REPORT

OF THE

ATTORNEY GENERAL

TO THE

GOVERNOR
STATE OF MINNESOTA

1947 - 1948

J. A. A. BURNQUIST
Attorney General

To His Excellency,

Honorable Luther W. Youngdahl,

Governor

Sir:

In compliance with statutes relating thereto, I herewith transmit the report of this Department for the biennium 1947-1948.

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, 1948.

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, 1948

ATTORNEY GENERAL
J. A. A. Burnquist

DEPUTY ATTORNEYS GENERAL

Arthur Christofferson
George B. Sjoselius

ASSISTANT ATTORNEYS GENERAL

Victor H. Gran
Charles E. Houston
Earl H. A. Isensee
David W. Lewis
Knute D. Stalland
Ralph A. Stone
Kent C. van den Berg

SPECIAL ASSISTANT ATTORNEYS GENERAL

Joseph S. Abdnor
John Burwell
George G. Edgerton
Irving M. Frisch
Roy W. Ganfield
Victor J. Michaelson
Charles P. Stone
G. L. Ware

SPECIAL COUNSEL
George T. Simpson

LAW CLERK
Kenneth W. Green

DEPARTMENT CLERK
Genevieve K. Spangenberg

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6102	Chicago, St. Paul, Mpls. & Omaha Ry. Co.	Penalty—increase in freight rates	Dismissed
6103	Mpls., St. Paul & Sault Ste. Marie	Penalty—switching charges, Ramsey Co.	Dismissed
6104	Mpls., St. Paul & Sault Ste. Marie	Penalty—Switching charges—Hennepin Co.	Dismissed
6135	American National Ins. Co.	Delinquent premium tax	Collected $750
6149	Allstate Finance Co. v. Commissioner of Banks	Small loan license	Affirmed
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6164	Shawmut Company, et al. v. Director of Lands & Minerals	Boundary dispute—mine property	Submitted
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6193	Nels P. Carlson Estate	Old age assistance lien	Settled
6195	Minnesota Valley Youth Center	Involuntary dissolution	Dissolved
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6264	Kenneth D. Hassler v. Commissioner of Insurance, et al.	Injunction—policy surcharge	Dismissed
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6266	Aric B. Hoffman v. Warden, State Prison	Damages	Dismissed
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6274	Rural Credits v. Fred Maitland Hull	Foreclosure of contract	Decree entered
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TABLE NO. 1
PROSECUTIONS REPORTED BY COUNTY ATTORNEYS FOR 1947 AND 1948

COUNTY—COUNTY ATTORNEY	DISTRICT COURT							
	Found Guilty		Pleaded Guilty		Acquitted		Dismissed	
	1947	1948	1947	1948	1947	1948	1947	1948
Aitkin—John T. Galarneault	.....	2	12	16	2	.....	7	4
Anoka—L. Darrah Cutter	*	**	.....	.....	.....	.....	.....	.....
Becker—Carl G. Buck, Jr.	*	2	.....	33	.....	1	.....	2
Beltrami—Herbert E. Olson	9	2	33	40	2	1	9	.....
Benton—J. Arthur Bensen	.....	**	4	.....	1	.....	4	.....
Big Stone—C. J. Benson	3	2	.....	3	.....	.....	1	1
Blue Earth—Milton D. Mason	.....	.....	30	7	1	.....	.....	.....
Brown—George D. Erickson	1	.....	8	10	1	.....	.....	3
Carlton—Thomas M. Bambery—Stanford Dodge, Assistant	1	3	32	41	.....	.....	1	6
Carver—John J. Fahey	2	8	2	4	.....	.....	.....	.....
Cass—Edward L. Rogers	1	1	14	6	2	1	3	2
Chippewa—Sigvald B. Oyen	.....	.....	.....	6	.....	.....	.....	.....
Chisago—Carl W. Gustafson	.....	1	10	7	.....	.....	2	.....
Clay—Goodwin L. Dosland	1	2	24	31	.....	.....	10	5
Clearwater—Oscar E. Lewis	.....	1	6	7	1	.....	3	.....
Cook—J. Henry Eliasen	*	.....	.....	5	.....	.....	.....	.....
Cottonwood—M. F. Juhnke	.....	.....	5	6	.....	.....	.....	.....
Crow Wing—Arthur J. Sullivan	*	**	.....	.....	.....	.....	.....	.....
Dakota—David L. Grannis, Jr.—R. C. Nelsen	3	1	12	46	1	.....	4	9
Dodge—Bruce A. Erickson	.....	1	7	6	.....	1	1	.....
Douglas—K. L. Wallace	.....	.....	13	24	1	.....	3	3
Fairbault—Harold C. Lindgren	.....	.....	8	21	.....	.....	1	1
Fillmore—George E. Frogner	1	.....	10	12	.....	.....	.....	2
Freeborn—Rudolph Hanson	.....	.....	18	20	5	3	3	7
Goodhue—Milton I. Holst	1	2	7	14	.....	.....	.....	.....
Grant—I. L. Swanson	.....	.....	.....	3	.....	.....	1	.....
Hennepin—Michael J. Dillon	26	28	463	485	7	12	25	23
Houston—L. L. Roerkohl	.....	.....	5	4	.....	.....	.....	.....
Hubbard—James A. Wilson	.....	.....	4	5	.....	.....	6	5
Isanti—Harold L. Westin—Robert B. Gillespie	.....	.....	3	.....	.....	.....	.....	.....
Itasca—Ben Grussendorf	3	3	18	11	.....	1	14	1
Jackson—Warren P. Adams	.....	.....	.....	14	.....	.....	.....	.....
Kanabec—L. M. Carlson—Robert W. Nyquist	.....	.....	5	.....	.....	.....	1	.....
Kandiyohi—Roy A. Hendrickson	.....	.....	2	10	.....	.....	1	10
Kittson—Lyman A. Brink	.....	.....	2	4	.....	.....	.....	.....
Koochiching—L. P. Blomholm	*	**	.....	.....	.....	.....	.....	.....
Lac qui Parle—H. W. Swenson	2	2	4	16	.....	.....	2	.....
Lake—Emmett Jones	4	7	6	.....	.....	.....	2	.....
Lake of the Woods—Frank H. Timm	*	**	.....	.....	.....	.....	.....	.....
Le Sueur—George T. Havel	.....	.....	6	9	.....	.....	2	.....

Lincoln—Edward T. McEvoy			6	1				
Lyon—C. J. Donnelly			12	33			1	
McLeod—Hubert G. Smith	1		21	3		2	6	
Mahnomen—L. A. Wilson			10	17				1
Marshall—Arnold A. Trost	2		1	7		1	4	
Martin—Arthur T. Edman			11	12			2	
Meeker—Sam G. Gandrud	1		3	13				
Mille Lacs—John S. Nyquist			13	9			1	1
Morrison—Attel P. Felix	1	2	9	16		2	2	3
Mower—Wallace C. Sieh	2	1	36	21	1	2	8	1
Murray—J. T. Schueller			2	5				
Nicollet—A. L. McConville			5	8				
Nobles—Raymond E. Mork			13	15				
Norman—Lloyd J. Hetland—Olav E. Vaule			3	14				
Olmsted—Thomas J. Scanlan	2	3	26	42		2		3
Otter Tail—Chester G. Rosengren	1	3	36	20				2
Pennington—Paul A. Lundgren—L. W. Rulien	1		14	10			3	6
Pine—George E. Sausen	1	4	7	8				
Pipestone—J. H. Manion	*	**						
Polk—F. H. Stadsvold	1	3	58	35			3	4
Pope—Wm. Merrill	2			6		1		
Ramsey—James F. Lynch	1	3	228	277	1	4	2	8
Red Lake—Charles E. Boughton, Jr.	*			1				
Redwood—Thos. F. Reed				15				3
Renville—Russell L. Frazee	*			4				1
Rice—John E. Coughlin—Urban J. Steimann	2	1	5	37		1	6	1
Rock—Mort B. Skewes			2	2			1	
Roseau—Bert Hanson	*			7				3
St. Louis—Thomas J. Naylor	12	12	198	133	3	5	35	35
Scott—Harold E. Flynn	8	3	12	11				3
Sherburne—Howard S. Wakefield			6	1			3	2
Sibley—Everett L. Young			6	1			1	
Stearns—David T. Shay	*	**						
Steele—John P. Walbran			11	2				
Stevens—Thomas J. Stahler			1	1				1
Swift—Frank A. Barnard			2	4				
Todd—Frank L. King	5	5	28	36	2	3	4	12
Traverse—Earl E. Huber			3	4	1			
Wabasha—Arnold W. Hatfield	*	2		10				3
Wadena—Charles W. Kennedy			18	5				
Waseca—Einer C. Iversen		1	7	8		1		1
Washington—Wm. T. Johnson	1		11	52			7	3
Watonwan—Paul V. Fling	1		8	5	1			
Wilkin—R. N. Nelson			7	2				1
Winona—W. Kenneth Nissen	1		7	17			3	3
Wright—Walter S. Johnson	1		6	7				2
Yellow Medicine—Robert M. Baker	1		5	4			1	2
Totals	106	111	1630	1867	33	44	199	189

*No report received for 1947.

**No report received for 1948.

TABLE NO. 1—Continued
PROSECUTIONS REPORTED BY COUNTY ATTORNEYS FOR 1947 AND 1948

COUNTY—COUNTY ATTORNEY	MUNICIPAL AND JUSTICE COURTS							
	Found Guilty		Pleaded Guilty		Acquitted		Dismissed	
	1947	1948	1947	1948	1947	1948	1947	1948
Aitkin—John T. Galarneault	4	.....	201	171	2	3	.....	.....
Anoka—L. Darrah Cutter	.....	.....	.....	557	.....	.....	.....	14
Becker—Carl G. Buck, Jr.	.....	.....	.....	.....	.....	.....	.....	.....
Beltrami—Herbert E. Olson	7	2	31	30	4	.....	2	2
Benton—J. Arthur Bensen	9	.....	90	.....	.....	.....	21	.....
Big Stone—C. J. Benson	3	2	104	48	.....	.....	7	5
Blue Earth—Milton D. Mason	36	35	3083	906	11	11	8	8
Brown—George D. Erickson ***	7	3	56	74	.....	.....	2	4
Carlton—Thomas M. Bambery—Stanford Dodge, Assistant	8	8	500	494	.....	2	19	15
Carver— John J. Fahey	25	22	28	13	.....	.....	2	2
Cass—Edward L. Rogers	5	10	117	120	.....	6	3	10
Chippewa—Sigvald B. Oyen	1	1	105	115	1	.....	5	1
Chisago—Carl W. Gustafson	4	12	194	200	.....	.....	4	10
Clay—Goodwin L. Dosland	.....	82	412	322	2	.....	1	1
Clearwater—Oscar E. Lewis	.....	3	157	193	2	1	.....	1
Cook—J. Henry Eliasen	.....	3	.....	39	.....	.....	.....	2
Cottonwood—M. F. Juhnke	3	.....	95	167	.....	.....	.....	.....
Crow Wing—Arthur J. Sullivan	.....	.....	.....	.....	.....	.....	.....	.....
Dakota—David L. Grannis, Jr.—R. C. Nelsen	42	29	620	1130	6	11	25	4
Dodge—Bruce A. Erickson	13	8	61	83	.....	1	1	3
Douglas—K. L. Wallace	8	15	172	152	.....	2	6	8
Faribault—Harold C. Lindgren	4	1	125	81	.....	.....	7	5
Fillmore—George E. Frogner	6	5	148	131	.....	2	4	2
Freeborn—Rudolph Hanson	9	9	265	293	4	8	1	2
Goodhue—Milton I. Holst	.....	6	398	485	.....	5	1	9
Grant—I. L. Swanson	.....	.....	30	52	.....	1	.....	.....
Hennepin—Michael J. Dillon	116	108	3457	2551	21	5	52	57
Houston—L. L. Roerkohl	7	6	124	212	.....	2	1	2
Hubbard—James A. Wilson	5	6	209	238	4	.....	16	7
Isanti—Harold L. Westin—Robert B. Gillespie	.....	.....	88	99	1	.....	6	.....
Itasca—Ben Grussendorf	17	26	509	370	.....	4	21	5
Jackson—Warren P. Adams	5	.....	168	217	.....	.....	2	.....
Kanabec—L. M. Carlson—Robert W. Nyquist	.....	2	159	35	.....	.....	.....	.....
Kandiyohi—Roy A. Hendrickson	1	12	163	113	3	1	6	19
Kittson—Lyman A. Brink	.....	1	53	33	.....	.....	.....	2
Koochiching—L. P. Blomholm	.....	.....	.....	.....	.....	.....	.....	.....
Lac qui Parle—H. W. Swenson	1	1	112	100	.....	.....	8	7
Lake—Emmett Jones	.....	2	174	162	.....	.....	4	.....
Lake of the Woods—Frank H. Timm	.....	.....	.....	.....	.....	.....	.....	.....
Le Sueur—George T. Havel	.....	.....	201	165	.....	.....	.....	1

Lincoln—Edward T. McEvoy	1	2	79	59				1
Lyon—C. J. Donnelly	1		200	184				1
McLeod—Hubert G. Smith	2		68	127	4	2	2	16
Mahnomen—L. A. Wilson		1	108	119			1	
Marshall—Arnold A. Trost			96	112			1	6
Martin—Arthur T. Edman	8		254	255	1		7	3
Meeker—Sam G. Gandrud			86	144				
Mille Lacs—John S. Nyquist	14	19	211	208	3	5	2	4
Morrison—Attel P. Felix	2	7	335	285	4	1	39	37
Mower—Wallace C. Sieh	6	6	210	152	7	4	5	16
Murray—J. T. Schueller	11		173	156			6	3
Nicollet—A. L. McConville			254	189				
Nobles—Raymond E. Mork	1	1	168	136	1		2	
Norman—Lloyd J. Hetland—Olav E. Vaule			28	52	5		40	46
Olmsted—Thomas J. Seanlan	18	13	589	748	3	7	2	18
Otter Tail—Chester G. Rosengren	12	12	141	192		2	19	9
Pennington—Paul A. Lundgren—L. W. Rulien	1		68	136			6	1
Pine—George E. Sausen		2	254	241				
Pipestone—J. H. Manion								
Polk—F. H. Stadsvold	1	2	53	76	1		3	9
Pope—Wm. Merrill		1	95	143				1
Ramsey—James F. Lynch	29	49	1024	1167	5		3	4
Red Lake—Charles E. Boughton, Jr.		1		133				1
Redwood—Thos. F. Reed	6	6	211	175	3	2	17	3
Renville—Russell L. Frazee		2		16		1		6
Rice—John E. Coughlin—Urban J. Steimann	19	15	570	494	6	7	19	9
Rock—Mort B. Skewes	1		81	47			1	2
Roseau—Bert Hanson				113				
St. Louis—Thos J. Naylor	5	25	434	459	1		37	45
Scott—Harold E. Flynn	13	74	57	20	2		6	1
Sherburne—Howard S. Wakefield	4	8	120	527	1	1		2
Sibley—Everett L. Young	14	2	136	140	2		7	9
Stearns—David T. Shay								
Steele—John P. Walbran	4	5	615	544	2		8	2
Stevens—Thomas J. Stabler		1	152	146			6	4
Swift—Frank A. Barnard			313	239				
Todd—Frank L. King	27	3	178	123			5	4
Traverse—Earl E. Huber			66	82			1	
Wabasha—Arnold W. Hatfield				87				
Wadena—Charles W. Kennedy		1	174	195				
Waseca—Einer C. Iversen	2	1	63	71		1	3	4
Washington—Wm. T. Johnson	12	14	490	235	1	1	11	17
Watonwan—Paul V. Fling			139	210				
Wilkin—R. N. Nelson	1	1	180	224				
Winona—W. Kenneth Nissen	8	10	2255	2384	4	4	16	12
Wright—Walter S. Johnson	6	2	156	200			1	7
Yellow Medicine—Robert M. Baker			68	60		1	8	4
Totals	575	706	23,361	21,956	117	104	519	515

***Municipal court cases not included in 1948 report.

TABLE NO. 2
TABULATED STATEMENT OF CRIMINAL CASES AS REPORTED BY COUNTY ATTORNEYS FOR 1947 AND 1948

NATURE OF ACCUSATION	IN JUSTICE, MUNICIPAL, AND DISTRICT COURTS							
	Pleaded Guilty		Found Guilty		Acquittals		Dismissals	
	1947	1948	1947	1948	1947	1948	1947	1948
I. Crimes Against the Person (Ch. 619)								
Murder—1st degree	2	1	2	1				
2nd degree		1		1		1		1
3rd degree	1							
Manslaughter—1st degree	6	6	2	2	1	1	3	
2nd degree	4	4	2	4				1
Assault—1st degree	4	14		2			2	2
2nd degree	42	45	11	6	3	4	9	8
3rd degree	526	421	91	74	34	22	62	55
Robbery—1st degree	36	25	2	4		1	1	
2nd degree	17	13	5		1	1	3	
3rd degree	5	3		1			1	
Kidnaping								1
Slander		1						
II. Crimes Against Morality, etc. (Ch. 617)								
(a) Sex Crimes, Indecency, etc.								
Rape	8	6	2	1			7	2
Carnal knowledge	3	4						1
Female under 10	1	1		1			1	
Female 10 to 13	2	16				1		
Female 14 to 17	53	47	4	6	3	1	10	14
Indecent assault	35	41	3	7	1	3	8	3
Adultery	4	7					4	5
Abortion	8	16					1	1
Bigamy	6	4						
Fornication	6	7			2		1	1
Incest	2	2						
Sodomy	5	5	1	1	1	2	1	
House of ill fame	1	2						
Psychopathic personality	2		1	4				
Abduction	1	1					1	4
Indecent Exposure	17	20		5				
Miscellaneous	18	18	4		1		2	2
(b) Crimes against Children, etc.								
Paternity, illegitimate child (Ch. 257)	230	243	24	26	9	6	31	32
Absconding to evade paternity proceedings	1						3	4
Abandonment, wife or child	85	85	8	6	2	3	34	40

Non-support, wife or child	152	180	13	39	4	6	40	40
Neglect of minor	1	3	1	1				
Contributing to minor's delinquency	10	33	3	3			1	
Cruelty to child	2	1				1		
Child labor	9	3						1
Miscellaneous	1	8						
(c) Miscellaneous Crimes against Morality, etc.								
Public dance laws, violations	11	3			1			
Gambling and lottery laws, violations	22	18				2	9	2
III. Crimes Against Property (Ch. 620-622)								
Arson—1st degree								
2nd degree	1	1						
3rd degree	12	3	1					1
Burglary—1st degree		3						
2nd degree	6	2					1	2
3rd degree	90	123	2	1	1	1	9	8
Unlawful entry	13	27					2	8
Forgery—1st degree	3	5					2	1
2nd degree	71	110	2	4		2	6	8
3rd degree	4	9			1		3	2
Larceny, grand—1st degree	71	98	1	4	1	2	10	14
2nd degree	301	297	11	13	3	2	32	38
Larceny, petit	322	353	15	25	9	5	33	30
Giving check without funds	208	247	4	2			85	110
Receiving stolen property	9	21				1	4	2
Mortgaged chattels, sale, removal, etc.	17	32		2			10	14
Malicious mischief	84	89	10	4			11	14
Extortion	1	2						
Trespass	19	6	1					1
Fraud	16	10	3	1			5	2
Fraud on innkeeper (Ch. 327)	11	14						1
Miscellaneous	3	2						
IV. Crimes Against Sovereignty (Ch. 612), **Public Justice** (Ch. 613), **Safety** (Ch. 616), **Peace** (Ch. 615), etc.								
Bribery (giving or receiving)	3				2			
Perjury	2							
Resisting or interfering with officer	62	56	9	5	2	4	4	3
Concealed weapons, carrying, etc.	8	12	2	1			2	
Language provocative of assault	34	35	2	4	1	1	6	7
Contempt of court	5	3	1	3				
Escape	23	22	5	2			7	6
Breach of peace	112	147	13	3	1	2	12	7
Disorderly conduct	344	511	19	34	4	7	9	18
Public Nuisance	66	48	18	8	2		2	1
Malfeasance in office			2				1	
Miscellaneous	11	33					1	

