has been determined by the Supreme Court that the county board has no authority to cancel personal property taxes except in strict performance of Section 2092. Grundysen v. Polk County, 57 Minn. 212. The cancellation must take place

at the proper time in accordance with the proceedings for the collection of personal property taxes as provided for in Section 2092 and the other related sections.

The only other provision under which any action may be taken by the county board upon personal property taxes is when an application has been properly made under Mason's Minnesota Statutes of 1927, Section 1983, for their abatement to recommend to the commissioner of taxation the action to be taken upon the petition for abatement. It is to be noted, as you state in your letter, that this section does not authorize the county board to make the cancellation of taxes but merely authorizes them to make recommendation to the commissioner of taxation, who alone is empowered to make the order of abatement.

If the county board attempts to effect the cancellation of these personal property taxes in any manner other than those provided by the sections discussed, namely, 1983 and 2092, the action of the county board is void and of no effect. It is the duty of the county auditor and clerk of the district court to disregard such attempted action of the county board.

GEO. B. SJOSELIUS,
Special Assistant Attorney General.

March 17, 1941. 407-L

345

REDEMPTION

346

State assignment certificate — Notice of expiration — Amount required to redeem—M27 § 2152; M40 § 2136.

Norman County Attorney.

Facts

The owner of a State Assignment Certificate of taxes for the years 1935, 1936 and 1937 has presented such certificate to me with request that notice of expiration of time for redemption be issued thereon.

The same party has also paid subsequent delinquent taxes in accordance with Chapter 412, Laws of 1931 (Mason's 1940 Supplement, Section 2136), as follows: On the second Monday of May, 1940, he paid the 1938 tax, and on the second Monday of May, 1941, he paid the 1939 tax. In each case he received the regular tax sale certificate prescribed for the May sale.

The 1940 tax is now delinquent, but cannot be paid by the holder of the above mentioned certificates until the second Monday of May, 1942, and is not, of course, bid in for and held by the state at this time.

Questions

1. Is it proper to include in the amount required to redeem, to be stated in the notice, the amount of taxes for the years 1938 and 1939?

2. Should the 1940 tax, now delinquent, be included in the amount required to redeem?

Answers

1. Yes. 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 person 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. * * *"

It is our opinion that even though Mason's Supplement 1940, Section 2136, provides for the issuance of a certificate to the purchaser who pays subsequent taxes at the annual May sale following the date they become delinquent, this does not change the character of the payment within the meaning of the paragraph of Section 2152, paragraph 2, quoted above.

2. Yes. In order to redeem under the language quoted above, the owner is required to pay all unpaid delinquent taxes, interest, costs, and penalties accruing subsequent to the assignment referred to in your letter, which necessarily means the inclusion of the 1940 taxes which are delinquent and unpaid.

GEO. B. SJOSELIUS,
Assistant Attorney General.

April 15, 1942.

Beltrami County Attorney.

Opinion

We have reexamined the question in the foregoing opinion.

It appears that Mason's Minnesota Statutes 1927, Section 2136, until amended by Laws 1931, Chapter 412, read in part as follows:

> "The taxes for subsequent years shall be levied on property so sold or bid in for the state in the same manner as if the sale had not been

made. The purchaser or assignee of the state may pay the amount of such taxes at any time after they become delinquent, and upon such payment the amount thereof, together with interest at the rate of twelve per cent per annum from the date of payment, shall be added to and be a part of the money necessary to be paid for redemption from sale. * * *."

After the 1931 amendment this section, Mason's Supplement 1940, Section 2136, read in part as follows:

"* * * The purchaser or assignee of the state may pay the amount of such taxes at the annual May sale following the date they become delinquent. Any such purchaser or assignee paying such taxes shall, if he be the owner of a prior certificate of sale, notify the county auditor prior to the annual May sale that he is the owner of a tax certificate and such notice shall contain a description of the property for which such certificate was issued together with the year of sale, thereupon the county auditor shall issue the said certificate or a certificate for said taxes in the same form as now provided by Section 2129, Mason's Minnesota Statutes of 1927, such certificate shall bear interest at the rate provided by Section 2128, Mason's Minnesota Statutes 1927, and acts amendatory thereof unless said prior certificate bears a lower rate of interest, in that case such lower rate shall apply * * *."