TABLE NO. 2—Continued

TABULATED STATEMENT OF CRIMINAL CASES AS REPORTED BY COUNTY ATTORNEYS FOR 1947 AND 1948

NATURE OF ACCUSATION	IN JUSTICE, MUNICIPAL, AND DISTRICT COURTS							
	Pleaded Guilty		Found Guilty		Acquittals		Dismissals	
	1947	1948	1947	1948	1947	1948	1947	1948
V. Miscellaneous Crimes (and various special statutes)								
Cruelty to animals (Ch. 614)	8	16	.....	4	.....	3	.....	.....
Vagrancy	91	98	5	5	1	2	1	2
Violations of laws re:								
Compulsory education	12	9	2	2	3	.....	1	3
Forestry	49	29	1	2	.....	.....	1	.....
Wild animals (game and fish) (Chaps. 97-102)	1359	1532	45	57	11	11	48	41
Health	27	37	5	1	.....	.....	2	.....
Food	29	26	3	.....	.....	2	4	3
Motor vehicles, traffic	14900	13069	197	278	34	27	84	74
Motor vehicles, tampering	22	14	.....	.....	.....	.....	1	.....
Motor vehicles, intoxicated driver	954	956	44	51	4	11	10	10
Motor vehicles—Criminal negligence causing death	13	13	4	3	2	1	2	3
Motor vehicles, unauthorized use	119	190	1	20	.....	.....	11	7
Drunkenness	2215	2205	51	65	1	3	19	21
Intoxicating liquor	269	176	14	10	1	3	19	11
Non-intoxicating liquor	33	97	3	3	.....	3	13	3
Narcotics	3	6	.....	.....	.....	.....	.....	2
Aeronautics	9	8	.....	.....	.....	.....	.....	1
Gas tax	27	21	1	.....	.....	.....	.....	.....
Abatements	.....	.....	.....	.....	.....	.....	.....	.....
Confiscations	.....	.....	.....	1	.....	.....	.....	.....
Miscellaneous Crimes and Ordinance Violations	1581	1692	5	4	3	.....	10	5
Totals	24,991	23,823	681	817	150	148	718	704

SELECTED OPINIONS

BANKS AND CORPORATIONS

CREDIT UNIONS

1

Funds—Investment by Purchase of Savings, Building and Loan Association Shares—L 1943, C 635; M. S. A. 50.14; C 52; 52.04, clause (5); C 51; 51.29, subd. 2; 501.125.

Question

Whether or not credit unions organized and operating under M. S. A., c. 52, are prohibited from investing funds by purchase of shares of savings, building and loan associations organized and operating under M. S. A., c. 51.

Opinion

In an opinion of this office dated February 9, 1944, No. 426, 1944 Report file 53-D, it was held that the shares of such corporations were proper investments under the "prudent-man rule" of L. 1943, c. 635 (M. S. A. 501.125), assuming, of course, the particular corporation met the other requirements of the rule as to management, reserves, etc.

The answer to your inquiry turns upon the question of whether the "prudent-man rule" applies to investment of credit union funds.

Section 52.04 provides, among other things, that a credit union shall have the power to (5) "invest in any investment legal for savings banks or for **trust funds in the state.**"

It should be noted that the boldfaced portion of clause (5) does not refer to trust funds owned by the State of Minnesota.[1] It refers to trust funds which are within the jurisdiction of the State of Minnesota so as to be subject to the laws of this state.

Section 51.21 provides that share accounts of savings, building and loan associations organized and operating under c. 51 "may be purchased and held absolutely by, or in trust for, any person, * * * a partnership, association, and corporation."

It would seem clear, therefore, that your question should be answered in the affirmative. You have, however, called our attention to § 51.29, subd. 2, and state that at the time the legislature was considering the 1945 amendment to subd. 2 the original bill specifically authorized the issuance of these shares to state banks and credit unions; that you objected to the inclusion of the banks, and the credit unions asked the committees to delete their institutions from the amendment. It is our opinion that the legislative history of subd. 2 as related by you does not require a modification of the above conclusion as to investments of credit unions. It is true that subd. 2 does not

[1]Whether the "prudent-man rule" applies to state trust funds was discussed in an opinion of this office to the State Auditor dated January 13, 1947, file 53-A.

specifically authorize an issue of a share to a credit union. However, it should be noted that subd. 2 of § 51.29 specifically provides:

> "The provisions of this subdivision are supplemental to any and all other laws relating to and declaring what shall be legal investments for the persons, corporations, organizations, and officials herein referred to."

In other words, if by virtue of other applicable laws a corporation has the authority to invest in savings, building and loan association shares, then the fact that such authority is not again recited in subd. 2 ibid. does not carry with it an inference that the investment may not be made.

You have also stated that prior to the effective date of L. 1943, c. 635, trustees could invest only in the authorized securities set forth in M. S. A. 50.14 as it appeared before the 1943 amendment.

Assuming that this be a correct statement of the former law, the question is presented whether 52.04, clause (5), permitting credit unions to invest in any investment legal for trust funds in this state, is limited to those laws relating to trust funds as they appeared at the time 52.04, clause (5), was enacted (L. 1925, c. 206).

It should be noted that § 52.04, clause (5), does not incorporate by reference any specific statute but merely refers generally to the law relating to the investment of trust funds. It is well settled that a statute of specific reference incorporates the provisions referred to from the statute as of the time of adoption without subsequent amendments. On the other hand, a statute which refers to the law of a subject generally will include all amendments and modifications of the adopted law subsequent to the time the reference statute was enacted. See Sutherland, Statutory Construction, Vol. II, § 5208.

It is our opinion that clause (5) adopts as a limitation upon the powers of credit unions those limitations that then applied, or thereafter might apply, to investment of trust funds and that consequently L. 1943, c. 635, applies to and defines the powers of investment of credit unions.

It is, therefore, our opinion that credit unions are not prohibited from investing funds by purchase of shares of savings, building and loan associations organized and operating under M. S. A., c. 51, providing, however, that the particular corporation whose shares are to be purchased satisfies the requirements of the "prudent-man rule."

KENT C. VAN DEN BERG,
Assistant Attorney General.

Commissioner of Banks.

June 24, 1948 53-A

CONSERVATION

DRAINAGE

2

Employment—Appeal from Award—Attorney—Powers of town meeting— MS § § 365.10, 212.03. Op. 204, 1918 Report, March 13, 1917, File 434a-1 reversed.

Opinion

Attention is called to the powers of the town board which are statutory. See Dunnell's Digest, Sec. 9651. The supervisors have charge of all of the affairs of the town not by law committed to other officers. M. S., Sec. 366.01.

The powers of the town meeting are set out in M. S., Sec. 365.10. In paragraph (3) thereof we read that the town meeting has the power to direct the institution and defense of all actions in which the town is a party or interested; to employ necessary agents and attorneys for the prosecution or defense of the same, and to raise such sums of money, for that purpose as they deem necessary. Although an appeal in a ditch proceeding is not a civil action, for the purpose of the problem, I think that we may consider that it is analogous to a civil action and that the section mentioned covers the point. Since the town meeting is not held until next March, I call attention to M. S., Sec. 212.03, which relates to special town meetings. It is there provided that special town meetings may be held for the purpose of transacting lawful business whenever the supervisors, town clerk, and justices of the peace, or any two of them, together with at least 12 other freeholders of the town, file in the office of the town clerk a written statement setting forth the reasons and necessity for such meeting and the particular business to be transacted thereat and that the interests of the town require that such meeting be held.

It would appear that a special town meeting should be called. If at that meeting action is taken wherein the sense of the meeting is expressed to the effect that in the ditch proceeding the town has been assessed benefits and awarded damages, which awards are not sustained by the facts and it is the sentiment of the meeting that an appeal from such awards should be taken to the district court and directing an appeal to be taken in the name of the town by the attorney, selected by the meeting, to take such appeal, then such action should be taken. The appeal should be authorized by the meeting. The town board does not appear to be authorized to take the appeal since the statute appears to contemplate this action to be taken by the town meeting.

The only practical way to handle an appeal is to have an attorney at law take charge thereof. It is my opinion that the town meeting has authority to employ an attorney for that purpose. His employment should be by motion or resolution embodied in the minutes of the meeting. It would be well to state the compensation to be paid him in the motion or resolution. His compensation may be based upon the time employed and specified as the

amount to be paid per day of employment; or his compensation may be a lump sum which he is willing to accept for such employment. The town meeting should levy taxes in a sum sufficient to pay the attorney. M. S., Sec. 365.10 (3). But in any event, the compensation must be reasonable.

It is my opinion that the town board does not have the right to employ counsel since the statute appears to vest this power in the town meeting.

Opinion No. 204, 1918 report, in re powers of Town Board to employ attorney reversed.

CHARLES E. HOUSTON,
Assistant Attorney General.

Town of Sioux Agency Attorney.
December 4, 1947 434-A-1

3

Ditch Inspector—Compensation—Resolution appointing inspector should specifiy such compensation. County Engineer may be appointed inspector—M. S. A. 106.481.

Question

"In view of the fact that M. S. A. § 106.481 provides that the county engineer may be appointed by the commissioners as ditch inspector, in that event is the county engineer entitled to additional compensation by virtue of extra duties as ditch inspector?"

Opinion

The pertinent language for consideration, found in M. S. A. Sec. 106.481, is:

"The appointment shall be for such time and for such compensation as the board may specify."

This language certainly contemplates that the ditch inspector shall be paid the sum which the county board specifies in its resolution of appointment. His compensation as county engineer does not involve the duties of ditch inspector and he should not be expected to perform the duties of ditch inspector without compensation. If his services are of value, there is no reason that he should not be compensated and the law apparently contemplates that for his services he shall be paid.

It is my view that the resolution of appointment shall specify the compensation that he is to receive.

CHARLES E. HOUSTON,
Assistant Attorney General.

Scott County Attorney.

November 26, 1947. 148-A-10

4

Establishment—Appeal—Order establishing ditch is final where the board had jurisdiction and no appeal therefrom is taken within time permitted by law—M. S. A., Sec. 106.631.

Facts

In drainage proceedings, where the county board has jurisdiction, and the notice required by M. S. A., Sec. 106.171, has been given before the final hearing on the petition, engineer's and viewers' report, under the provisions of Sec. 106.181, the board has jurisdiction over the lands involved, the municipal corporations interested, and the owners of lands. Then the hearing proceeds as outlined in Sec. 106.191. When the facts appear, as required in Sec. 106.201, the board establishes the drainage system and makes an order containing findings to that effect.

If any party is thereby aggrieved, he may appeal to the district court from such order, as provided in Sec. 106.631, provided he follows the prescribed procedure therein outlined. Subd. 2 of that section in paragraph (b) requires the steps to be taken to effect the appeal within thirty days of the date of such final order. Having taken such steps within the time prescribed, the law affords him a trial in the district court.

The county board has made such an order establishing the ditch. One of the towns in the county was not represented and did not appear at the final hearing. It now desires to take such steps as may be required to have the order establishing the ditch rescinded and to permit the town to oppose an assessment made against it for benefits to the town roads.

Question

Is any remedy afforded by the law to the town for the review of this order or is any procedure authorized to set the order aside to enable the town to litigate the question of benefits?

Opinion

The force and effect of an order establishing a public ditch is that of a judgment in rem, and all property rights affected thereby are settled and fixed in a new status and may be altered only by competent legal change authorized by law. **Nostdal v. County of Watonwan**, 221 Minn. 376, 22 N. W. (2d) 461. As stated in the opinion, this principle was definitely held in **Lupkes v. Town of Clifton**, 157 Minn. 493, 196 N. W. 666.

If the town interested in this question had suffered a judgment to be entered against it which was entered in the district court and if the town had permitted the time for appeal from such judgment to expire without taking an appeal, there would be no question that the action of the court was final. We have a like situation to consider. The town having allowed the time for

appeal to expire without taking an appeal from the order establishing the ditch, it is without remedy. The order is binding upon the town.

CHARLES E. HOUSTON,
Assistant Attorney General.

Renville County Attorney.

November 23, 1948. 602-E

5

Establishment—Petition—Meaning of term "resident owner"—M. S. A., Sec. 106.031.

Facts

The land described in the petition for establishment of a public drainage ditch includes land owned by three brothers as tenants in common. It also includes land formerly owned by a person now deceased, whose estate is pending for settlement in the probate court and in the ownership of which land eight heirs have succeeded the deceased.

Questions

Within the meaning of M. S. A. § 106.031.

1. Is each of the three cotenants mentioned to be considered a "resident owner"?
2. Is each of the heirs mentioned to be considered a "resident owner"?
3. In the case of real estate owned in joint tenancy, is each joint tenant to be considered a "resident owner?"

Opinion

A resident owner must be an actual resident of land described in the petition. See opinion of the Attorney General, dated February 21, 1939, File 602-I.

It appears to me that the term "owners of land" includes each tenant in common, each heir of a deceased owner and each joint tenant. See 30 W & P 632, 634.

On the definition of the term "owner" as applied to real property, many cases may be found on both sides of the question under consideration. 50 C. J., Property, Sec. 49, p. 772-776. But it is my opinion that as the term is used in the statute which we are considering, any person having a substantial interest in the real property whether it is an entire interest or undivided, in common or joint, is to be considered an owner.

CHARLES E. HOUSTON,
Assistant Attorney General.

Renville County Attorney.

September 19, 1947. 602-I

6

Improvements—Filing, enlarging and extending an existing ditch—New laterals—M. S. A. 106.521, 106.501.

Opinion

M. S. A. 106.501 applies to (1) tiling, (2) enlarging, or (3) extending an existing ditch. It does not apply to straightening the course. When one of such three things is to be accomplished, then § 106.501 applies, but if it is proposed to depart from the line of the old ditch, the petitioner must proceed under M. S. A. 106.031. The two sections have different requirements in respect to the number of petitioners required.

When it is desired to construct new laterals, the procedure required in M. S. A. 106.521 must be followed.

CHARLES E. HOUSTON,
Assistant Attorney General.

Kandiyohi County Attorney.

September 21, 1948. 602-G

7

Injunction—To restrain unlawful drainage of lands not assessed. Who are proper parties.

Facts

A public drainage system has been established and constructed and thereafter lands not assessed for benefits caused by the construction are drained into this system, thereby imposing a burden upon the system not contemplated when it was established.

Question

Whether the duty is incumbent upon it and upon the county attorney to bring a suit for an injunction to restrain the drainage of such lands into the ditch when such lands were not assessed for its construction.

Opinion

When a proceeding is pending for the repair of a county or judicial ditch and the facts above stated are shown to the county board as outlined in M. S. A., Sec. 106.471, Subd. 7, then it is appropriate under the proceedings there outlined to determine the benefits to such lands arising from the drainage thus afforded. But that does not appear to be your question.

It appears to me that the injury, the wrong done, is not against the public. It is a wrong committed against the owners of the lands which were

assessed for benefits and burdened with the cost of construction and maintenance of the drainage system. If the public health is endangered, then we might say that the public is interested. If public roads are flooded, including county roads, then the county attorney and the board would be interested. The county attorney would then have a duty to perform. Without increasing illustrations, I would say that any situation where damage results to the county, to the public roads of the county, or damage in other particulars which may be attributed to such facts, would give rise to a cause of action for injunction in which the county board might initiate the proceeding in behalf of all of the people of the county. But where the interests of private landowners are the interests sought to be protected, they should bring their action in their own names because they are the real parties in interest. See **Lupkes v. Town of Clifton,** 157 Minn. 493.

CHARLES E. HOUSTON,
Assistant Attorney General.

Lac qui Parle County Attorney.

December 20, 1948. 361-D

8

Repairs—Assessments—L 1945, C 82, MS 1945, Sec. 106.484—L 1947, C 143, Sec. 67, MS Sec. 106.01-106.79, repealed save for proceedings pending which may be finished under old law and when in public interest may be finished under new law. M. S. A., Sec. 106.471, Subd. 3—Contribution by county where a ditch lies in more than one county—Sec. 106.381—Assessment against tax forfeited land.

Facts

Under the provisions of M. S. 1945, Sec. 106.484, the board proceeded to clean out and repair a portion of Judicial Ditch No. 2 in Clearwater and Polk Counties, the portion repaired being in Clearwater County. You say that it is your understanding that in pursuance of the law cited the assessment against land to raise the revenue required to pay for this work must be made in the same proportion and against the same land as is shown by the assessment which was made against the land at the time that the ditch was established and constructed. You understand this to mean the entire system.

Many of the lands originally assessed at the time of the construction of the ditch have become tax forfeited. A part of the land originally assessed for the construction of the ditch lies in Polk County.

Questions

1. **Should the tax forfeited lands be assessed or should they be omitted from the assessment?**

2. **How can the county board for Clearwater County impose an assessment on the lands in Polk County?**

Opinion

L. 1947, C. 143, Sec. 67, repealed M. S. 1945, Sec. 106.01 to Sec. 106.79, both inclusive, "save only as to unfinished proceedings instituted under any" part thereof "and not completed at the effective date of this act." "Any proceedings so instituted and incomplete at the effective date of this act may be completed under the provisions of the laws under which the same were instituted; and for such purpose the provisions of such laws shall continue and apply to such proceedings. In proceedings pending at the effective date hereof, the board or court may avail itself of the provisions of this act when such course appears to be in the public interest."

I presume that these proceedings were pending at the effective date of this act.

L. 1947, C. 143, Sec. 38, M. S. A. Sec. 106.381, provides in part:

> "All state lands and properties, including rural credit lands, shall be assessable for benefits received and such assessment shall be paid by the state from any funds appropriated and available therefor upon certification thereof to the state auditor."
> This language is broad enough to include tax forfeited land.

L. 1947, C. 143, Sec. 47, M. S. A. Sec. 106.471, takes care of the situation with reference to Polk County. See Subd. 3 thereof. Upon reading this subdivision, it is observed that a petition will be addressed to the district court which had jurisdiction of this judicial ditch proceeding. This petition will show the things required to be shown by this subdivision and will ask for the order of the court apportioning the cost between the two counties. The court will make an order as therein provided for hearing and at the hearing evidence will be offered in support of the petition and the court will order the reimbursement which is just. The reimbursement is made on the strength of the order.

CHARLES E. HOUSTON,
Assistant Attorney General.

Clearwater County Attorney.

September 16, 1947. 602-B

9

Repairs—Assessments—Judicial Ditch—Where repairs were made before 1947, but assessments were not imposed upon lands to pay the cost thereof, the rules in M. S. A., Sec. 106.471, Subd. 3, apply since they are rules of procedure only.

Facts

In several years before 1947, repairs were made in Chippewa County on judicial ditches theretofore established. In this opinion, it is assumed that such judicial ditches as are herein considered extended in more than one

county, including Chippewa. When the repairs were made, no assessments were imposed upon the lands originally assessed for benefits.

You have for consideration the law as it existed when the repairs were made in the several different years and also as it exists now and is found in M. S. A., Sec. 106.471, Subd. 3.

Question

"May a County apply for contributions for repairs made to drainage systems by it in years prior to 1947 under M. S. A., § 106.471, subdivision 3? May application now be made for contributions by the other Counties under this section?"

Opinion

Your letter does not state the specific years in which the various repairs were made.

In Oleson v. County of Chippewa (Minn.) 31 N. W. (2d) 432, it was established that after the lapse of years following repairs on a drainage ditch, the assessment might be imposed. And in this Oleson case the court applied the rule of procedure which was in force at the time that the repairs were made, M. S., Sec. 106.48, although the provisions thereof were repealed by L. 1945, C. 82, Sec. 7.

If, when the repairs were made in any year before 1947, the procedure in respect thereto conformed to the law as it then existed, the lands which were originally assessed for the construction of the ditch, by reason of the repairs, became burdened with the obligation of an assessment against them respectively for their proportion which the law imposed to pay the cost of the repairs. The proportion of the burden to be imposed has not been changed. It was within the province of the legislature at any time to change the rules for the accomplishment of the ultimate end, so long as the burden upon the particular tract was not changed. For example, a new duty could be imposed upon an officer of the government who did not have that duty before the new law was enacted. New procedures could be devised for the accomplishment of the end.

Sec. 106.471, Subd. 3, establishes procedure to be observed in the situations there described. It appears that this subdivision applies irrespective of whether the repairs were made before the enactment of these provisions. The burden on the lands is neither increased nor diminished by the provisions thereof. The subdivision is merely a statement of rules for the orderly handling of the business therein described. The legislature evidently considered that the enactment of this law was necessary in view of the fact that the county board has no authority to impose assessments outside its county, whereas benefits may result to lands situated outside the county by reason of repairs being made within the county and the burdens were established against these lands when the ditch was established.

For the reasons herein stated, it is my opinion that your question is to be answered "yes."

In the collection procedure, it will be remembered that there is now a limitation which deprives the county auditor of authority to enter omitted property on the assessment and tax books more than six years after May first of the year in which the property was originally assessed or **should have been assessed.** M. S. A., Sec. 273.02, **Oleson v. Chippewa County,** supra.

CHARLES E. HOUSTON,
Assistant Attorney General.

Chippewa County Attorney.

April 29, 1948. 602-B

10

Repairs—Assessments—Omitted lands—Inclusion of added land in assessments. M. S. A., Sec. 106.471, Subd. 7.

Facts

A judicial ditch was established in Mower County some thirty years ago. It has recently been discovered that a forty-acre tract lies within the drainage area of this ditch and is benefited thereby, but was never included in the proceedings and assessed for benefits.

You call attention to M. S. A., Sec. 106.471, Subd. 7. You comment that it is your opinion that this subdivision operates only when a petition is made for repairs as provided in Subd. 4 of the same section.

Question

What is the shortest procedure for bringing this omitted land into the ditch system for the purposes of assessment?

Opinion

Subd. 7 aforesaid, by its language, is not limited to proceedings under a petition for repairs provided in Subd. 4 of this section. The language of Subd. 7 is:

> "(a) In any proceeding for the repair of any state, county, or judicial drainage system, if it shall appear * * * ."

So, the proceedings provided apply when the repairs are made on the initiative of the county board without a petition. The proceedings are appropriate in any repair job.

When proceedings are pending for improvements under Sec. 106.501, the benefits are redetermined, so it was not necessary to provide in this statute that in improvement proceedings new land could be assessed. The only place where it would be applicable would be in case of repairs and that is all that this particular subdivision relates to.

In any repair job where the engineer makes a report if it appears that lands not assessed for benefits resulting from the construction of the ditch have been benefited, then the procedure should follow that provided in this subdivision to bring such lands within the proceedings. Notice will be given as provided in paragraph (a). A hearing will be had after the viewers have determined the benefits as provided in paragraphs (b) and (c).

CHARLES E. HOUSTON,
Assistant Attorney General.

Mower County Attorney.

June 14, 1948. 602-B

11

Repairs—Damages—Law makes no provision for determining damages resulting from maintenance. Original determination of damages before construction contemplates damage for all time.

Facts

Thirty or thirty-five years ago, county ditch No. 85-A was established and constructed in your county. On the north side of Sec. 27, just south of the north line of the section, the ditch runs easterly and westerly. When constructed, the earth removed was placed in spoil banks on either side of the excavation. On the north spoil bank, a road was constructed. South from the south spoil bank, the farm buildings of an owner were located. This owner made a road on the south spoil bank, which constituted his driveway from his buildings to the public road on the east side of his land, which, I understand, was the east section line. This constituted his access to the highway from his buildings. It was cheaper to construct than a bridge across the ditch, which lay north from his buildings.

In the plans and specifications for construction of the ditch, no specific provision was made concerning the place where the earth removed from the ditch should be deposited.

Recently, the ditch was repaired. The repair required removal of earth from the ditch. The contractor engaged to do the work deposited this earth to the south and covered the driveway aforesaid. The contractor considered it practical to do this because otherwise if he deposited the earth on the north side of the ditch, it would necessitate carrying the earth across the road, if the road were not to be covered. He chose to cover the private driveway rather than cover the public road.

The owner of the driveway complains that he has been damaged. That he has been greatly inconvenienced, appears to be obvious.

Your statement of facts does not disclose what the contract for repairs required in the way of depositing the earth removed from the ditch. I

presume that the contract was silent on that subject. If so, it appears that the contract is incomplete. You have for consideration, in order that you may advise the county board, this

Question

When the ditch was constructed and the earth removed and deposited as aforesaid, did the ground upon which this removed earth was deposited constitute a part of the drainage system—that is—an easement to receive the waste material not only at the time of construction but during all future times when repairs were required, so that when the landowner appropriated the spoil bank and used it for driveway purposes, he did so at his risk that the same ground would again be required for the deposit of further waste material when repairs should be made so that he now is entitled to no damages because of the deposit of waste material upon his driveway when necessary repairs were made?

Opinion

In this opinion, it is assumed that when the ditch was originally constructed, and the south waste bank made, it was with the consent of the then landowner. At any rate, it appears that it was an appropriation of so much of the land on the south side of the ditch as was required for the deposit of the earth removed from the ditch. It was a taking in fact. It is well known, and the courts have declared, that in the establishment and construction of a ditch one of the sovereign rights exercised by the government is the right of eminent domain. The county government thus appropriated a part of the owner's land at the time that the ditch was made. Part of the land thus appropriated was for the ditch itself. A part of the owner's land was appropriated and used as a receptacle for the spoil bank. The fact that the landowner made use of the spoil bank in a legitimate way did not lessen the right of the government. And it seems logical to say that since a ditch which is not maintained and kept useful is a useless thing, when it became necessary to repair the ditch, that is, to maintain it so as to continue the ditch as a useful instrument, that the government again had the right to deposit earth in the same place that it had originally appropriated as a receptacle for the waste material taken from the ditch. It does not appear why it was necessary to give the landowner all of the waste material when at the time of construction his land was burdened with only a part of it. It seems that the contractor considered at the time that he deposited this earth when the repairs were made that the government would be damaged if a part of the material were deposited on the public road. The landowner so far as our statement of facts is concerned stood by and did not attempt any legal means to prevent the contractor from depositing this earth upon his land until it was all there. What he could have then done to prevent it is of no interest now because the time has passed.

The county has no money out of which damages can be paid. There is no provision in the law relating to the repair of drainage ditches for the payment of damages. If the landowner has any remedy for damages, it is not

against the county, but against the contractor. This opinion is not to be considered from the standpoint of the landowner, that is, whether the landowner has any cause of action. It is only from the standpoint of the right of the government. And it is clear that the county is not responsible for damages to the landowner. When repairs are made on a drainage system, there is no provision in the law for the ascertainment of damages growing therefrom. It is not contemplated that anything will be done which will result in damages to landowners. When the ditch is constructed, it is known that it will be repaired in the future. Any damages resulting from the repair are damages incident to the construction and establishment of the ditch and in contemplation of law, it must be said that when the damages were ascertained at the time that the ditch was constructed, those damages were not only for the then damages sustained but for all that should be sustained in the future.

CHARLES E. HOUSTON,
Assistant Attorney General.

Renville County Attorney.

December 8, 1948. 602-D

12

Repairs—Engineer's certificate of completion of contract by contractor not conclusive evidence but board must make final determination of completion of contract before contractor receives final payment—M. S. A. 106.471, Subd. 4, M. S. A. 106.331, M. S. A. 106.471.

Facts

A large repair project was undertaken in connection with a county ditch. This was by authority of M. S. A., Sec. 106.471. A contract involving the expenditure of several thousand dollars was made for the cleanout job. The stage has been reached where the contractor has substantially performed his contract. The engineer appointed by the county board has certified that the contractor has complied with the contract and specifications. A few landowners along the ditch have appeared before the county board with complaints that the contractor did not fully complete his contract according to such plans and specifications which were a part thereof. Some of the complaints are minor in nature. The contractor has agreed with some of the landowners whereby the landowner undertakes to remedy the matter of which complaint he has made and the contractor pays the landowner for the expense involved.

The county board is not convinced that the contract has been substantially completed according to the plans and specifications and it has refused to accept the job even though the engineer has certified that the contract has been performed.

Question

Is the final certificate of the engineer as to the completion of a contract on the part of the contractor conclusive so that the county board must accept the engineer's conclusion and pay the contractor in accordance with the engineer's certificate the sum which he states to be the balance due on the contract, or does the county board have discretion in the matter with the right to refuse to accept the repair job if it finds the facts to be that the job is not completed in accordance with the contract, the engineer's certificate of completion to the contrary notwithstanding?

Opinion

M. S. A. 106.471, subd. 4, relating to repairs, in paragraph (b) provides in the last sentence thereof that in the case of a drainage system lying wholly within the county, after it has been determined that the repairs are necessary, the board directs the county auditor and the chairman of the county board to let a contract for the repair of the system as shown in the engineer's report and as determined necessary by the board, "in the manner provided in this chapter for original ditch construction."

M. S. A. 106.331 relates to the proceedings to be had after the completion of the construction of a ditch. It provides for a report by the engineer upon the completion of construction. A hearing is provided on the engineer's report after notice given. It is only when it appears that the contract has been completed and the board so finds that the balance of the contract is paid. It appears to me that the duty rests on the board to make the final determination. The engineer's report amounts to nothing more than a recommendation based upon the facts which he reports. But if the board believes, or has reason to believe, that the contract has not been completed, it should act accordingly and should require completion.

When the contract for the repair is entered into, this contract, like all other public contracts, requires a performance bond. This bond is conditioned for the performance of the contract. If the contractor fails to finish his job, the county board will see that the job is completed by another contractor and the other contractor will be paid by the original contractor or out of the contract price before the original contractor receives his final payment. To sum up, it is my opinion that the board must be convinced by all of the evidence available that the contract has been performed by the contractor before the contractor is entitled to receive full payment of the contract price.

CHARLES E. HOUSTON,
Assistant Attorney General.

Renville County Attorney.

December 8, 1948. 602-C

13

Repairs—10% of cost of construction—Petition—Benefits—M. S. A. Sec. 106.471.

Questions

"1. If a county board on its own initiative ordered a drainage ditch to be repaired under 106.47, Minnesota Statutes as amended by 1947 laws, is the board limited to 10 per cent of the cost of construction in any calendar year?

"2. If the board orders repairs after the submission of a petition signed by one person, or any number less than 26 per cent of the owners, is the amount of repairs limited to 10 per cent of the cost of construction or is the amount limited to the total benefits as provided in 106.471 subdivision 4 (c)?"

Opinion

L. 1947, C. 143, Sec. 67, repealed M. S., Sec. 106.47. Accordingly, Sec. 106.47 no longer states the law. That section of the statutes related to apportionment of liens. I fail to find that it relates to the subject matter of your letter, so your attention is called to the situation in order that you may restate it if you wish.

M. S. A. Sec. 106.471, states the authority of the board to make repairs of a drainage ditch lying within its county, or so much thereof as lies within its county. Subd. 2 grants authority to the board to make repairs without a petition. Undoubtedly, the legislature contemplated routine repairs such as must be made from time to time and such as would be expected to be made for the purpose of maintenance, the amount of expenditures being limited to 10% of the cost of construction thereof in that county. But, if a petition is made as provided in Subd. 4, then the 10% limitation does not apply. In other words, the board may make these routine repairs not exceeding 10% of the cost of the ditch in the county in one calendar year.

Subd. 4 relates to repairs brought about by a petition. When the proceedings are under Subd. 4, that is, initiated by petition, the 10% limitation found in Subd. 2 does not apply. But it is expressly provided that no job of repair shall be ordered if it appears that the cost thereof will exceed the total benefits theretofore determined in the ditch proceeding. So, under Subd. 4, the expenditures are limited only by the amount of benefits determined and not by the limitations found in Subd. 2.

As stated in the opinion of the Attorney General, dated September 2, 1947, File 602-J, where this subdivision was under consideration and reference was made to paragraph (b):

"If at this hearing it appears from the engineer's report and the evidence presented that the repairs recommended are necessary and for the best interests of the property owners affected, and the board or

court shall so find, the board or court shall make findings and order accordingly."

And, again, in that opinion, it was stated:

"In one calendar year, the board shall not spend or contract to be spent for repairs or maintenance on one ditch system a sum greater than ten per cent of the cost of construction thereof in that county, except as provided in Subd. 4 of this section."

"But in Subd. 4, there is no limitation on the amount to be spent, provided, that the cost of repairs will not exceed the total benefits theretofore determined in the ditch proceeding."

I wish to make it clear that as I understand this section, the 10% limitation applies only to proceedings for routine maintenance which the board makes without any petition. It does not apply to proceedings upon petition.

The distinction which I see between a petition by less than 26% of the owners of the area of the property affected and a petition by not less than 26% of such owners is this:

Under paragraph (a) when the petition is by less than 26% of such owners and it appears to the board or court that the ditch is out of repair, the board or court appoints an engineer to perform the duties there specified. Before appointing such engineer we see that it is necessary that it must appear that the ditch needs repair. If the board or court is not satisfied from the inspection of the petition that the ditch is out of repair, a hearing may be ordered before an engineer is appointed. Upon that hearing, the fact would be determined whether the ditch is out of repair. If and when an engineer is appointed, after the engineer files his report, a hearing is held on the report. If, at this hearing, it appears from the engineer's report and the evidence that the repairs recommended are necessary and for the best interests of the property owners affected, and **the board or court shall so find**, then the board or court makes findings accordingly. The repairs are not ordered until these findings are made.

But if, on the other hand, the petition is signed by the owners of not less than 26% of the area of the property affected, and if on the hearing required in paragraph (b) it appears that the ditch is in need of repair, then it is mandatory that the board or court order such repairs, provided, of course, that the limitation of cost applies.

So, we see that under paragraph (b) in proceedings on a petition by less than 26% of the owners aforesaid, it must appear from the engineer's report and evidence **that the repairs recommended are necessary and for the best interests of the property owners affected** and the board or court shall so find before repairs are ordered. But where the petition is by not less than 26% of such owners and **it appears that the ditch is in need of repair so that it no longer serves its original purpose**, then the board or court shall order the repairs.

I think that what I have said above makes it clear that it is my opinion that the 10% limitation applies only to proceedings initiated by the board without a petition. You will note that that authority is limited to the board and not to the court. The court is without power to initiate a proceeding without a petition.

You call attention to the proviso in Subd. 4 (c) limiting the cost of the repair and stating that no job of repair shall be ordered if it appears that the cost thereof will exceed the total benefits theretofore determined in the ditch proceeding. You inquire whether the proviso is limited to proceedings on petition by more than 26% of the owners aforesaid. It is my view that, irrespective of the intention of the legislature in that respect, it applies to all situations. The entire structure of the law relating to drainage ditches is based upon the theory of benefits. No assessment will stand where it is in excess of the special benefits. That is merely a declaration of the law, not an enactment of a new idea. It applies equally to a petition by less than 26% of the owners, not because of the manner in which the law was written but because of the principle involved.

This 1947 act of the legislature was a new bill. Where the terms are plain, they must be taken to be the law, irrespective of what the law was before. The legislature has the power to change the law. Merely because the revision as stated in this new bill is different than the law before revision does not change the law as rewritten. The courts have no power to read anything into or out of the law when it does not offend the constitution and where there is no ambiguity.

CHARLES E. HOUSTON,
Assistant Attorney General.

Chippewa County Attorney.

November 20, 1947. 602-J

14

GAME & FISH

Pigeons and Doves—Not included within the meaning of "wild animals"—use of poisons in taking of pigeons and doves—MS 1945, 614.46.

Question

As to the legality of employing exterminator firms who use poisons to do away with pigeons.

Opinion

It has been previously held by this office that the common domesticated dove or pigeon is not a wild animal within the meaning of the present game and fish code. The ordinary barnyard or domesticated pigeon or dove has been under domestication for so long as to have lost the characteristics which

motivated the legislature to use the expression "wild by nature" in its definition of wild animals.

It is our opinion that the state statutes relating to game and fish and their protection are not applicable to the ordinary types and species of domestic pigeons or doves.

As to the use of poisons to destroy the pigeons, we call your attention to Minnesota Statutes 1945, Section 614.46, which provides as follows:

> "Any person who unjustifiably administers any poisonous, or noxious drug or substance to any animal, or procures or permits the same to be done, or unjustifiably exposes any such drug or substance with intent that the same shall be taken by any animal, whether such animal be the property of himself or another, is punishable by imprisonment in the state prison for not exceeding two years, or in a county jail for not exceeding six months, or by a fine of not exceeding $500, or by both such fine and imprisonment."

It is apparent that the legislature intended that no person should unjustifiably administer any poison or noxious drugs or substances to any wild animals or permit the same to be done. Whether or not the use of poisons to destroy the pigeons which you refer to is unjustifiable or not is a question of fact which is not within the province of this office to determine.

JOHN H. BURWELL,
Special Assistant Attorney
General for the Department of
Conservation.

Hennepin County Attorney.

May 19, 1947. 210-D-7

WATER LEVELS

15

Procedure to maintain—Functions of county board and commissioner of conservation—Water supply—How obtained—Appropriation by county—Cost of project—How paid—Benefits assessed and damages awarded—M. S. A., Secs. 111.79, 105.43, 111.65, 111.64, 111.66, 111.68, 111.71, 111.76, 475.14.

Facts

The Prior Lake Association, representing the abutting property owners along the shore of Prior Lake, contemplates initiating appropriate action for the drilling of one or two wells so that the lake level of Prior Lake may be raised.

Questions

"1. Whether Scott County as a governmental subdivision or the conservation department of the state of Minnesota has the authority to drill necessary wells near Prior Lake for the primary purpose of raising the lake level?

"2. May the costs of such drilling and the maintenance of the wells be assessed back against the property owners in accordance with the benefits to be derived by the raising of the lake level?

"3. In the event that the county commissioners of Scott County, Minnesota, should so desire may Scott County pay a portion of the cost as a benefit to the county and assess the remaining portion or percentage back against the property owners abutting upon the lakeshore?

"4. How should the costs of installation of the wells and the maintenance thereof be pro rated back against the lakeshore property for some of the property will be benefited even though not expressly abutting upon the lakeshore? Certainly certain back shore lot owners should pay a pro rata share also.

"5. May Scott County as a subdivision of government borrow the necessary funds to finance the project and how should this be done?

"6. What percentage of lakeshore property owners should sign a petition for the improvement as above outlined?"

Opinion

See the opinion of the Attorney General, No. 173, 1940 report; also opinion dated October 21, 1931, File 273-A-23.

When the proceedings are taken, which are contemplated in M. S. A., C. 111, the county board may appropriate money for the purposes stated in Sec. 111.79.