It will be noted that the provision that the amount of delinquent taxes paid should be added to the amount necessary to be paid to redeem was omitted from the amended section. However, we do not think that such omission amounts to an implied repeal of the requirement for inclusion of subsequent delinquent taxes paid by a prior purchaser or assignee in the amount required to redeem. That requirement rests upon the express provisions of Section 2152, prescribing the amount required to redeem, including, among other items, the following:

"* * * 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."

If the legislature had intended to dispense with this requirement it would certainly have amended this provision accordingly. The corresponding provision which appeared in Section 2136 before the 1931 amendment was really surplusage; hence no significance can be attached to the dropping out of this provision in the amendment.

Section 2136 was further changed by the 1931 amendment to prescribe the issuance of a certificate in the form of a tax sale certificate, instead of requiring the entry of the amount paid upon the original sale or assignment certificate. However, we do not think that this changed the essential character of the transaction, which amounted to a payment of delinquent taxes before actual sale, not to a new purchase at or after the sale.

It is true that the changes made by the 1931 amendment to Section 2136, standing alone, might lead to the conclusion reached by your county auditor.

However, they do not stand alone, and consideration must be given to two other applicable provisions which were not amended. These are Mason's Minnesota Statutes 1927, Section 2152, above referred to, and Section 2126.

Section 2126 provides in part as follows:

> "Before sale any person may pay the amount adjudged against any parcel of land * * * If payment is made after judgment is entered and before sale, the auditor shall certify such payment to the clerk, who, upon production of such certificate and the payment of a fee of ten cents, shall enter on the right-hand page of the real estate tax judgment book, and opposite the description of such parcel, satisfaction of the judgment against the same. The auditor shall make proper entries in his books of all payments made under this section."

Under this provision the holder of the state assignment certificate has the absolute right to pay the delinquent taxes at the May sale upon compliance with requirements of Section 2136, as amended, and such payment would stop the proceedings to enforce the payment of such delinquent taxes. State ex rel. C. F. Keyes v. Erickson, 147 Minn. 453. As above indicated, it is our opinion that such payment is not a new purchase, in spite of the form of certificate to be issued. To avoid misunderstanding and confusion, such a certificate should show that it was issued pursuant to Section 2136, as amended, to the holder of a prior certificate of sale or assignment. If such holder wishes to obtain a new certificate of sale or assignment not subject to these conditions, he must waive the privilege of payment given him by Section 2136, as amended, wait until the land is offered for sale, and then bid the land in, or, if it is not sold, take a subsequent assignment, as in other cases.

From a consideration of the foregoing provisions and the decision of our Supreme Court, we come to the conclusion that the position stated in the opinion to County Attorney Lloyd J. Hetland is correct.

We have read Brodie v. State, 102 Minn. 202, the case referred to in the letter which you enclosed. The situation before the court in that case was not like the one before us in the opinion to County Attorney Hetland. We were dealing with delinquent taxes paid by the holder of the assignment certificate. The court was dealing with a certificate issued upon a second purchase at a later sale by the certificate holder. This case has no application to the situation before us.

We adhere to the conclusion reached in our opinion of April 15, 1942.

GEO. B. SJOSELIUS,
Assistant Attorney General.

June 29, 1942. 423-K

SCHOOL DISTRICTS

347

Lands, purchased to fill out full block for school site, not subject to taxation —Minn. Const., Art. IX, § 1; L 41, C 169, Art. VI, § 6, sub 2; (MS41 § 125.06).

Meeker County Attorney.

Facts

Independent School District No. 9 of Litchfield, Minnesota, in order to become the owner of an entire block of ground, upon a part of which block one of its public school buildings is located, acquired two additional lots in said block. Both are residence properties and are now being rented to private parties and the District is obtaining the usual rental therefrom.

Question

Whether the property in question is subject to taxation.

Opinion

Minnesota State Constitution, Article 9, Section 1, provides that "* * * public property used exclusively for any public purpose shall be exempt from taxation * * *." Without such a constitutional provision, publicly owned property used for a public purpose would be immune from taxation. The immunity is not dependent upon constitutional or statutory provisions. It rests upon public policy and the fundamental principles of government. Foster v. City of Duluth, 120 Minn. 484.

In the case of In Re Delinquent Real Estate Taxes, Polk County, 182 Minn. 437, our Supreme Court takes the position that,

> "Public property, by reason alone of its ownership, is immune from taxation in the absence of any expression of sovereign will otherwise. * * * Public property, * * * remains immune from taxation in the absence of express and effective law declaring otherwise."

From the phraseology used in our Constitution, it is clear that the legislature cannot provide for the taxation of public property used exclusively for any public purpose. The Constitution, however, does not make it clear that publicly owned property not used exclusively for a public purpose should be taxed. The case above cited is authority for the principle that, unless it is clearly expressed in the Constitution or by legislative enactment that publicly owned property although not used exclusively for a public purpose is to be taxed, such property is immune from taxation. In Minnesota there is no statutory law providing for the taxation of land owned by a school district and not devoted exclusively to school purposes.

Without such legislation, however, our Supreme Court in the case of County of Anoka v. City of St. Paul, 194 Minn. 554, held that a certain acreage owned by the City of St. Paul and leased to farmers in Anoka

County was taxable, because the property, although publicly owned, was not used for a public purpose. The opinion does not refer to the legal principle established in the previous case cited, namely, that publicly owned property cannot be taxed in Minnesota without a specific law providing therefor.

The County of Anoka v. City of St. Paul case involves the taxation of property which the court finds the city could legally hold and lease in its proprietary capacity. The real estate was acquired in connection with the city's business of selling water to its residents. Such water-works activities were transacted under authority granted to the City of St. Paul as a municipal corporation. In such circumstances, the Supreme Court held the publicly owned real estate not used for a public purpose but leased to farmers was subject to taxation.

The school district here involved can only own the property in question to enable it to perform a governmental function, that of education. It has no legal right to engage, in a proprietary capacity, in the business of leasing real estate. It may, however, incidentally lease its property for some such temporary purpose as preventing waste through deterioration thereof through vacancy. It is, therefore, assumed that the leasing of the property and lots under consideration is merely incidental to the real purpose of their acquisition, which, it appears, was to comply with Laws 1941, Chapter 169, Article VI, Section 6, subdivision 2, which provides:

> "* * * In any village or city such site when practicable shall contain at least one block, * * * and when any schoolhouse site shall contain less than such amount, the board may, without a vote of the electors, acquire other land adjacent to or near such site to make, with such site, all or part of such amount."

In view of the facts hereinabove stated and of the decision in the Polk County case above cited, I am of the opinion that the law applicable to the situation in the case of County of Anoka v. City of St. Paul should not be construed as requiring, at this time, the payment of taxes by the school district on the property concerning which you inquire. This position is taken largely because the leasing of the property in question, as it now appears, is merely incidental to the chief purpose of its acquisition, which, as heretofore stated, was pursuant to the statute above quoted and intended for educational purposes. If it shall later appear that the leasing of this property is not merely incidental to said purpose, the matter must be given further consideration because of changed conditions and the legal status created by the aforesaid decisions.

J. A. A. BURNQUIST,
Attorney General.

August 27, 1942. 414b-4

TIMBER

348

Upon state land sold to purchaser taxable as real estate.

Koochiching County Attorney.

Facts

A purchaser buys timber but the same is still standing on the state land on May 1st.

Question

How should such timber be assessed?

Answer

A person who purchases from the state the timber standing upon state lands acquires an interest in real property which is taxable as real estate. Pine County v. Tozer, 56 Minn. 288, 294. This, we are informed, has been for many years the position of the State Department of Taxation as set forth in its assessor's manual. Through inadvertence, this was omitted from the 1942 manual. There was no change in law which required such omission. The taxability as real estate of such timber upon state land is confirmed by Mason's Minnesota Statutes of 1927, Section 1978-1, which provides for the taxation of timber reserved when land is conveyed to the state as therein provided. There is no practical difference for purposes of taxation between timber which is reserved and timber which is sold. In view of the Supreme Court decision above cited, followed by the taxing authority for many years, the practice of assessing as real estate timber interests which are owned separately should be adhered to.