The county board may apply for authority to establish and maintain levels on any public water. The application is made to the commissioner of conservation. M. S. A., Sec. 105.43, L. 1947, C. 142, Sec. 7. The procedure is set out in the law cited.

A majority of the owners of property abutting upon any lake or other body of water, or the proper officials of any city or village, authorized by resolution of the council thereof, liable to be affected by or assessed for the cost of the proposed improvement, may initiate a proceeding for the establishment of a uniform water level in any lake or body of water by following the procedure outlined in M. S. A., Sec. 111.65.

Raising the level of a public water involves the obtaining of a supply of water sufficient for the purpose. To obtain such water, dykes, dams, sluiceways, and other structures or devices necessary and essential to maintain such uniform water level may be established. M. S. A., Sec. 111.64. To my

mind, the language of the statute is broad enough to include the drilling or digging of wells.

When proceedings are taken in pursuance of M. S. A., C. 111, Sec. 111.66 provides that appraisers are appointed by the court. They report to the court the benefits and damages resulting from the establishment and construction of the enterprise. A statement of the benefits and damages is made. Sec. 111.68. The court directs notice to be given and a hearing upon the benefits and damages thus reported. Sec. 111.70. If the evidence warrants it, the court makes an order confirming the assessment and findings, or such other order as is appropriate. Sec. 111.71. Such benefits are shown in the statement provided in Sec. 111.76 and become a lien on the property benefited. Sec. 111.77.

If the county board is so advised and considers it in the public interest, it may appropriate money for the benefit of the project as provided in Sec. 111.79.

The sections above cited show the method to be employed in impressing a lien on benefited lakeshore property. How far back on the shore, the property is benefited, is, of course, a question of fact to be determined by the apraisers and the court.

A county may borrow money only in the manner and for the purposes which the statutes provide. M. S. A., Sec. 475.14, L. 1947, C. 296, Sec. 4, shows the purposes for which the county may borrow money. Such purposes do not include the purpose here contemplated.

Accordingly, the conclusion follows that the county may not borrow money to finance this project.

CHARLES E. HOUSTON,
Assistant Attorney General.

Scott County Attorney.

September 9, 1948. 273-A-23

COURTS AND CRIMINAL LAW

COURTS

16

Commissioners—Vacancy—Filled by district court judges—Term of appointee—Minn. Stat. 1941, § 382.01. M. S. A., § §382.02, 489.01.

Facts

"On May 14, 1947, 'A', the then incumbent court commissioner of Hennepin County, died. Thereafter, on May 19, 1947, the District Judges of Hennepin County appointed 'B' to fill the vacancy so created.

The appointee duly qualified, assumed the duties of that office and at the present time is serving as court commissioner of Hennepin County.

"Had 'A' lived and continued in office, his term would not have expired until the first Monday in January, 1951, since he was elected at the general election of 1946 for a term of four years. The question now arises as to how long the present incumbent will continue in office under her appointment."

Question

"Does the present court commissioner of Hennepin County hold office until the first Monday in January, 1951, or does her appointment continue only until the first Monday in January, 1949?"

Opinion

Unless otherwise stated, the sections hereinafter cited are those of Minnesota Statutes Annotated.

Section 489.01 provides that:

"In each county in the state there shall be elected at the general election in 1918 a court commissioner. The term of office of the court commissioner shall be four years and until his successor is elected and qualified, and begin on the first Monday in January next succeeding his election. This office shall be filled by election every four years thereafter. * * *"

Minnesota Statutes 1941, Section 382.01 provides as follows:

"In every county in this state there shall be elected at the general election in 1918 a county auditor, county treasurer, sheriff, register of deeds, county attorney, clerk of the district court, court commissioner, coroner, county surveyor, and county superintendent of schools.

"The terms of office of these county officers shall be four years and until their successors are elected and qualified, and shall begin on the first Monday in January next succeeding their election, and these offices shall be filled by election every four years thereafter."

Section 382.02 provides:

"Any appointment made to fill a vacancy in any of the offices named in section 382.01 shall be for the balance of such entire term, and be made by the county board."

Minnesota Statutes 1941, Section 382.01 was revised by the revisor of statutes so as to exclude in Minnesota Statutes 1945, Section 382.01 the offices of clerk of court and court commissioner from the application of that section. The office of clerk of court was obviously omitted because of the decision of the supreme court in **State v. Berg**, 132 Minn. 426, holding the section to be unconstitutional as respects the office of clerk; and the office of court commissioner was omitted, I assume, because Section 489.05 provided that in the filling of a vacancy in the office of court commissioner the

appointment should be made by the district court. When the legislature enacted Minnesota Statutes 1945 with the above section so revised, it is improbable that it intended to abrogate the legislative policy theretofore established that all county officials should be elected every four years at the same election and that appointees to fill vacancies in the county offices named should hold for the balance of the unexpired term. There is no reason why a different policy in this respect should be applied to the office of court commissioner from that applied to all other county officials. Therefore, if possible, a construction should be given which puts into effect the same policy as to the length of appointment in the filling of vacancies in the office of court commissioner as is applied to appointments in the filling of vacancies in all other county offices.

The provisions above quoted and the history of the legislative provisions of which they are amendments make it clear that the legislature intended that all the officials therein named should be elected for a term of four years each beginning in 1918 and every four years thereafter. Pursuant to Section 489.01 an election of court commissioner should be held not in 1948 but in 1950, unless in the case of a vacancy the act relating to the court commissioner shall be construed to require his election at the next general election for the balance of the unexpired term.

In **State ex rel. Evens v. Borgen,** 189 Minn. 216, the court said:

> "* * * It is perfectly clear from the wording of the above act of 1913 as amended by that of 1915 that the legislature intended to make the term of the county offices named four years and that all such offices in every county of the state should be filled at the same general election. In order to achieve that object, the appointments to fill vacancies must be for the remainder of the unexpired term. Otherwise the plan of electing all county officers in every county of the state at the same election would be quickly disrupted by deaths, resignations, and removals. * * *"

In the case last cited, there were involved statutory provisions (Laws 1913, Chapter 458, as amended) which specifically provided that in the case of a vacancy in the office of sheriff the county commissioners should fill the same by appointment and that the person so appointed should hold for the remainder of the unexpired term. The court in that case also stated that:

> " * * * When L. 1913, p. 668, c. 458 (which was amended in 1915 to include court commissioners), was enacted there was no provision of law, nor has there been since, under which, if a vacancy occurred in one of the offices named, it could be filled by an election for the remainder of the unexpired term * * * ."

Section 489.05 provides for the holding of the office of court commissioner by an appointee to fill a vacancy therein until the next general election but does not specifically authorize an election to fill such vacancy for the remainder of the unexpired term. Section 489.01 does specifically provide that an election of court commissioner must be for a term of four years. That is the only election expressly authorized by statute to fill that position.

The holding of such an election in 1948 to elect a court commissioner for a term of four years would be wholly inconsistent with Section 489.01, which requires that the next term of court commissioners is to commence on the first Monday of January, 1951. Therefore, the provision of Section 489.01 so providing and the provision in Section 489.05 that the court's appointee shall hold his office until the next general election as applied to the situation in question are irreconcilable. In such circumstances, the construction of the provisions under consideration should, I believe, be controlled by Section 645.26, Subdivision 4, which provides that when the provisions of two or more laws passed at different sessions of the legislature are irreconcilable, the law last in date of final enactment shall prevail. In the matter here considered, Section 489.01 is the later enactment and must, therefore, be construed as superseding any irreconcilable provision in Section 489.05. The words "next general election" contained in Section 351.06 relating to appointments to fill vacancies in elective offices and providing that they shall continue until next general election are, I believe, subject to the same construction as is herein given the use of such words in Section 489.05.

Therefore, it is my opinion that to carry out the legislative intent to elect court commissioners and other county officers every four years and at the same time, as hereinabove referred to, and not cause a disruption of the legislative "plan of electing all county officials in every county in the state at the same election," and in the absence of a statutory provision that at the next general election a vacancy in the office of court commissioner shall be filled for the remainder of the unexpired term, the provision in Section 489.05 that the appointee by the district court in case of a vacancy in the office of court commissioner shall hold his office until the next general election must be construed to mean that he shall hold such office until the general election at which a court commissioner may be elected.

Under the construction herein given, the next general election at which a court commissioner may be elected is not in 1948 but in 1950; the term of the candidate elected for that office in 1950 will commence on the first Monday of January succeeding the general election of that year, and the present holder of the office appointed by the court will hold the same until the first Monday in January, 1951.

See State ex rel Bergin v. Washburn 33 N. W. 2nd 854.

J. A. A. BURNQUIST,
Attorney General.

Hennepin County Attorney.

June 4, 1948. 128-D

17

Commissions—Youth conservation—Commitments—Administration—Penal institutions—M. S. A., Sec. 260.125, L. 1947, C. 595.

Opinion

1. L. 1947, C. 595, Sec. 1, Subd. 13, M. S. A., Sec. 260.125, Subd. 13, makes provision that in case a person is convicted of a felony or gross misdemeanor, who is found to be less than 21 years of age at the time of his apprehension, and who is not sentenced to imprisonment for life, or in a county jail for ninety days or less, or to a fine only, the district court shall commit him to the commission. The court does not commit the offender to the reception center at the state reformatory. It commits him to the Youth Conservation Commission which is created by Sec. 1, Subd. 2 of this act. It is observed that Subd. 13 aforesaid prescribes the maximum age of a person who may be so committed. It prescribes no minimum age. Therefore, the subdivision is authority to the district court to commit the persons named who are less than 21 years of age to the commission.

Under authority of Subd. 16, the commission orders the person committed to be conveyed to some place of detention approved or established or designated by the commission until otherwise ordered.

Under authority of Subd. 19, if the offender has been committed to the commission upon conviction of a felony or gross misdemeanor, the commission may order his confinement to such reformatory, state prison, jail, or other place of confinement, to which he might have been sentenced by the court in which he was convicted except for this act. It is incumbent upon the authorities in charge of reformatories, state prisons, jails, or other places of confinement, to accept such persons in like manner as though they had been committed by such court. It is observed that the power of the commission to commit to the reformatory at St. Cloud is not broader than the power of the court to commit to the reformatory before the passage of this act.

The so-called reception center is a creature of the commission, not a creature of the law. It is an establishment of necessity and convenience for the transaction of the business of the commission. The law does not locate a reception center at the reformatory at St. Cloud. If a reception center has been established there by order of the commission, it cannot be considered a part of the reformatory, but is merely a place of detention approved or established or designated by the commission under authority of Subd. 16.

2. The second question again refers to commitments to the reception center. What is said under the first subdivision of this discussion applies here concerning commitments. The powers of commitment granted to the commission in Subd. 19 are broad. Under clause (b) if the offender has been committed to the commission upon conviction of a felony or gross misdemeanor, the commission has authority to order his confinement to such reformatory, state prison, jail, **or other place of confinement,** to which he

might have been sentenced by the court in which he was convicted except for this act. The language is broad enough to include the State Training School. Clause (c) is authority to the commission to commit to the State Training School for Boys or the Minnesota Home School for Girls of a person committed to the commission by a juvenile court upon a finding of delinquency. Clause (f) is authority to the commission to revoke or modify previous orders made by the commission itself except an order of discharge. The reception center so-called is, as I understand, a mere temporary place of detention from which it is intended that the person committed will be transferred to the proper place when it has been decided where the proper place may be.

3. In considering this act, the purpose thereof, as stated in Subd. 1, is always to be remembered. Such purpose is to provide a program looking toward the prevention of delinquency and crime by educating the youth against crime and by substituting for retributive punishment methods of training and treatment directed toward the correction and rehabilitation of young persons found delinquent or guilty of crime. It appears that a youth committed to the commission is in contemplation of this act not doing time but rather is undergoing a process of rehabilitation. Since he is not doing time and there are no precise limits upon his term of imprisonment, if confined in the reformatory, a credit against an indefinite term would not have the effect that it does when credited against a sentence imposed by the court having maximum and minimum limits. A person committed to the commission is discharged upon the order of the commission, placed on probation, released on parole and reconfined upon the commission's order. See Subd. 19. The control of the commission ceases upon the expiration of a term of sentence, as provided in Subd. 26, and under the conditions stated in Subd. 27.

4. The declared purpose of this act is the correction and rehabilitation of young persons found delinquent or guilty of crime. It is the duty of the commission to provide and conduct a program looking toward the prevention of juvenile and youth delinquency and to provide and administer preventative and corrective training for persons committed to the commission. Subd. 1 and 2. The facilities and services of the Division of Public Institutions are made available to the commission. Subd. 9. The commission has power to commit to an institution, granting and revoking parole, and issuing final discharge. Subd. 10. Subd. 19 authorizes in some cases that the commission may commit a felon to the reformatory, prison or jail. Until the discharge of the person committed, the authority of the commission over such committed person is very broad. While the commission has no control over the reformatory and cannot require its officers to do things inconsistent with their official duties (Subd. 24), it appears to be the purpose of the act to give the commission control over these committed persons. I would say that this control does not go to the extent that while they are imprisoned in the reformatory, they are exempt from rules applying to other prisoners, but it is my view that they may be transferred from the reformatory without conforming to the orthodox reformatory rules. Such prisoner will rather be governed by the rules of the commission. Subd. 35.

5. It appears to me that the decision on the subject when a person who has been committed to the Youth Conservation Commission is to be released is a question to be decided by the commission. Any commitment to the reformatory is made by the commission and subject to its further order subject only to the limitations in Subds. 26, 27 and 28. It appears that the superintendent of the reformatory in respect to commitments coming from the commission has the duty only to follow such orders.

6. If a district court should make a commitment to the reformatory in a case which should have been committed to the commission, I would consider it prudent that the facts be reported to the Attorney General in order that he might consider the same and take such steps as he considers required for the protection of the superintendent and the proper administration of the law.

CHARLES E. HOUSTON,
Assistant Attorney General.

Division of Public Institutions.

May 26, 1948. 145-B-1

18

Commissions—Youth conservation—Commitments—Indians—No authority to accept commitments from court—L. 1947, C. 595.

Facts

"On the 27th day of March, 1948, a petition was filed by a social worker of the Red Lake Indian Agency wherein complaint was lodged against an Indian youth residing within the agency or reservation. The youth was tried before the judge of the Court of Indian offenses, adjudged delinquent, and committed by the judge to the custody, control, and guardianship of the Director, Youth Conservation Commission."

Question

"Is there any legal basis for the Commission's acceptance of a child so committed? Do the state agencies have any responsibility in assisting with the treatment of children who are residents of the Indian reservations?"

Opinion

Indian reservations are sovereignties, subject to contractual relations entered into with the United States Government through treaties.

The legislature of the State of Minnesota has no authority to pass laws governing tribal Indians while on an Indian reservation. **State v. Jackson, 218 Minn. 429.** The laws of the state are coextensive with its territorial

boundaries. The Indian reservations do not come within those territorial boundaries although they may be physically situated therein. The law is adequately summarized in the syllabus to the case of **Minnesota v. Campbell, et al.**, 53 Minn. 354, in the following language:

> "But Indians, while preserving their tribal relations, and residing on a reservation set apart for them by the United States, are the wards of the general government, and as such the subject of federal authority, and the power to legislate for them is exclusively in congress. And for acts committed within the limits of the reservation, they are not subject to the criminal laws of the state."

Through treaty provisions the United States is permitted to establish courts of Indian offenses to function as a judicial body in the government of the inhabitants of the reservation. In the case of **U. S. v. Clapax**, 35 F. 575, our Federal Court has defined "courts of Indian offenses" in the following terms:

> "The courts of Indian offenses are not the constitutional courts provided for in section 1, article 3, of the Constitution, which Congress only has the power to 'ordain and establish,' but mere educational and disciplinary instrumentalities, by which the Government of the United States is endeavoring to improve the condition of the dependent tribes to whom it sustains the relation of guardian."

The language of the Youth Conservation Act, Laws 1947, Chapter 595, indicates that our legislature was cognizant of its authority and restricted the application of the act to commitments by courts duly established within the state. Section 1, Subdivision 11 of said law provides:

> "No person may be committed to the Commission until it has certified in writing to the Secretary of State that it is prepared to discharge its duties and functions and has filed certified copies thereof in the office of the clerk of the district court and with the probate court in each county. Before such filing a judge of said courts shall deal with persons convicted of a crime or found delinquent without regard to the provisions of this Act."

There is no provision in the cited law for filing a certificate of readiness with the court of Indian offenses. Until such certificate is filed with a court, the court is required to deal with persons convicted or found delinquent without regard to the act (Sec. 1, subd. 11 quoted above).

It is the opinion of this office that the Youth Conservation Commission has neither authority to accept a child committed to it by a court of Indian offenses nor any responsibility in assisting with the treatment of tribal children who are residents of an Indian reservation.

EARL H. A. ISENSEE,
Assistant Attorney General.

Youth Conservation Commission.

May 17, 1948. 145-B-1

19

Juvenile Appeals—Order finding youth delinquent and committing him to Youth Conservation Commission is appealable. M. S. A. 260.06. Procedure for appeal. M. S. A. 525.712 et seq. Order of commitment suspended pending determination of appeal. M. S. A. 525.714.

Facts

The Probate Court of Mahnomen County, sitting as the Juvenile Court, tried a youth charged with delinquency, found him guilty, and committed him to the Youth Conservation Commission under the provisions of Laws 1947, Chapter 595.

Question 1

"May such person appeal to the District Court, and, if so, what is the statute authorizing such appeal?"

Answer

A person found to be delinquent by the juvenile court may appeal to the district court under the provisions of M. S. A. 260.06, wherein it is provided:

"A final order of commitment in any case of * * * delinquency, shall be an appealable order which, on appeal, shall be treated and considered the same as an order appointing a general guardian, and shall be tried by a jury, unless a jury is waived by the appellant. * * *

"The parent or attorney for any child so committed may appeal from such order of commitment by complying with the laws regulating appeals from probate and district courts."

Question 2

"If there is no right of appeal, may such person proceed by certiorari, and, if so, what is the statute governing such procedure?"

Answer:

The answer to question 1 obviates the necessity of answering question 2.

Question 3

"Does an appeal or a review by certiorari automatically stay commitment to the Youth Commission, or, may commitment be made notwithstanding such review procedure?"

Answer

M. S. A. 260.06 provides in part:

" * * * on appeal, (the final order of commitment in case of delinquency) shall be treated and considered the same as an order appointing a general guardian * * * ."

M. S. A. 525.714, dealing with an appeal from an order appointing a general guardian, provides in part as follows:

> "Such appeal shall suspend the operation of the order * * * appealed from until the appeal is determined or the district court shall otherwise order."

Applying this provision concerning the suspension of the order appointing a general guardian until the appeal is determined to the facts you relate, it is the opinion of this office that the same law would apply and suspend the operation of the order appointing a guardian of the youth and committing him to the Youth Conservation Commission until the appeal is determined or the district court disposes of the same by its own order.

EARL H. A. ISENSEE,
Assistant Attorney General.

Mahnomen County Attorney.

August 25, 1948. 145-B-1

20

Municipal—Fines—Disposition—Fines imposed for criminal offenses against the cigarette tax law should be remitted to the county treasurer— M. S. A. 297.01 et seq.

Facts

Some time ago several persons were convicted in your Municipal Court of violating the cigarette tax law. Fines were imposed and collected totaling $230. A check for that amount was forwarded to the State Treasurer, who returned the same to the Clerk of the Municipal Court, stating that he did not have an account into which this amount could be credited.

Question

The question arises as to the disposition to be made of fines collected for violation of the cigarette tax law.