GEO. B. SJOSELIUS,
Assistant Attorney General.

July 15, 1942. 429-G

UNFAIR TRADE PRACTICES

349

Actual current delivered invoice defined—L 41, C 326, § 2, subd. 1; (MS41 §§ 325.01, 325.52).

Duluth City Attorney.

Question

As to the meaning of the phrase "actual current delivered invoice" as set forth in Laws 1941, Chapter 326, Section 2, subdivision 1, which states that the term "cost" as applied to the wholesaler or retail vendor shall mean:

> "The actual current delivered invoice or replacement cost whichever is lower, not including customary cash discounts, plus the cost of doing business at said location by said vendor."

Answer

The object of the unfair trade practices act is to require goods to be sold by wholesalers and retailers at a price not lower than the cost of the article, plus the cost of doing business, excluding customary cash discounts not exceeding 2%, which discounts are based on the payment for the goods within a certain length of time.

Consequently, it is our opinion that in determining cost under the aforesaid section, the merchant may base his selling price on what he actually paid for the goods or the replacement cost, whichever is lower (discounts being taken into consideration as provided in the law).

For example, supposing X is in the retail grocery business. He has anticipated a shortage in King Oscar sardines, and as a result of such anticipation, he lays in a large supply of such article. He may sell such article at a cost based on what he pays for them, plus the cost of doing business, less the customary cash discounts over and above 2%. To compel him to use a daily price quotation would be to compel him to sell above the cost, as defined in Chapter 326, Laws 1941, which is not the purpose of this law.

On the other hand, supposing X's judgment is wrong and the market becomes flooded with King Oscar sardines. His competitor Y, as a result thereof, is able to stock said article at a lower cost than that paid by X, who had laid in this large supply. X would be able to sell this article at what it would cost him to replace his stock; or, in other words, at the current replacement cost, if such replacement cost is lower than what he actually paid for the goods.

The replacement cost must necessarily be the present existing price, which may be the price from day to day. Any other construction, if the replacement cost is lower than the actual current delivered invoice, would give an advantage to a merchant that might find it necessary to replace or restock on a day certain when such current price is down. This was not the intention of the legislature in enacting this law.

This opinion and decision relate only to the subdivision mentioned and assume that the requirements of Section 2, subdivision 2, paragraph 5, (8%), are being complied with.

J. A. A. BURNQUIST,
Attorney General.

July 31, 1941. 681-A

350

Fair Trade Law—OPA regulation—Conflicts between OPA orders and the state law—Federal order controls—M40 §§ 3976-37, et seq., 3976-51, et seq.; (MS41 §§ 325.01, et seq.).

Department of Agriculture.

Facts

You have received a letter from the St. Paul Retail Grocers Association asking for advice as to the effect of the order of the federal Office of Price

Administration, known as "The General Maximum Price Regulation," issued April 28, 1942, fixing the prices to be charged for articles sold generally at the highest prices charged for those articles by the seller during March, 1942. Under date of May 14, 1942, you transmitted this letter to this office with the request that an official opinion be rendered on this subject.

The Retail Grocers Association is receiving requests for an interpretation of this law from merchants all over the state. This office has also received such requests. It is felt that an opinion from this office is necessary to clarify the situation for you and in the interest of the merchants as well.

Question

What effect has the said order of the Office of Price Administration, fixing prices of articles sold, upon the "Unfair Trade Practices Act" and the "Fair Trade Law" of the State of Minnesota?

Answer

The OPA order fixes maximum prices which may be charged. The Minnesota Unfair Trade Practices Act (the act of March 30, 1937, being Laws 1937, Chapter 116, as amended; now appearing as Mason's Supplement 1940, Sections 3976-37 to 3976-49; amended as appears in Mason's Supplement 1941, Sections 3976-41, 42, 44, 45 and 47) prohibits discrimination in the sale prices of goods as between different sections and communities and prohibits the sale of articles of merchandise for less than eight per cent above the manufacturer's list price or eight per cent above the actual current delivered invoice or replacement cost for the purpose of or with the effect of injuring or destroying competition.