Opinion

The law is found in Laws 1947, Chapter 619. The tax is imposed upon the sale of cigarettes in this state. The payment of the tax is evidenced by stamps affixed to the package. Licenses are provided for distributors and subjobbers. Distributors are required to file a return monthly showing the amount of their tax liability. A penalty is provided for non-payment. Laws 1947, Chapter 619, § 7, Subd. 4. Subd. 5 following provides for an action to recover the amount of the tax and unpaid interest and penalty. That section provides that the collection of the tax, interest and penalty shall not be a bar to prosecution under the act.

According to the nature of the offense, violations of the statute are either felonies, gross misdemeanors or misdemeanors. Sec. 12, Subdivisions 1, 2 and 3.

Sec. 13 is headed "Disposition of revenue." It provides that "All revenues derived from taxes, penalties, and interest under this act and from license fees and miscellaneous sources of revenues shall be deposited by the commissioner in the state treasury and credited one-third to a special fund to be known as the 'Cigarette Tax Apportionment Fund'."

The question resolves itself into what is meant by the word "penalties" as used in the section last above quoted. Does that word refer to penalties added to the amount of taxes because of nonpayment of taxes imposed by the act, or does it refer to fines imposed for violations of the provisions of the act?

The words "taxes, penalties, and interest" are familiar terminology in tax laws. The word "penalties" is always undertsood in such laws to mean the penalties added to and resulting from nonpayment of the taxes when due or at the time specified. I think the word is so used in this act under consideration.

Furthermore, fines paid for a violation of the act are not "revenues." "Revenue" is money resulting from the imposition of a tax as the word is used in this act. It does not include fines imposed for criminal offenses.

These fines should be disposed of as provided by M. S. A. 574.34, which reads as follows:

> "Fines and forfeitures not specially granted or appropriated by law shall be paid into the treasury of the county where the same are incurred."

The Clerk of the Municipal Court should remit the amount of these fines to the County of Hennepin.

RALPH A. STONE,
Assistant Attorney General.

Minneapolis City Attorney.

August 20, 1948. 199-B-4

21

Probate — Guardianship — Commitment — Mentally Ill or Feeble-minded— Court has no authority to authorize payment of fees to a guardian ad litem in a proceeding to commit a minor as mentally ill or feeble-minded —Court can appoint the same person as guardian ad litem and attorney in a proceeding to commit a minor—M. S. A., § § 525.754, Subd. 1 and 525.751, Subd. 4.

Facts

The probate court has authority to appoint an attorney to represent the interests of an alleged mentally ill or feeble-minded minor in a proceeding to commit such person where it deems it necessary and to authorize the payment of a fee set by statute to said attorney for his services.

Questions

1. In a proceeding to commit a minor as mentally ill or feeble-minded, does the probate court have authority to order the payment of a fee to a guardian ad litem appointed by the court in such case for his services?

2. In a proceeding to commit a minor as mentally ill or feeble-minded, can the court appoint the same person as guardian ad litem and attorney for the patient?

Opinion

The questions presented for our opinion will be answered in the sequence in which they are set forth above.

M. S. A., § 525.754, Subd. 1, provides for the payment of fees and mileage in a commitment proceeding to certain individuals therein specifically specified. A guardian ad litem is not one of the persons specified to be paid a fee and mileage. The legislature, in passing the law and specifying specifically persons who are to be paid, has by inference excluded all others from payment. Therefore, a guardian ad litem, not being one of those specified as entitled to payment, is by inference excluded, and the court cannot order the payment of a fee for his services. It is understood that this opinion deals only with those instances where the county is responsible for the payment of the fees and mileage and does not include those instances where the patient has an estate of his own.

In a proceeding to commit a minor as incompetent or feeble-minded, our supreme court has held that it is necessary for the court to appoint a guardian ad litem. **Hatton v. State**, 225 Minn. 554. Under the provisions of M. S. A., § 525.751, Subd. 4, in a proceeding to commit a minor as mentally ill or feeble-minded, it is incumbent upon the court to appoint counsel for him if he is financially unable to obtain counsel and the patient so requests or is held for observation under order of the court, and in all cases the court may appoint counsel for the patient if it determines the interests of the patient require counsel. There is nothing in the statute which states that the court cannot appoint as counsel the person appointed by the court as guardian ad litem. It does not appear that the interests of a guardian ad litem and counsel would in any way conflict nor would they be adverse to the interests of the patient. Therefore, this office is of the opinion that the court could appoint the same person as guardian ad litem and counsel for a minor in a proceeding to determine whether the minor is mentally ill or feeble-minded.

EARL H. A. ISENSEE,
Assistant Attorney General.

Fillmore County Attorney.

October 7, 1948. 679-G

CRIMINAL LAW

22

Autopsy—Right of coroner to hold autopsy—Coroner may require autopsy where there is reasonable ground for suspecting that death may possibly have been caused by a criminal act. Consent of next of kin not required in such a case—M. S. A. 390.11.

Question

In a case where a coroner has been called upon the death of a person and he having examined the body cannot determine the exact cause of death, and there appearing to be no apparent violence upon the body and the decedent left no known next of kin, may the coroner cause an autopsy to be performed to determine the exact cause of death?

Opinion

M. S. A. 390.11, provides:

> "Coroners shall hold inquests, post mortem examinations, or autopsies upon the dead bodies of such persons as are supposed to have come to their death by violence and may hold such inquest when the death is believed to have been and was evidently occasioned by accident or casualty. The record of the inquest proceedings and the report thereof may not be used in evidence in any civil action arising out of the death for which such inquest was ordered. Before any inquest is held the coroner shall notify the county attorney to appear and conduct the examination of witnesses at such inquest."

"Death by violence" includes a death caused by unlawful means such as usually call for the punishment of those who employ them. **State v. Bellows,** 62 Ohio State 308, 56 N. E. 1028, 1029.

If the coroner has reasonable ground for suspecting, or if all the facts and circumstances create a ground for suspecting that the death may possibly have been caused by a criminal act, the coroner would have the right to cause an autopsy to be held.

If the coroner is satisfied that there is reasonable ground to believe that the death may have been caused by foul means or that there is reasonable ground to suspect that a criminal act was the cause of death, he has the right to require an autopsy.

There should be grounds for a reasonable suspicion that the death was caused by foul play of some kind. See Attorney General's opinions dated April 1, 1942, and August 28, 1940, file 103-B, copy enclosed.

Question

Would the situation be changed if there were next of kin, or would the consent of the next of kin be required in such a case?

Opinion

The answer to this question is no. If the coroner has the right to require an autopsy, he has the right to cause it to be performed with or without the consent of the next of kin.

RALPH A. STONE,
Assistant Attorney General.

Winona County Attorney.

October 10, 1947. 103-I

23

Complaint—Removing mortgaged property—Where conditional sales contract is followed by an absolute bill of sale giving buyer absolute title, there is no basis for criminal prosecution.

Facts

"A used car dealer sold an automobile for a third party. The used car dealer took in part payment another automobile and signed a conditional sale contract as vendor, with the buyer as vendee. The registration card and bill of sale were made out from the third party to the buyer, and title never went through the used car dealer. All this took place on July 29, 1948.

"Subsequently and on July 31, 1948, the third party executed to the used car dealer a bill of sale and the used car dealer executed an application for transfer, on the blank of which was indicated that the form used was utilized because the registration card had been sent in to the Secretary of State to make a transfer. The used car dealer on the same date executed a bill of sale to the buyer. All these papers were subsequently filed in the office of the Secretary of State.

"The buyer has defaulted in all payments on the conditional sale contract, beginning with the first payment, which was due on August 29, 1948.

"An investigation has revealed that the buyer has removed himself and the automobile from the community and it is thought that he has removed the property from the state."

Question

"The used car dealer has now requested that I issue a criminal complaint under Section 621.21 of Minnesota Statutes. On the basis of the facts given, am I warranted in issuing a complaint?"

Opinion

It might have been possible to uphold the conditional sales contract dated July 29, 1948, even though the vendor named therein was not then the owner of the automobile. It might be considered that he had authority to execute the conditional sales contract as agent for the true owner.

However, when on July 31, 1948, the vendor named in the conditional sales contract executed another and absolute bill of sale to the buyer, I think the basis for a criminal prosecution has disappeared.

While it undoubtedly was the intention of the parties that the purchaser should hold title to the automobile conditionally and in accordance with the conditional sales contract issued July 29, yet I do not think that in a criminal prosecution it would be permissible to attack the absolute bill of sale given July 31 as not expressing the intention of the parties. The later bill of sale operated to wipe out the first one. While in a civil action it might be possible to reform the bill of sale dated July 31 so as to conform to the intention of the parties, I do not feel that this could be done in a criminal action.

I think that by giving the last bill of sale the used car dealer has placed himself in the position where you should not attempt to prosecute the buyer for removing mortgaged property.

RALPH A. STONE,
Assistant Attorney General.

Kandiyohi County Attorney.

December 3, 1948. 133-B-59

24

Defendant—Previous conviction—Cross-examination of defendant as to previous convictions.

Opinion

As to cross-examination of the defendant in a criminal case upon the question of a previous conviction, see the note in 6 A. L. R. p. 1609. The general rule is there stated thus:

> " * * * when the defendant in a criminal case testifies in his own behalf, he thereby assumes the position of an ordinary witness, and may be discredited on cross-examination by inquiries as to his previous prosecution for, or conviction of, crime, in the same manner and under the same rules as any other witness."

The annotation cites the Minnesota case of State v. Kight, 106 Minn. 371. In that case our court said:

" * * * As a witness defendant was subject to the rule governing the examination and cross-examination of other witnesses, and we discover no violation thereof in the record before us.

"There is a limit, of course, to the right of cross-examination in criminal as well as in civil procedure. It should not be extended minutely into the private affairs and life of the witness, nor matters brought out in a criminal case for the purpose of showing the commission of some crime other than that on trial. His conviction of other crimes may be shown, and he may be interrogated as to the fact of the conviction; but it is not proper to drag from him evidence of guilt. We have never adopted the rule, in force in some of the states, under which the cross-examination of defendant in a criminal case is limited to matters brought out on the direct examination (8 Enc. Pl. & Pr. 102), but have applied to him the general rule applicable to all witnesses (Dunnell, Minn. Pr. 722; State v. Quirk, 101 Minn. 334, 112 N. W. 409). Under that rule the extent to which the cross-examination may go for the purpose of testing his credibility rests in the discretion of the trial court."

See also

State v. Gordon, 105 Minn. 217;
State v. Brendeke, 158 Minn. 239;
State v. Dale, 159 Minn. 455.

See also State v. McTague, 190 Minn. 449, 455, where our court said:

"The defendant testified in his own behalf. He could have been asked on cross-examination about former convictions, for the statute makes them competent upon credibility. 2 Mason Minn. St. 1927, § 9948; 6 Dunnell, Minn. Dig. (2 ed.) § 10309. He may be cross-examined, as a defendant who is a witness for himself in a civil action, upon collateral matters to affect his credibility and to discredit him. To some extent the state may go into his life. It is said that the defendant, being a witness, cannot assert a right to remain wholly a stranger to the jury; but in a general way the state may show what manner of a man he is. State v. Abdo, 165 Minn. 440, 206 N. W. 933; State v. Nelson, 148 Minn. 285, 181 N. W. 850. The state cannot go so far as to favor or induce a conviction because the defendant is a generally bad man and society should get rid of him, since it has him on trial, irrespective of his guilt of the particular offense charged. This will not do. 1 Wigmore, Evidence (2 ed.) §57. An exact line cannot be drawn between what is permissible and what is forbidden cross-examination upon collateral matters; and it has come to be recognized as the correct rule that the extent of the cross-examination upon collateral matters is largely discretionary with the trial court. State v. Price, 135 Minn. 159, 160 N. W. 677; State v. Taylor, 144 Minn. 377, 175 N. W. 615; 6 Dunnell, Minn. Dig. (2 ed. & Supp.) § 10307. The state cross-examined the defendant upon his prior life. Naturally enough it was unfavorable to the defendant. Though it might have been restricted, we are unable to

say, contrary to the view of the trial court, that the cross-examination went beyond that which was permissible."

These authorities may be of some assistance to you and the court in your cross-examination of the defendant in the case which you have.

RALPH A. STONE,
Assistant Attorney General.

Aitkin County Attorney.

December 6, 1948. 494-A

25

Gambling—Enforcement—Duty of officers—Punch boards—Dice—Dice box—Bank night—Ticker tape—Merchandise wheels—Blanket stands— Minnesota Statutes 1945, Sections 340.14, 351.03, 614.06, 614.07. Laws 1947, Chapter 586.

Facts

At the meeting of the sheriffs and county attorneys called on June 25, 1947, it was agreed that the questions hereinafter referred to should be submitted to the attorney general.

Unless otherwise noted, reference hereinafter made to statutes is to those of Minnesota Statutes 1945.

Question 1

"Are all punch boards illegal?"

Answer

In Laws 1947, chapter 586, relating to the revocation of licenses, punchboards are defined as gambling devices for the purposes of that act. Under it "intentional possession or willful keeping" of a punchboard upon licensed premises constitutes cause for revocation of license.

Under the laws existing prior to the enactment of chapter 586, which, of course, were not repealed by the passage of that chapter, operation of punchboards as a "scheme for the disposition of property by chance among persons who have paid or agreed to pay a valuable consideration for the chance * * *" is illegal. Opinions of this office have been to that effect for more than 30 years.

Question 2

"Are all forms of dice illegal?"

Answer

Laws 1947, chapter 586, relating to the revocation of licenses, does not include dice within the definition of gambling devices for the purposes of that chapter. However, Minnesota Statutes 1945, section 614.06, in so far as material here, provides:

> "Gambling with * * * dice * * * is hereby prohibited. * * * and every person who shall keep any gambling device whatsoever designed to be used in gambling, shall be punished by imprisonment in the county jail for not more than six months, or by a fine of not more than $200, or by both; and every person who shall bet any money or other property at or upon a gambling table, game, or device shall be punished by a fine of not less than $5.00, nor more than $20.00."

There is nothing in the above quoted section which makes the mere possession of dice or using the same for non-gambling purposes illegal. Under section 614.06 it is the gambling with dice or keeping dice "designed to be used in gambling" that is prohibited. Section 614.07 makes it illegal for any person "to suffer any * * * gambling device to be set up or used for the purpose of gambling" in or on the premises therein designated. When dice are so used they would, under the last cited sections, constitute a gambling device within the meaning thereof. Attention should be called to section 340.14, subd. 2 which prohibits any liquor licensee from keeping on the licensed premises or in a room adjoining the same, any gambling device or apparatus, including dice.

Question 3

"Is a dice box a gambling device?"

> Would a dice box and dice permitted by the proprietor to remain on his counter, not for his own play, nor for the purpose of "playing against the house," but purely for the purpose of customers to determine between themselves who shall pay for the treat, constitute a gambling device maintained on the premises by the proprietor, making him subject to the penalties of Laws 1947, chapter 586?

Answer

If a dice box is maintained and intended to be used for the purpose of gambling, it would, of course, as in the case of dice, be considered to be a gambling decive under above cited sections 614.06, 614.07, and 340.14.

Dice boxes and dice are not included within the definition of gambling devices in Laws 1947, chapter 586, for the purposes of that chapter.

Question 4

"Is bank night illegal?"

Answer

In connection with this question you refer to an opinion of this office dated December 20, 1938. The only statement in said opinion here material is the following:

"The question of whether or not the scheme called 'Bank-Nite' is a lottery depends entirely upon the facts. Since you do not submit any facts with your request, we are unable to express an opinion thereon."

The law as to the legality of "bank nights" is discussed at length in the cases of **State v. Sterns**, 201 Minn. 139, and **State v. Shubert Players Company**, 203 Minn. 366.

Questions 5, 6, and 7

Are ticker tape results, merchandise wheels, blanket stands, raffle tickets, and others of like nature illegal under the statutes?

Answer

The questions so submitted do not refer to the method of operation involved, but an application of the tests set out in the opinion of July 10, 1947, should make it possible to determine whether any device of such character is illegal.

Question 8

"Who must notify the licensing body after gambling arrest to initiate license revocation proceedings?"

Answer

Laws 1947, chapter 586, section 4, makes it the duty of every sheriff, deputy sheriff, constable, marshal, policeman, police officer, and peace officer to observe and inspect the premises where operations are carried on under license and ascertain whether gambling devices are present thereon and immediately report the finding thereof to the authority or authorities issuing the license or licenses applicable to the premises in question; and by section 5 an issuing authority is authorized to revoke a license upon receipt of such information from any of the peace officers referred to in section 4.

Question 9

"Will the Governor hold the sheriff wholly responsible for law enforcement in his county even though he may have a police chief under civil service in the county? Am I not correct in stating that the law makes the sheriff the chief law enforcement officer of his county, and that in event of failure upon the part of police officials to enforce the law, it becomes the duty of the sheriff to do so?"

Answer

Under section 351.03 the governor may remove any of the officers therein designated when it appears to him, by competent evidence, that either has been guilty of malfeasance or non-feasance in the performance of his official duties, first giving such officer a copy of the charges against him and an opportunity to be heard in his defense. There is nothing in our statutes which relieves a sheriff of doing his duty "even though he may have

a police chief under civil service in the county." If any official charged with malfeasance or non-feasance in office wishes to have the findings of the governor reviewed by the Supreme Court, he may, of course, apply for a writ of certiorari for that purpose.

In a memorandum of law enforcement duties heretofore issued by the attorney general, the duties of the sheriff are stated as follows:

> "The sheriff has the general responsibility for enforcing the criminal laws throughout his county. It is his duty, so far as available means permit, to take the initiative in law enforcement without waiting for complaints, to investigate conditions respecting observance of the laws, to take such action as circumstances may require for the prevention of violations, to arrest offenders when sufficient grounds appear, to swear to criminal complaints when he has sufficient knowledge of the facts, and to investigate criminal cases and secure evidence for the prosecution thereof. Any one may report a law violation to the sheriff, who should make such investigation and take such action as the case may require."

Question 10

"What about each municipal officer being held responsible for deeds in his own community?"

Answer

The duties of local peace officers are set out in the same memorandum to which reference has been made, and the following quotation from that memorandum, I believe, answers this question:

> "City or village police officers, marshals, and constables are responsible for general law enforcement within their respective jurisdictions, with duties similar to those of the sheriff as hereinbefore stated. In addition they are responsible for the enforcement of local ordinances. The presidents or mayors and trustees of villages as well as the mayors of most cities are also peace officers, with the duty of enforcing laws and ordinances for preservation of peace and order."

J. A. A. BURNQUIST,
Attorney General.

Redwood County Attorney.

July 14, 1947. 733

Excerpts from Opinions not Included in above Opinion.

BINGO

July 11, 1947

Question

Whether the common and ordinary businessmen's clubs which are found in most cities and villages of Minnesota, known as civic and commerce associations, businessmen's clubs, etc., which are not organized for

profit, are such clubs and associations as are meant to be included in the word "association" as used in Section 10213-2 of Mason's Minnesota Statutes, 1946 Supplement (Minn. Stat. 1945, Section 614.054). The question assumes that an association need not be incorporated to be allowed to conduct the game of "bingo."

Opinion

It was held in an opinion dated July 23, 1945, that it was the intention of the legislature to include in the term "association" as used in the act under consideration any corporation or organization not organized for pecuniary profit and duly existing under the laws of this state. It is therefore my opinion that such associations as those to which you refer are included within the term "association" as used in the statute, and your assumption that such an association need not be incorporated in order to conduct the game of "bingo" is correct.

July 14, 1947

Question

With reference to Laws 1945, Chapter 419, Section 2, which is Minnesota Statutes 1945, Section 614.054, particular attention is directed to the language "or county or state fair in which it intends to conduct such game," and the question is asked as to what is meant by this. The city attorney submitting the request also asks particularly whether it would be lawful under any circumstances to hold a bingo game in a church or in a veterans' center or at a street fair or carnival.