It is manifest that there will occur instances where the minimum prices prescribed by this state law will be higher than the maximum prices established by the OPA order.

The Minnesota Fair Trade Law (Laws 1937, Chapter 117, Mason's Supplement 1940, Sections 3976-51-60) also relates to the prices at which goods may be sold, and conflicts may arise between this act and the federal order.

In our opinion, the questions with which your department and the Retail Grocers Association and other retailers are concerned may best be answered by the statement of a few simple rules which will apply:

1. The General Maximum Price Regulation issued April 28, 1942, by the Office of Price Administration (Leon Henderson, Price Administrator) is the paramount law and must be observed and followed.

2. If, in following the provisions of that regulation, a merchant or seller thereby violates the terms of either of the Minnesota laws above cited, he has a good defense to a prosecution under the state law. This situation is expressly provided for in the Emergency Price Control Act of 1942, approved January 30, 1942, in pursuance of which law the OPA order was

issued (this law may be found in the United States Code Congressional Service 1942, No. 1, page 32). Briefly it provides that no person shall be held liable for damages or penalty in any court, state or federal, for anything done or omitted to be done in good faith pursuant to this federal act, even though the provision of the act or regulation or price schedule adopted thereunder might thereafter be rescinded or held invalid.

Therefore, it is our opinion that a person cannot be prosecuted under the state law if such violation of the letter of the state law was caused by following the commands of the federal government.

3. The OPA regulation cannot be used as a screen for violating the state law. A merchant cannot reduce prices below the requirements of the state law unless the federal regulation compels him to do so. If he does so reduce prices when not compelled by the federal regulations to do so, he is subject to prosecution under the state law.

4. Many cases of hardship will arise under this rule. The letter of the Retail Grocers Association cites one such instance. It is stated that:

> "* * * a merchant purchased his present stock of Palmolive soap about nine months ago and based his selling price on the cost at the time of purchase. He has not increased his selling price, feeling that while the market was rising, his margin of profit was ample, based on his cost. Now that his stock is running out he finds that he will have to pay as much to replace the soap as he has been selling it for. Under the Maximum Price Regulation his price cannot exceed his March price which will automatically force him to violate the Unfair Trade Practice Act."

As pointed out above, this merchant cannot be prosecuted under the state law for complying with the federal regulation.

This merchant cannot sell this kind of soap at more than the price which he was getting for it in March. If he must carry this article in stock, he will have to sell it at a loss. However, I call attention to the provision made for adjustment or amendment of prices of retail sellers in Sections 18 and 19 of the order. This provision reads as follows:

> "Section 18. Applications for Adjustment by Retail Sellers.
>
> "(a) Any seller at retail who finds that the maximum price of a commodity or service established for him under the provisions of Sections 2 or 3 of this Regulation is abnormally low in relation to the maximum prices of the same or similar commodities or services established for other sellers at retail, and that this abnormality subjects him to substantial hardship, may file an application for adjustment of that maximum price in accordance with procedural regulations which will be issued by the Office of Price Administration.
>
> "(b) Any seller at retail who finds that his maximum price for any commodity, and the maximum prices of other retail sellers for the same commodity are abnormally low in relation to the level of maximum

prices established by this Regulation for wholesalers, manufacturers or producers of such commodity, and that this relationship subjects sellers at retail of such commodity generally to substantial hardship, should immediately communicate such information in writing to the Retail Trade and Services Division, Office of Price Administration, Washington, D. C., so that the Price Administrator may take appropriate action.

"Section 19. Petitions for Amendment.

"Any person seeking a modification of any provision of this Regulation, or an adjustment not provided for in Section 18 of this Regulation, may file a petition for amendment in accordance with the provisions of Procedural Regulation No. 1 issued by the Office of Price Administration."

It is believed that many instances of injustice resulting from the price order may be corrected under this provision thereof.

In conclusion, I will reiterate that the state Unfair Trade Practices Act and the state Fair Trade Law are still in force in Minnesota and must be observed and followed except in so far as the regulation issued by the Office of Price Administration compels a departure therefrom.

RALPH A. STONE,
Special Assistant Attorney General.

May 15, 1942. 681-a

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