Opinion

If an organization which is entitled under Section 614.054 to conduct a bingo game desires to operate that game at a county fair or at the state fair, it is necessary that it give the 30 days' written notice of time and place to the governing body of the county fair or of the state fair, as the case may be, and this even though it may have given notice to the governing body of the governmental subdivision in which the fair is conducted. The right to conduct the game under these circumstances would, of course, be limited to the time and place where the fair was held as specified in the notice and would not authorize operations elsewhere in the governmental subdivision. If it desires to conduct the game elsewhere within a governmental subdivision than at a fair, it would be necessary that the 30 days' written notice be given to the governing body of the governmental subdivision.

With reference to the last question (which we assume does not apply to fairs), we are of the opinion that if an organization properly qualified under the law complies with the conditions as to notice and no objection is made by the governing body of the governmental subdivision a bingo game may be held in a church or veterans' center or at a street fair or carnival, or in fact in any place specified in the written notice.

J. A. A. BURNQUIST,
Attorney General.

733

26

Lotteries—Gambling— M. S. 1945, Sections 614.01-614.05—Prizes—Drawings—Raffles and various operations considered.

Opinion

This opinion will be confined to the lottery statutes and will not purport to deal with other forms of gambling or gambling devices.

M. S. 1945, Section 614.01, defines a lottery as "a scheme for the distribution of property by chance among persons who have paid, or agreed to pay, a valuable consideration for the chance, whether it be called a lottery, raffle, gift enterprise, or by any other name."

It is elementary that the three necessary elements of a lottery are the offering of a prize, the awarding of the prize by chance, and the giving of a consideration for an opportunity to win the prize. 38 C. J. p. 289; 34 Am. Jur. p. 647; **State v. Powell,** 170 Minn. 239, 240. The elements of prize and chance are generally present in any scheme to be examined, and it is most frequently upon the presence or absence of the element of consideration that cases of this type turn.

The supreme court of this state, in the early case of **State v. Moren** (1892), 48 Minn. 555 (involving a so-called "suit club" plan), said:

> "The term 'lottery' has no technical meaning, but under the statute it must be construed in a popular sense, and with the view to remedy the mischief intended to be prevented. The statute is intended to reach all devices which are in the nature of lotteries, in whatever form presented; and the courts will tolerate no evasions for the continuance of the mischief."

Approximately the same thought is expressed in the following quotation from 34 Am. Jur. at p. 650:

> "It has been said that no sooner is the term 'lottery' defined by a court, than ingenuity evolves some scheme within the mischief discussed, although not quite within the letter of the definition given; but an examination of the many cases on the subject will show that it is very difficult, if not impossible, for the most ingenious and subtle mind to devise any scheme or plan, short of a gratuitous distribution of property, which has not been held by the courts of this country to be in violation of the lottery laws in force in the various states of the Union. The court will inquire, not into the name, but into the game, however skillfully disguised, in order to ascertain if it is prohibited, or if it has the element of chance."

Following are some of the matters which have been definitely settled by our supreme court.

The statute is intended to reach all devices in the nature of lotteries, in whatever form presented, and the courts will tolerate no evasions. **State v. Moren, supra.**

A person may distribute or give away his property or money by chance provided he does so without consideration, but the moment some pay for the chance of participating in the drawing of the prize enters into the picture it is a lottery under the law. **State v. Schubert Theatre Players Co.** (1938) (bank night), 203 Minn. 366, 368.

And this is true no matter how many receive a chance also to participate free and without consideration. **Ibid.**

Whether the lottery is so conducted as to be profitable to the operator thereof is no concern of the law. **Ibid.**

A game does not cease to be a lottery because some, or even many, of the players are admitted to play free, so long as others continue to pay for their chances. **Ibid.**

Prizes

The giving of a ticket representing a chance to get a prize, with a purchase of merchandise, constitutes the operation of a lottery. The purchaser pays a consideration when he buys his merchandise. When he pays his dollar he gets in return the merchandise and a chance to get a prize. **State v. Powell** (1927) (tickets given by merchants to customers without extra charge upon purchases of merchandise), 170 Minn. 239.

The holding last stated has been followed by this office in opinions as to the giving of chances on coal or candy with tickets to a theater (No. 469, 1912 Report); the giving of free tickets to patrons of a theater, entitling them to chances on a prize (Jan. 18, 1926, File 510b-5); the giving of cards representing chances on a valuable prize with tickets of admission to an exhibition (Aug. 24, 1926, File 510b-5); the giving of coupons representing chances on an automobile with tickets of admission to a county fair (Aug. 3, 1928, File 733h); and the giving purchasers of tickets to a school carnival chances on a prize (July 28, 1938, File 510b-5).

Our supreme court has held suit club plans to be illegal. **State v. Moren, supra; State v. Wolford** (1921), 151 Minn. 59. And this despite the fact that each contributor eventually gets a suit.

In **State v. Wolford** it was held that the mere fact that the tickets made no reference to a drawing did not avoid liability under the statute, since it was apparent that there would be a drawing and determination by chance in fact.

This office has also held that, where it was proposed to solicit donations for a certain meritorious purpose, each donor to get a ticket for each twenty-five cents donated "entitling the winner, in a raffle, to some prize," "it seems hardly necessary to suggest to an attorney that the proposed operation will be in violation of such (the antilottery) law." (Aug. 12, 1926, File 733h.)

Annotations under the heading "Scheme for advertising or stimulating legitimate business as a lottery," digesting cases from a number of states,

may be found in 48 A. L. R. 1115 **et seq.**, 57 A. L. R. 424, **et seq.**, and 103 A. L. R. 870, **et seq.** See also, on lotteries generally, annotations in 109 A. L. R. 714, 113 A. L. R. 1124, and 120 A. L. R. 412.

Bank Night

The matter of "bank nights" has been fully dealt with by our supreme court in **State v. Stern** (1937), 201 Minn. 139, and **State v. Schubert Theatre Players Co.** (1938), 203 Minn. 366.

Several inquiries disclose some misunderstanding as to the opinion of this office dated May 2, 1947, relative to "bank night" operations. All that was held in that opinion was that a so-called "bank night" enterprise is not within the term "gambling device" as used in L. 1947, C. 586, which by its terms refers only to slot machines, roulette wheels, punch boards, number jars, and pinball machines which return coins or slugs, chips or tokens of any kind redeemable in cash or merchandise. The opinion specifically calls attention to **State v. Stern** and **State v. Schubert, etc., supra.**

It should not be necessary to spend any time discussing situations which have been presented in oral inquiries where one or more of the elements of a lottery are lacking and, therefore, there is clearly no violation of law, such as the payment of prizes to actual competitors in a golf tournament—(we do not pass on so-called "Calcutta pools," which have not been presented for consideration)—; payment of prizes to competitors in rodeos; furnishing of free parking to customers or the giving of premiums, by stores, where the element of chance is not involved; or the drawing of prizes at meetings or picnics of social organizations where no admission is charged, no so-called "donations" received from those who receive chances on the prizes, no sale in connection with which the chance for a prize is given, and neither the organization giving the prizes nor anyone else receives any consideration, directly or indirectly.

Drawings

An organization is sponsoring a dance. In connection with the dance, tickets are being sold for $1.00 each. The tickets are numbered individually, and, when a ticket is sold, a stub with the same number is retained in the book. This stub also has blanks for writing in the name and address of the purchaser of the ticket. The ticket itself bears the words "Admit one," the number of the ticket, the name of the sponsoring organization followed by the word "dance," the date of the dance, name of the orchestra, picture of an automobile, with the words over it "Grand Prize 1947 Packard Clipper" and underneath it the words "Attendance not Required to Win Any of Prizes"; on the side the wording, "Additional Prizes, ... Washer, ... Roaster, (name of electric mixer), ... Radio, (name of automatic toaster)," and under these words, "Established Price, $.83, Tax .17, Total Price $1.00."

It is clear that this operation constitutes a lottery. **State v. Powell, State v. Schubert, etc.**, Ops. No. 469, 1912 Rep., Jan. 18, 1926, Aug. 24, 1926, Aug. 3, 1928, July 28, 1938; **supra.** The mere fact that the ticket does

not state on its face that there is to be a drawing is not sufficient to take the scheme out of the statutes. **State v. Wolford, supra.**

> An organization is sponsoring a large celebration. Local merchants have donated items of merchandise ranging in value from $2.00 to several hundred dollars. Tickets have been printed, and on the face of these tickets appears the word "Donation." The money derived from these so-called "donations" will be used to defray the expenses of the celebration. At the celebration drawings will be made. The tickets are numbered. The holder of each winning number drawn will receive one of the items of merchandise.

In my opinion, this scheme constitutes a lottery. The use of the word "donation" constitutes merely an evasion which the courts will not tolerate. **State v. Moren, supra**; Opinion Aug. 12, 1926, **supra.**

Raffle

An organization proposes to hold a picnic. Numbered tickets are sold for the picnic which state that the holder has made a "donation" of 25 cents to the organization. Prizes are to be donated, which will be raffled off and given to the "donors" holding winning numbers.

In my opinion, the use of the word "donation" means nothing. The holder of the ticket pays a consideration; a prize is involved, and that prize is to be awarded by chance. All the elements of a lottery are present.

> The county fair association and another organization have for a number of years promoted attendance by giving away automobiles, farm tractors, farm machinery, and merchandise of various kinds. Businessmen of the county and city purchase tickets from one or both organizations for a fixed price per thousand and then give them to their customers when they sell merchandise for cash or when charge accounts are paid. The customers pay nothing for the tickets, and the merchant does not increase the sale price of the merchandise being sold. A practice is followed, however, of giving so many tickets for each dollar of merchandise purchased. The holders of tickets then attend the fair or other gathering, and numbers are drawn in some fashion. If the person holding a lucky number is present, he receives the article of merchandise then being given away. If not, numbers are successively drawn until a successful holder appears.

This operation falls squarely within the decision in **State v. Powell, supra**, and must be held to be a lottery. See also A. L. R. annotations cited **supra.**

> The fair association sells tickets representing chances on several cars, and merchants dispose of these to their customers, normally giving a ticket representing one chance with each $1.00 worth of merchandise purchased. This additional feature is presented. The customer gets two tickets from the merchant, identically numbered, representing each chance. One of these he retains, and the other he deposits in a con-

tainer at the fairgrounds. To deposit a ticket in the container he must purchase a general admission ticket to the fair. Tickets in the container are mixed and winning numbers drawn from it. The winner must, as in the last case, be present to win.

For the reasons stated in the opinion as to the last previous operation examined, the opinion must be the same.

The question is also asked on behalf of the fair association as to what elements of the factual situation must be absent to prevent this arrangement from constituting a violation of law. This we cannot answer without attempting to set up some method of distributing prizes to persons in attendance at fairs, which is not our province. From an examination of the cases and opinions cited it is obvious that either the requirements of purchasing merchandise to obtain a ticket or the requirement of purchase of a ticket to the fair would involve the element of consideration. Even though tickets were distributed without requiring any purchase of merchandise, and persons outside the fairground as well as those within were permitted to win prizes, the effect of the decision of the supreme court in **State v. Schubert, etc., supra,** must be considered.

It appears that in the past a number of county farm bureaus have put on farm bureau exhibits and have maintained headquarters booths at their county fairs. In some counties these bureaus have offered prizes, invited persons attending the fair to register, and at the close of the fair held drawings from among the names of the registrants, awarding the prizes in these drawings.

This presents a very close question. It might well be said that, since the farm bureau is not operating the fair, there is no such consideration as there would be if the fair association were conducting the operation. On the other hand, a registrant would not be able to compete unless he did purchase an admission ticket, and it could be argued that the prospect of getting a chance on the farm bureau prize was one of the things for which he paid when he bought his admission ticket. While I am far from being free of doubt on this question and find no authority in point, it seems to me that, if the door were opened for this operation, the good faith of which is not questioned in the slightest, others who now are barred by the decisions of the court and the long line of opinions of this office, running back 35 years, might devise schemes on the same principle and assert their legality on the basis of this opinion. It is, therefore, my opinion that the practice suggested is at least of such doubtful legality that a county officer would be warranted in commencing a prosecution on the theory that the purchase of a ticket of admission to a fair constitutes a consideration for any chances on prizes to be awarded by lot within the fairgrounds.

Horse Racing

"The provisions of Section 10235 Mason's Minnesota Statutes, 1946 Supplement regarding horse racing are noted. I would like your opinion as to whether or not you feel that if the entrants in a horse race at

a county fair pay an entrance fee and race for a purse, you consider it a violation of the gambling laws."

Mason's Supp. 1946, Section 10235, which is M. S. 1945, Section 614.29, merely refers to horse racing on the Sabbath and prohibits all horse racing on that day except horse racing at the annual fairs held by the various agricultural societies of the state. As to whether the situation stated constitutes a violation of the gambling laws, it is the general rule that a test of speed or endurance of horses for prizes or premiums is not a lottery and that the offer or paying by race associations of premiums or prizes for definite sums without regard to the amount of entrance fees received and payable out of general funds of the association does not constitute gambling. **People ex rel. Lawrence v. Fallon,** 152 N. Y. 12, 37 L. R. A. 227.

Basketball Concession

"The first game is called Basketball Concession. The party is given three throws for a quarter and the aim is to throw the ball into the basket. The party stands sixteen feet from the basket. If the party hits the basket each time, he receives a choice of any article which is in the concession. If he makes only one or two baskets on the three throws, the concession operator can select what prize is to be given."

High Striker

"The second game is called High Striker. A person gets three hits for a quarter. The party is given a maul with which to strike a rubber bumper and if he can hit the bumper hard enough, it will ring a bell. If the party with three hits can ring the bell three times, he gets the right to make a choice of any article in the concession. If he hits the bell only once or twice, the concession operator can pick the article of merchandise to be given."

Hoopla

"The third game is known as Hoopla. This game consists of throwing a seven inch wooden ring onto a merchandise table where there are certain articles of merchandise. If the ring completely encircles or covers any article of merchandise, the party is entitled to such merchandise. It is five cents for each throw or six throws for a quarter."

The question, of course, is whether these games constitute games of chance or games of skill. A game of chance has been defined to be a game determined entirely or partly by lot or mere luck and in which judgment, practice, skill, and adroitness have no office at all or are thwarted by chance. 24 Am. Jur. p. 410. The term "game of skill" is self-explanatory.

Assuming that the games referred to are honestly conducted and that a skillful player in the case of the first and third games and a strong man in the case of the second game can win by a proper exercise of skill or strength, in my opinion, each of the operations would be legal. If, as observation has sometimes shown, the apparatus used is so devised that skill or strength may

be thwarted by the operator, the operation of such a device might come within M. S. 1945, Section 614.11, as an obtaining of money by a trick or device. In each case it would be necessary to make a careful inspection of each device to ascertain whether it meets the tests suggested.

J. A. A. Burnquist,
Attorney General.

To All County Attorneys.

July 10, 1947. 733

27

Lotteries—Prizes—It is not a lottery for the owner of a store to give away a prize to the holder of a winning ticket where there is no consideration paid for the ticket. Intoxicating Liquor: Whether the giving away of such a prize as a matter of advertising by the operator of an on sale liquor store is a violation of Regulation 8, Sec. 2, of the Liquor Control Commission is a question of fact—M. S. A. 340.15, M. S. A. 340.09.

Facts

"The operator of an 'On Sale' liquor store in Minneapolis proposes to use the following plan as a business stimulator: He will give to each person entering his place of business, upon entering therein, a ticket with duplicate numbers thereon. No charge will be made for entering said place of business, or for said ticket, nor will the person entering the place of business be obligated or required to purchase any merchandise therein, nor will he be obligated to pay for checking personal clothing, or effects, nor any other charge of any kind will be made.

"The person entering the place of business and receiving a ticket, will then place the stub of his ticket bearing one of the duplicate numbers, into a barrel, and during the course of the evening, stubs or tickets will be drawn from said barrel by lot, and the holder of the duplicate stub so drawn, will receive a free prize. Said prize will not consist of liquor or food, nor cash money.

"In the event that a winner of the duplicate stub is not present at the time of the drawing, his number will be posted upon a bulletin board and he can call for and receive his prize at a subsequent date."

Question

"Whether such a plan would constitute a lottery?"

Opinion

The answer to this question is in the negative. Opinions of Attorney General, dated November 12, 1947, and February 14, 1947, file 510-B-9.

Question

Whether such a plan would violate any of the statutes respecting on sale liquor establishments.

Opinion

The plan proposed is in its essence an advertising scheme. With reference to advertising of liquor, M. S. A. § 340.09 provides as follows:

> "The commissioner shall have power to make all reasonable regulations to effect the object of sections 340.07 to 340.96 * * * ."

M. S. A. 340.15 provides:

> " * * * The unrestricted advertising of intoxicating liquor is hereby declared to be contrary to public policy. Reasonable rules and regulations restricting advertising to prevent it from counteracting temperance education shall be made by the liquor control commissioner."

Pursuant to such authority, the liquor control commissioner adopted Regulation No. 8, which provides in Section 2 thereof as follows:

> "No advertisement of intoxicating liquor shall contain:
>
> " * * *
>
> "K. Any statement relating to the giving away of any gratuities or premiums in connection with the sale of liquor, provided that consumer advertising specialties such as ash trays, bottle or can openers, cork-screws, paper shopping bags, matches, printed recipes, wine lists, leaflets, blotters, post cards, pencils, stirrers, glassware, calendars, notebooks, playing cards, greeting cards, desk sets, pocket lighters, folding knives and billfolds or any similar article which bears advertising matter may be furnished or given to consumers provided that the distribution of such advertising specialties shall be limited to the licensed premises only and provided further that such advertising specialties have been submitted to and approved by the Commissioner."

It is a question of fact which I am unable to answer from the limited statement of facts given as to whether the advertising put out by the operator of the store would be in violation of this regulation.

RALPH A. STONE,
Assistant Attorney General.

Hennepin County Attorney.

April 22, 1948. 510-B-9

28

Traffic violations—reckless driving—Misdemeanor committed in city limits—City attorney to prosecute in Municipal Court and in the District Court on appeal—M. S. A. 488.22.

Facts

A person was arrested and brought before the Municipal Court of Staples charged with the crime of reckless driving. M. S. A. § 169.13. I assume that the offenses occurred within the municipal limits of the city of Staples. The accused was convicted in that court and has now taken an appeal to the District Court.

Question

Is it the duty of the city attorney to handle the appeal in the District Court, or does that duty devolve upon the county attorney?

Opinion

You direct attention to M. S. A. 488.22, which makes it the duty of the city attorney to prosecute such a misdemeanor committed within the city limits. The statute does not provide who shall represent the state on appeal. This question has never before been presented to this office so far as I can find.

M. S. A. 488.22 reads: "Misdemeanors * * * shall be prosecuted by the city * * * attorney * * * ."

Inasmuch as it is the duty of the city attorney in such a case to prosecute the case in the court where it arises, it would seem to follow that his duty extended to the handling of the case in all courts to which it may be appealed. It could hardly have been intended that as it was made the duty of the city attorney to prosecute the case in the Municipal Court, the prosecution thereof should thereafter be abandoned by the city attorney in the District Court on appeal and the state be without representation.

I think the statute means that where the duty is imposed upon the city attorney to prosecute the case, that duty continues and remains with the city attorney in all courts to which the case may be appealed.

There is no provision for the county attorney to step into such a case when it reaches the appellate court, and it would seem better that the attorney who represented the state in the lower court should continue to do so.

It is my belief that the courts would hold that the duty of the city attorney to prosecute the case in the Municipal Court follows through to the District Court, and that the city attorney should handle the prosecution of the case.

RALPH A. STONE,
Assistant Attorney General.

City Attorney Staples.

September 15, 1948. 59-A-5

EDUCATION

SCHOOL DISTRICTS

29

Board—Powers—Records—Destruction of—M. S. A. 125.06, sd 1.

Opinion

The statute gives the school board general charge of the business of the district and of the interests of the schools thereof. M. S. A., Sec. 125.06, Subd. 1. The question how long records should be kept is, of course, a question of management. So long as an action might be brought in which old records should be used as evidence, such records should not be destroyed.

There is no purpose that I see in keeping old accounts filed as claims and the warrants issued in payment of such accounts more than six years after they became due.

On the other hand, it may be important to know what the proceedings of the school board were some time in the remote past. These proceedings are shown by the minutes and it would seem that it would be prudent to keep the minutes indefinitely. Often the records concerning the pupils who attended the schools are sought years after the pupils have graduated and it would appear to be prudent to keep such records.

The manner of keeping the records and whether they are kept under fireproof protection is a matter for the school board to decide. If they are worth keeping, it would seem that they are worth keeping under adequate protection. But these are all things which the board must decide for itself.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.

May 25, 1948. 851-F

30

Bond issue—Schoolhouse site and buildings—Acquisition—Submission of questions—Ballot—Form—Notice—M. S. A., § § 125.06 and 124.02, subd. 2. Minn. Const. Art. 14, § 1.

Question

Whether it would be legal to submit to the voters of your district the following question:

> "Shall the school board be authorized to acquire Block 5, Lots 1 to 6, inclusive, of Block 7, Highland Outlots to Little Falls, Minnesota, for a schoolhouse site and to erect a schoolhouse thereon?"

Opinion

Under M. S. A., § 125.06, the school board may be authorized by the voters to acquire necessary sites for schoolhouses and to erect schoolhouses or additions thereto. M. S. A., § 124.02, subd. 2, contains the following statement:

> "Each proposition or question submitted shall be stated separately in the notice and on the ballots."

It is my understanding that the sale of bonds for the acquisition of a site and the construction of a school building thereon has already been authorized by the voters of your district and pursuant thereto bonds have been issued and sold for that purpose, and that it is now the desire of the board to ascertain whether the site described in the question submitted meets with the approval of the voters and is one upon which the school building should be erected.

The above-quoted provision in § 124.02, subd. 2 is somewhat analogous to the last sentence of Article 14, Section 1 of the state constitution, which reads as follows:

> "If two or more alterations or amendments shall be submitted at the same time, it shall be so regulated that the voters shall vote for or against each separately."

In **Winget v. Holm**, 87 Minn. 78, the court said on page 86 of its opinion:

> "From the decisions above cited it appears that courts are slow to conclude that the legislature has proposed a constitutional amendment containing two or more alterations or amendments in violation of such a provision as we have in the last sentence of Art. 14, § 1. Courts defer somewhat to the judgment of the legislature upon that proposition. It is not enough that a proposed amendment contains several propositions which could have been submitted in separate amendments. But the changes proposed must be independent and unrelated so as not to fit in with the one general aim or purpose of the amendment framed."

In reading the above-cited case and the quotations therein from decisions of the supreme courts of other states, it appears that a legislative body in submitting a proposed constitutional amendment has considerable discretion with reference to the form of the question upon which a vote of the electors is desired. As the bonds for the purposes here in question have already been sold and the money therefor is on hand, I assume that the main reason for submitting a question at this time is to acquire the authority to purchase the particular site which has been selected by the school board for the construction of a school building thereon.

If there be applied in the construction of the above-quoted statutory provisions in § 124.02, subd. 2, the principles applied to Art. 14, § 1 of the constitution, it would appear that the courts would not hold illegal the submitting of one question unless it contains propositions that are "independent and unrelated so as not to fit in with the general aim or purpose"

under consideration. Here the submission of the question as to acquisition of a site and the construction of a building thereon after an election authorizing the issuance of bonds for such purpose involves only propositions that are closely related and germane to the general subject. They may be viewed as parts or aspects of a single plan.

If, in the circumstances here considered, the board frames and submits the question in the language contained in your letter as above quoted and a majority of the electors voting at the election cast their ballots in the affirmative, it is my opinion that the courts would not set aside the election on the ground that two questions instead of one should have been submitted to the voters.

In so far as this opinion modifies any ruling or rulings this office has heretofore made, it hereby supersedes such former ruling or rulings.

J. A. A. BURNQUIST,
Attorney General.

Attorney for Independent School District No. 3.

April 28, 1948. 159-A-3

31

Consolidation—Reorganization—When consolidation of several school districts, including two or more maintaining graded elementary or high schools, a special election should be held for the officers of the new consolidated district—L. 1947, C. 421, M. S. A., Sec. 122.23.

Facts

The St. Louis County Survey Committee is appointed by authority of L. 1947, C. 421. One proposal made by the committee involves the consolidation of five present school districts, three of which are now independent districts. Two of the three independent districts maintain graded elementary and secondary schools, at Proctor and Hermantown.

Questions

1. Which school board will administer the affairs of the new district, if reorganized?
2. Does M. S. A., Sec. 125.02, apply?
3. Would it be better to have the law amended to provide for the election of a school board for districts reorganized under L. 1947, C. 421?

Opinion

Sec. 13 of the law mentioned, M. S. A., Sec. 122.52, makes provision for the election on the question of reorganization or change of boundaries. It would appear that when the proposal for consolidation has the approval of the voters, the territory involved thereupon becomes a consolidated district and that the laws relating to consolidated districts apply. The districts thus consolidated become an independent district with the powers, duties and privileges conferred by law upon independent districts. The county superintendent then has the duty to give notice of a meeting to elect officers of the newly formed consolidated district. M. S. A., Sec. 122.23. In that section, we read:

> " * * * When such consolidation is with a district maintaining a graded elementary or high school the school board of the latter shall continue to govern the consolidated district until the next annual school election when the successors to the members whose terms then expire shall be elected by the legally qualified voters of the consolidated school district."

Such provision of the statutes cannot be considered to apply to the fact situation here considered. The law quoted refers to a single district maintaining a graded elementary or high school, whereas the situation considered involves two districts of such description. The new board is elected in the same manner as provided when a common district changes to an independent district. Sec. 122.23.

In Sec. 122.30, Subd. 4, we find the procedure for the election of officers on a change from a common to an independent district. It is there provided that the same proceedings shall be had as in the organization of independent districts. Sec. 125.02 applies.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.

October 6, 1948. 166-E-4

32

Funds—Disbursements—Rental or purchase price of caps and gowns for graduating high school students not a proper disbursement in special school district at Rochester. Dues of teachers for membership in MEA or NEA not a proper disbursement for district. Salaries may be increased to include amount thereof—L. 1891, C. 48, subchap. X, §§ 1, 3; M. S. A. § 125.08, subd. 5.

Questions

"Can this School District rent or purchase caps and gowns to be used by high school students at their graduation exercises and pay the cost thereof from School District money?

"Can the School District pay from School funds the membership dues of its teachers in the Minnesota Education Association and the National Education Association if the School District obligates itself to do so in the contract of employment?"

Opinion

The city of Rochester constitutes one school district. It is under the control and direction of a board of education. Special Laws 1891, Chapter 48, Subchapter X, Section 1.

The board of education has all the powers of a board of directors in independent school districts under the general school laws, and such additional powers as are conferred by this act. Section 3.

No specific authority is granted by Chapter 48 aforesaid to rent or purchase caps and gowns to be used by high school students at their graduation exercises and to pay the cost thereof from school district money. Under the general laws relating to schools, no such authority is specifically granted.

M. S. A., Sec. 125.08, Subd. 5, imposes upon the board the duty to provide by levy of tax necessary funds for the conduct of schools and all proper expenses of the district. The furnishing of clothing to students does not appear to be an item of expense in the conduct of schools, nor a proper expense of the district. Rather such a disbursement appears to be personal to the individual students. See opinions of Attorney General, April 4, 1932, holding purchase by district of class pins and colors not a proper disbursement, April 16, 1942, as to school patrol uniforms, January 6, 1940, as to school annual publications. File 159-B-10.

No specific authority appears in the special act mentioned, nor in the general laws, to the effect that the school districts may pay from school funds the membership dues of its teachers in the Minnesota Education Association or in the National Education Association. These items are personal to the teachers. If the school board is of the opinion that it is to the advantage of the districts that its teachers shall be members of such societies, without expense to themselves, and that the value of the teachers' services is thereby increased, there is nothing to prevent the board from increasing the salary of each teacher in such an amount as will include such dues above the salary now received.

CHARLES E. HOUSTON,
Assistant Attorney General.

Public Examiner.

October 22, 1948. 159-B-10

33

Funds—Disbursements—Tax levy—Independent school districts—Board manager of business and finances, including levy of taxes and disbursement of funds—M. S. A. 125.25, L. 1947, C. 633, S. 3, M. S. A. 275.01, M. S. A. 125.07.

Facts

The school funds are deposited (I assume that this means in a bank) under various accounts, such as bus funds, building funds, and general funds. I do not know whether this means that the school district has separate accounts in the bank under these names, but I assume that it is so. The superintendent says that from time to time the treasurer runs short in the general fund.

Question

May the clerk issue orders on the treasurer and leave the money in the other funds intact because the other funds are drawing interest?

Opinion

The duties of the clerk of the school district are stated in M. S. A., Sec. 125.25. It is the duty of the clerk to issue orders on the treasurer for the disbursement of district funds. In this section it is required that such orders shall state the fund on which the order is drawn. It states that teachers' wages shall have preference in the order in which they become due, and no money applicable for teachers' wages from the current school fund shall be used for any other purpose, nor shall teachers' wages be paid from any fund except that raised or apportioned for that purpose. The reference to the current school fund is meaningless for the reason that there is no current school fund. Before the effective date of L. 1947, C. 633, Sec. 3, there was a current school fund, but such fund disappeared by the amendment. See M. S. A., Sec. 128.01. It appears to me that we must consider that it is the law that money raised by taxation on a levy by a school district for one purpose cannot be used for another purpose. All taxes must be levied in specific amounts. M. S. A., Sec. 275.01.

In a common school district, the voters determine the amount of the tax levy and the purposes thereof. The school board is prohibited from expending money for any purpose beyond the sum appropriated by vote of the district. M. S. A., Sec. 125.07. But in an independent district the school board determines the amount of the tax levy and levies the taxes necessary. In the independent district where the same board makes the levy, determines its amount and spends the money, there is not the reason for limitation upon the expenditures of the board that there is in the common district. And in the independent district the law does not limit such expenditures as in the common district.

Accordingly, it is my opinion that the board in the independent district has the authority to use money in the treasury of the district, received under

a general tax levy and not under a levy certified for a particular purpose, for such purposes as it considers to the interest of the district. This does not relate to sinking funds, which are separate funds.

The law does not require the school board in an independent district to make up a budget before the tax levy is made and to certify this budget to the county auditor for the purpose of separate levies for separate purposes. The school board may or may not prepare a budget. In its own way it will determine the amount of taxes needed for the ensuing year and it levies such amount. It does not levy a certain sum for transportation, another sum for teachers' salaries, another sum for fuel, but it levies the sum which, in its judgment, is sufficient to pay items necessary to be paid. The board is the manager of the business of the district. So far as the sums deposited are concerned, the amount in the depository belongs to the school district. The board is charged with its management. No one else has anything to say about it so long as the board properly performs its functions. If the board considers that it has more money on hand than it needs for transportation of pupils, there is no reason that such money may not be used to pay teachers' salaries, or to buy fuel, or for any other legitimate purpose.

CHARLES E. HOUSTON,
Assistant Attorney General.

Scott County Attorney.

October 7, 1948. 159-C-6

34

Funds—Joint recreational activities—Public indebtedness—Means of raising money for joint recreational activities—Issuing warrants and orders payable from the operation of enterprise—Bond issue procedure— M. S. A., Secs. 475.03, 475.07, 475.14, 475.333, 475.23. **Municipalities—Villages—same.**

Facts

The village of Harmony and Independent School District No. 40 own adjoining tracts of real estate which they contemplate developing and operating as a recreational field. Certain improvements thereon are contemplated, a grandstand and modern lighting equipment. The council and the school board wish to issue warrants to obtain money to pay for these improvements, the warrants or orders to be payable only out of the proceeds from the operation of the recreation field.

Questions

"1. Is it legal for the village council and the school board to issue such warrants payable only out of the profits of the enterprise involved?

"2. Would it be necessary for either the village council or school board to call an election within their respective jurisdictions and receive

an affirmative vote of the electors therein before the issuance of such warrants?

"3. Would it be legal for either the village council or school board to pay interest on such warrants, while outstanding, at a rate to be determined by these respective governing bodies?

"4. Is there any statutory limitation on the amount of funds to be expended by either the village council or school board for the development of a joint recreational field?"

Opinion

It appears to me that whether such warrants and orders are "Obligations payable wholly from the income from a revenue producing convenience constructed or improved from the proceeds of the obligations," M. S. A., Sec. 475.03, Subd. 3 (8), is not a question of law, but a question of fact.

If the village council and the school district each determine from all of the available evidence that the enterprise contemplated is a revenue producing convenience, and if the village and the district each decide to issue their respective orders and warrants payable wholly from the income resulting from the operation of such revenue producing convenience, then I would consider that the so-called obligations are not obligations within the meaning of Subd. 3, aforesaid. Under such facts, it would be my opinion that the village council and the school district are authorized by law to issue such warrants and orders payable wholly as to both principal and interest out of the profits from the operation of such enterprise.

Upon such facts, no election would be necessary because these are not obligations of the public, but only payable from the operation aforesaid.

The interest could not be paid by the village or school district out of general revenue or out of any sinking fund raised by taxation.

There is no statutory limitation on the amount of funds to be raised in this manner because they are not obligations of the taxpayers and they are not paid out of general taxation.

But if this enterprise is not a revenue producing convenience within the meaning of Sec. 475.03, Subd. 3 (8), then what has been said before does not apply. In the absence of such facts, I would consider such warrants obligations within the meaning of the subdivision cited.

Upon the theory that they are obligations of the village and district, in order to conform to the law, they should be issued as bonds in order to conform to M. S. A., Sec. 475.07, L. 1947, C. 296, Sec. 3. The corporations would not be authorized to issue warrants or orders representing such obligations payable five or ten years in the future.

The procedure for the issuance of the bonds would be that specified in M. S. A., Sec. 475.14, L. 1947, C. 296, Sec. 4. You will note that this section permits the village to issue such bonds to equip and construct parks and

parkways and playgrounds and stadia. It permits school districts to issue such bonds to defray the expense incurred in athletic fields or stadiums.

You will further note that Sec. 475.333, L. 1947, C. 174, Sec. 3, requires an election.

The amount of the bonds to be issued for that purpose is limited by Sec. 475.23, L. 1947, C. 296, Sec. 5. The limitation is on the amount that may be borrowed, not on the amount that may be spent when the district or village has the money.

CHARLES E. HOUSTON,
Assistant Attorney General.

Village Attorney for Harmony.
August 10, 1948. 159-B-1

35

Liability—Tort liability—Damages to owner of property.

Questions

"1. One of our citizens has presented a claim against the school district for damages done to the roof of a shed adjacent to the school. The man claims that school pupils were responsible for the damage and that it was done during the recess period while they were under the supervision of their teachers. Assuming that he can prove this allegation, is the school district liable?

"2. Can you give me a general statement as to how Minnesota courts have ruled on the question of suits for damages against a school district?"

Opinion

No statement of facts is submitted. A claim is asserted against the school district for damages done to a roof. The property owner claims that the school pupils are responsible for the damage but it is not said what the pupils did. No opinion can be given upon such a meager statement of facts. All that I can do is to comment upon the law.

In **Ness v. Independent School District of Sioux City,** (Iowa) 298 N. W. 855, it was said:

"A school district is a 'quasi corporation' and an instrumentality of the state exercising a 'governmental function', and is not liable for negligence of its officers and employees."

"The immunity of a governmental agency from liability for negligence in the exercise of governmental functions does not exempt it from liability for a nuisance created and maintained by it."

"In action by property owner against school district for damages on account of way playground was run, evidence sustained conclusion of trial court that defendant had created and maintained a private nuisance which caused plaintiff special damages for which school district was liable."

"School district had obligation of supervising and conducting use of playground so that it would not essentially interfere with the comfortable enjoyment of life and property by taxpayer or substantially injure taxpayer, or in other words to so conduct the games that 'private nuisance' would not result."

Rhoades v. School Dist. No. 9, a Montana case, decided in 1943, reported in 160 A. L. R. 1, 142 P. (2d) 890, with the note appended, covers 284 pages in the A. L. R. report. Any person interested in a discussion of this subject may, with profit, read this note, which is altogether too lengthy to be reviewed in a letter.

It should be understood that no attempt is made in this letter to express an opinion upon the liability of the school district at East Grand Forks on the claim mentioned in the superintendent's letter, because I do not have before me the facts. In any event, such a claim should be considered by an attorney engaged in private practice rather than by the Attorney General. The problem is a specific case. It appears to me that this is beyond the realm of subjects on which the individual school districts may expect advice from the Attorney General through the Commissioner of Education. I attempt herein to point out that there are cases in which a school district may be liable on account of damage suffered by the owner of property. But to say whether a school district in a particular case, based upon particular facts, is in that case liable is a problem to be considered by the attorney for the school district.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.
December 22, 1948. 844-F

36

Property—Athletic Field—Eminent domain is based upon necessity— M. S. A. 125.06, Sd. 2.

Facts

An independent school district is planning to acquire land for an athletic field, gymnasium and like purposes. It has in mind the needs of the district ten years in advance. On the land intended to be acquired, either by purchase or eminent domain, several residences are situated. It is intended that the owners may continue to use and occupy the buildings as

well as the sites during a ten year period. And during this ten year period the school district would assert none of the usual rights of ownership. The present owners would be permitted to remove the buildings during the ten year period. But at the end of the ten year period, the school district would exercise all of the rights of ownership of the land which would include all structures thereon. During the ten year period the present owners would have the obligation to maintain the premises in repairs, pay taxes thereon and otherwise sustain all the burdens of ownership.

Question

May such a plan of operation be effected?

Opinion

The answer is "no."

M. S. A., Sec. 125.06, Subd. 2, is authority to the school board under the conditions there expressed to acquire **necessary** sites for schoolhouses. Such sites may be acquired either by purchase or through proceedings in the nature of eminent domain. For our purposes in this opinion, it may be assumed that the power extends to acquiring sites for athletic fields. But the power of the board to acquire in either manner aforesaid any land for the use of the district is based upon necessity. Eminent domain is the right of the state to appropriate private property to public uses. Dunnell's Digest, Sec. 3012. It is a prerogative of sovereignty. The foundation idea upon which the right of eminent domain rests is public necessity. Sec. 3013. To say that in 1948 it is necessary that this school district acquire land to be used in 1958, to my mind, is a statement which disputes itself. In 1958, it may not be necessary to acquire this land, the judgment of the present board in authority, to the contrary notwithstanding.

I doubt that a court upon the statement of these facts would issue an order in condemnation.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.

February 4, 1948. 817-F

37

Taxation—Levy—Change of boundaries of district to absorb adjoining district does not affect tax levy in district absorbed not certified to county auditor. Levy may still be certified by clerk in present district—L. 1947, C. 74, S. 1; C. 249, S. 1, M. S. A. 122.09, 125.07.

Facts

School districts Nos. 13 and 29 of Beltrami County adjoined.

At the annual election, District 13 voted a tax levy. On the same day, District 29 voted a tax levy. The levy in District 13 has not been reported to the county auditor.

Subsequent to the two elections and annual meetings, a petition was filed with the county board to dissolve District 13 and attach its territory to District 29. The county board granted the petition.

Questions

1. Was the levy in District 13 valid and may it now be reported to the county auditor and spread by him on the taxable property formerly included in District 13?

2. If so, who is to make the report since the clerk elected in school District No. 13 did not qualify?

3. If the tax levied by District 13 should not be spread and collected, what procedure should be adopted in order that a tax may be voted, spread and collected for that area?

4. If a new levy must be made, would the levy be an entire new levy for District No. 29 as now constituted, or would it be a levy only on the taxable property situated in former District 13?

5. If the levy should cover all the taxable property situated in District 29 as now constituted, would it be necessary to have a vote by the voters who resided in former District 29 to rescind the levy already made for that area?

6. If the levy to be made is to be spread against only the property situated in former District 13, are the voters of former District 29 entitled to vote on the levy?

Opinion

Attention is called to **State v. Republic Steel Corporation,** 199 Minn. 107, which is mentioned in the opinion of the Attorney General dated December 4, 1946, File 519-M.

In rendering this opinion, it is assumed that both school districts mentioned are common school districts. This is important because in independent school districts taxes are not levied by the voters.

While it appears from the facts stated that the levy made in District 13 was valid, it was not certified to the auditor and he has no official information which would authorize him to spread the tax so levied. It appears that the clerk of that district failed to perform a duty. He should have certified the levy.

You do not state under what statute the procedure was taken whereby you say that District 13 was set over to District 29 by the county board and School District 13 was abolished. I assume that it was by authority of L. 1947, C. 249, Sec. 1, M. S. A., Sec. 122.09.

In case the annual meeting in a common school district fails to levy a tax, it becomes the duty of the school board to make the levy. M. S. A., Sec. 125.07, L. 1947, C. 74, Sec. 1. Without the levy and collection of taxes, the school district cannot perform its functions. The business of the district must continue. In the facts under consideration, in the present state of things, District 29 must carry on the business for the area formerly included in District 13. If it sufficiently appears from the records in District 13 that the tax was levied by the voters at the annual meeting, the present problem appears to be merely that this information shall be communicated to the county auditor in order that he may perform his duty of spreading the tax in order that it may be eventually collected. The county auditor can spread no tax on the taxable property of former District 13 until the information is certified to him which he requires preliminary thereto. See opinion of the Attorney General, dated October 24, 1940, file No. 519-M.

The affairs of the area which formerly constituted District 13 continue without interruption upon the district becoming a part of District 29. The levy made by the voters in District 13 was valid when made and continues to be a valid levy even after the area embraced within that district becomes a part of District 29. It appears to me to be a perfectly proper function of the clerk of the present District 29 to make his certificate to the county auditor based upon the records of former District 13, showing that this tax levy was made in District 13, which will be spread by the county auditor as though District 13 still continued in existence.

The foregoing discussion covers your questions 1 and 2 and renders unnecessary the consideration of your questions 3, 4, 5 and 6.

CHARLES E. HOUSTON,
Assistant Attorney General.

Beltrami County Attorney.

August 30, 1948. 519-M

38

Teachers—Salaries—Tenure act—Cities of first class—Payment of salaries to nonstriking teachers—MSA § § 130.22 to 130.32.

Questions

1. Is the board of education obligated to pay for the strike period the probationary teachers from whom such letters (letters stating that they are ready, willing and able to work) have been received and who are performing no services?

2. Is the board of education obligated to pay tenure teachers under like circumstances?

Opinion

All teachers employed by the Minneapolis Board of Education, as well as the board itself, are subject to the city charter provisions. In the case of **Doyle v. City of St. Paul,** 204 Minn. 558, the court makes the following statements:

> "All who contract with school districts or municipalities are charged with knowledge of their powers and limitations. * * * We think the charter provisions must be considered a part of the contract respecting salaries."

Principles of law herein referred to apply to both probationary and the other teachers employed under the Teachers' Tenure Act in M. S. A., Chapter 130, Sections 130.22 to 130.32, inclusive. Therefore, all employed in Minneapolis as teachers for the year 1947-48 were charged with the knowledge that the budget originally adopted for that year might exceed the receipts for school purposes. The charter of the city provides that the board of education shall never incur an obligation for a greater sum than can be paid when due out of the regular revenues of the board for the school year in which the obligation is incurred.

In the case above cited, the court held:

> "Because it exceeded the budget item for salaries the contract was neither illegal nor void, but it was of no effect as to a larger sum than that allowed by the budget."

In **Doyle v. City of St. Paul,** 206 Minn. 452, on page 546 the court says:

> " * * * The important thing is that neither as officer nor employe do we find anything in the tenure law or elsewhere limiting the power of the city council in respect to legislation reducing teachers' salaries. Such a general or horizontal reduction as that presently involved operates without discrimination and is within the power of the council. Such a legislative act is very different from the administrative act of demotion or reduction in rank which is prohibited by our tenure law unless it be for cause."

Likewise, there is no provision in the tenure act which prevents the Minneapolis School Board from reducing salaries or closing the schools for such period as in its discretion may be necessary in order to comply with the city charter provision relative to available funds. However, in the situation here considered, the schools were closed approximately four working weeks on account of a strike involving salary schedules and teaching time.

It is my understanding that the salaries of the Minneapolis teachers are payable in ten instalments, each covering four working weeks. Although payments are made for forty weeks, only thirty-eight weeks of classroom work are required. Deducting the approximately four weeks for which no payment has been made during the period of the strike, the teachers, unless the time is made up prior to the end of the present school year, would be

losing one tenth of their anticipated salary. However, under the arrangements entered into for the settling of the strike, it has been stated to this office that one-half of the loss of teaching time due to the strike will be made up prior to the end of the present school year by conducting classes during days which would otherwise have been a vacation period and adding a certain number of days for class work in June so as to make the teaching time of the school year 1947-48 thirty-six weeks instead of thirty-eight weeks. The loss in pay, therefore, to the teachers will be the two weeks' salary of the original thirty-eight weeks during which they were to teach, except for the fact that they will receive an increase in salary of $40.00 a month for the approximately three months remaining of the 1947-48 school year.

It is also represented to the Attorney General that if the teachers continue to teach for the balance of the calendar year and are paid the increased salaries that have been prescribed under the strike settlement they will receive more compensation than they would have received if they had been paid salary during the strike period and the salary schedule for 1947-48 would have continued in effect.

It is further represented to the Attorney General that in negotiations for the settlement of the strike the nonstriking teachers were represented by a Central Committee of Teachers' Organizations, and that both they and the representatives of the unionized teachers approved the arrangement later authorized by the school board.

Both striking and nonstriking teachers have returned to their positions, accepted increase in salaries and taught during the usual Easter vacation. If the terms of settlement were made with the understanding above stated that the increased salaries and extended time for teaching during the 1947-48 school year were to eliminate any claim for compensation for the period of the strike, the school district's employees, by so returning to work and accepting the increase in salaries and extended time for teaching have ratified the settlement so made and the modification of their previous status resulting therefrom. If the nonstriking teachers had not returned to work under the new schedule increasing their salaries and extending the time for teaching, it is possible that many of them would have been entitled to pay for the four weeks lost through the strike, for which they were not responsible, unless funds for salary payments would not have been available by reason of charter provisions.

Payments at this time for the four weeks' work lost by the nonstriking teachers and other employees, numbering more than 1100, in addition to paying the increase in salaries and for the teaching time already specified for them and the union members, would mean the expenditure of more than $400,000 evidently not anticipated at the time of the strike settlement. Such additional obligations cannot now, it appears, be legally incurred as funds therefor are not at this time available because of the charter limitations.

The financial condition of the school funds and, therefore, the uncertainty of the enforcement of the alleged obligations under the teachers' employment status for the school year 1947-48 would, I believe, have constituted ample consideration on which to base a modification of the teachers' 1947-48 school year status, even if the same could be construed as a contract between the board and the teacher. The teachers who have begun teaching under the new salary and time schedules, which obviously were adopted with an intention to eliminate any claims for salaries during the four weeks when the schools were closed, and who have accepted the increase of salaries and extended employment, granted in the modified schedule have, in my opinion, waived the right, if any existed prior thereto, to collect compensation for the four weeks when no service was rendered.

J. A. A. BURNQUIST,
Attorney General.

Commissioner of Education.

April 6, 1948. 174-B

39

Transportation—Traveled road—Attendance at school in adjoining or nearby district nearer to place of residence of child than school in his own district—M. S. A. Sec. 132.02, Sd. 1.

Question

Does a traveled road mean a passable road?

Opinion

In 42 W. & P., 394, we read that **in Pagel v. School Dist. No. 1 of Town of Concord**, 199 N. W. 67, 184 Wis. 251, it was held that under St. 1921, § 40.16 (1) (b), in ascertaining distance traveled in transporting children to and from school, the nearest "traveled highway" includes travel on a private highway.

"Traveled way" is defined in 42 W. &. P., 397, as the part of the road that the borough has laid out and provided for public travel.

It would appear to me that, when the legislature in this section referred to the nearest traveled road, it meant the nearest road which the public actually traveled, not merely a road that had been laid out and not traveled. Accordingly, it does not appear that the road need, at all times, be passable in order to be called a traveled road.

There is no inherent right in a child, or in his parent, that the child attend school outside the district in which he resides. All these rights pertaining to school are statutory and unless a statute is found to meet the

need in the particular case, no right will be found outside the statute. The statute gives the child a right to attend school in his own district. To attend school in another district, he must bring himself strictly within the statute permitting such attendance in the other district. So far as Sec. 132.02 is concerned, it applies only to children residing **more** than two miles from the schoolhouse in his own district. Such child may attend school in another district where the schoolhouse is nearer to his residence than the schoolhouse in his own district. The measurement of distance is made over the nearest traveled roads. You will find other conditions mentioned in this section which I do not mention in this opinion because such other conditions are not involved.

CHARLES E. HOUSTON,
Assistant Attorney General.

Watonwan County Attorney.

June 17, 1948. 166-A-10

ELECTIONS

BALLOTS

40

Canvass—Method—M. S. 1945, § § 206.42, 206.46 (as amended by L. 1947, C. 564), and 206.51.

Facts

"In the Minnesota Election Code, Section 206.42, it is directed that the method of the canvass shall begin by taking from the box the ballots, singly; Section 206.46 provides that the ballots shall first be separated into piles.

"This appears to be a confliction and I shall appreciate very much your opinion or suggestion as to a method to be followed in the method of canvass."

Opinion

In the facts set out above you refer to § 206.46 and its provision that the ballots shall first be separated into piles. This section of the statute was amended by Laws of Minnesota 1947, Chapter 564. The amended section is in conflict with the provisions of Minnesota Statutes 1945, § 206.42.

Minn. Stat. 1945, § 206.42, provides as follows:

"The judges shall begin the canvass by taking from the box the ballots, unopened except so far as necessary to ascertain whether every ballot is single, and counting them to determine whether their number

corresponds with the number appearing on the election register to have been cast in such box."

Laws of Minnesota 1947, C. 564, provides as follows:

"The ballot box shall be opened by two election judges, each of whom shall belong to a different political party, if practical. One election judge shall then remove one ballot at a time from the ballot box, inspect the ballot for correctness as to voting and marking, and then hand the ballot to the second judge who shall read each name voted for in a firm voice to two tally clerks."

In so far as the two laws quoted above are inconsistent, the last expression of the legislature, found in said C. 564, will prevail. So, instead of having the judges begin the canvass by taking from the box the ballots, unopened except so far as necessary to ascertain whether every ballot is single, and counting them to determine the number, there will be one election judge removing one ballot at a time from the box, inspecting the ballot for correctness as to voting and marking, and then handing the ballot to the second judge for counting as prescribed. The provision found in said § 206.42 for laying aside two or more ballots so folded together as to appear to be a single ballot can still be followed.

The provision found in Minn. Stat. 1945, § 206.46 for separating the ballots into piles has been repealed by the amendment heretofore cited, and the provision found in § 206.42 for counting the ballots to determine whether their number corresponds with the number appearing on the election register before canvassing the vote has also been modified by said c. 564. The canvass must now be conducted in accordance with the provisions of said C. 564, which requires one election judge to remove one ballot at a time from the ballot box, inspect it, and hand it to the second judge, who reads each name voted for to tally clerks, who record the vote on a tally sheet.

There is an additional provision in said C. 564, which reads as follows:

"All defective ballots shall be disposed of as provided in section 206.52."

An inspection of the statute leads us to believe that the legislature made a mistake in the section number and that it should read "206.51."

J. A. A. BURNQUIST,
Attorney General.

Secretary of State.

April 17, 1948. 183-S

41

Counting—Spoiled ballots should not be included in determining the change of a town hall site requiring two-thirds of the vote cast at such election
MS1945, § § 206.18, 206.19, 365.10.

Facts

"The Town of Fayal at its annual meeting held March 9, 1948, held an election on the question of whether the present town hall should be dismantled and the site removed to another location. Under state laws governing such a question a two-thirds majority of votes cast on the issue is required for the issue to pass. The results of the election showed the following returns:

Blank votes	14
Ayes	178
Nays	89
Spoiled ballots	2

"The two spoiled ballots were ballots upon which the voters indicated their vote on the question but identified the ballots rendering them invalid."

Question

"Are the two spoiled ballots to be considered as votes cast on the issue?"

Opinion

The law governing the situation you have related is found in the sections enumerated below.

Minn. Stat. 1945, § 365.10, provides as follows:

"The electors of each town have power, at their annual town meeting:

" * * *

"(9) To authorize the town board to purchase or build a town hall or other building for the use of the town, * * *; but, if a site for a town hall is once obtained, it shall not be changed for another site, except by vote therefor designating a new site by two-thirds of the votes cast at such election of the legal voters of the town;

" * * * ."

Minn. Stat. 1945, § 206.19, provides as follows:

"No voter shall divulge to any one within the polling place the name of any candidate for whom he intends to vote or has voted, * * * . When any voter, after having marked his ballot, shows it to any one

except as herein provided, the judge shall refuse to receive such ballot, but shall place it among the spoiled ballots, and when such showing has clearly been intentional, no other ballot shall be delivered to such voter."

Minn. Stat. 1945, § 206.18, provides as follows:

"When a voter spoils a ballot, he may return it and receive another. * * * "

From the foregoing statutory provisions it will be noted that a voter who spoils a ballot by placing an identification mark thereon may be given another ballot, but, if he intentionally discloses the manner in which he voted, no other ballot is to be delivered to such voter. It is apparent from this that a spoiled ballot is not to be counted as a vote cast; otherwise, if the voter were given another ballot because he had spoiled one, he would, in effect, be voting twice. If he has intentionally spoiled the ballot by identifying the same, he is to be denied the right to vote by the language of the statute, which says specifically, " * * * no other ballot shall be delivered to such voter."

Our courts have adopted this view in a number of cases where the question has been passed upon. The leading case on the question is **Hopkins v. City of Duluth**, 81 Minn. 189. On page 193 of said case the court said:

"Of the twenty-six ballots thus excluded by the trial court, five had either the names or initials of the voters casting them written thereon, and clearly indicated such evidence of identification of the persons casting such ballots as constituted a plain and palpable fraud upon the election law. They were not counted, although expressing in each case the voter's choice in certain respects. Pennington v. Hare, 60 Minn. 146, 62 N. W. 116; Truelsen v. Hugo, supra, page 73. That the identified ballots thus deposited should be excluded from the total vote is the only reasonable inference that follows from the application of the doctrine of these cases. The fraud which nullifies the choice expressed on these ballots must logically vitiate their use for any purpose. They were void."

This principle of law has been approved in the more recent Minnesota cases of **Eikmeier v. Steffen**, 131 Minn. 287, and **Doepke v. King**, 132 Minn. 290. In the last cited case the court said, at page 292:

"The trial court, therefore, correctly excluded from the total the ballots cast in violation of the law, whether cast by an illegal voter, or by one who exhibited his ballot before it was cast, or by persons who wrote their names on their ballots, thus making them easily identifiable. Such ballots are void and must be excluded, whether the voter acted wilfully, ignorantly or innocently."

There is one case decided by the Supreme Court of our state, **Smith v. Board of County Commissioners**, 64 Minn. 16, wherein the court has held otherwise. At page 21 of said case the court said:

"As an indication that this (to count unintelligible as well as intelligible votes in arriving at total ballots cast) was the intention and design, we call attention to Section 650, wherein it is provided that the county commissioners shall canvass the votes and the returns thereof, and among these returns so to be canvassed are all ballots, defective as well as complete, and also the poll lists. It is from the votes cast and from the returns that the commissioners are to determine the result."

In rendering its decision, the court recognized the law applicable to the case had "some peculiar provisions." Our Supreme Court has not followed the decision in this case but has always distinguished it in arriving at the opposite position, as shown by the cases cited above. The law touching upon the present question does not contain peculiar provisions. Therefore, it is easy to distinguish the question you present from the holding in the case of **Smith v. Board of County Commissioners, supra,** and to follow the other decisions.

It is the opinion of this office that the two spoiled ballots are not to be considered in determining the number of votes cast at such election for the change of the town hall site.

In rendering this opinion there has been no effort made by this office to determine the fact question whether or not the two ballots were actually spoiled. Neither has the question been passed upon whether or not the 14 blank ballots should be considered as votes cast at such election.

EARL H. A. ISENSEE,
Assistant Attorney General.

Fayal Town Attorney.

April 7, 1948. 28-A-3

42

Marking rules—Where two candidates are to be elected, voter may vote for one, and ballot is not spoiled—M. S. A. 206.15, 206.16.

Facts

"On the white ballot at the recent election appeared four names as candidates for the office of Justice of the Supreme Court. Under the heading and title of the office appeared the words 'vote for two.' Several voters voted for one candidate only and did not vote for two."

Question

Is the ballot spoiled where the voter votes for but one candidate where two are to be elected?

Opinion

In the situation you relate, where two justices of the supreme court are to be elected and four names appear upon the ballot, a voter may vote for one of the candidates by marking the ballot in the prescribed manner in the square opposite the printed name of his choice, and only those so marked shall be counted. This is true even though at the top there appear the words, "Vote for two" (MSA 206.16). If the voter shall mark more names than there are candidates to be elected for the office, his ballot shall not be counted for such office, but the rest of his ballot, if properly marked, shall be counted (MSA 206.15).

EARL H. A. ISENSEE,
Assistant Attorney General.

Luverne City Attorney.

November 10, 1948. 28-A-6

43

Name—Change of—Candidate nominated in primary may not have county auditors change name on the general election ballot.

Facts

A certain party filed his affidavit of candidacy as a county commissioner and signed his name thereto "J. F. ....." He was nominated in the primary election, and the canvassing board certified his nomination as "J. F. ....." He now asks the county auditor to change his name so that it will appear on the ballot as "J. F. (Joe) ....."

Question

May the county auditor place the nominee's name on the general election ballot as "J. F. (Joe) ....."?

Opinion

It is the duty of the county auditor to have the ballots printed for the primary election with the names of the candidates appearing thereon the same as submitted to him in the affidavit of filing for the office. This office has held that the county auditor could print the name otherwise if the candidate requested it for the primary, in the absence of a showing that some other candidate would be injured thereby. However, it appears from the information you have submitted to this office that the primary is over, the candidate has succeeded in being nominated under a certain name, the canvassing board has certified his nomination, and now he desires to have his name changed so that it will appear on the general election ballot different from what it was on his affidavit of filing for the office, the primary

election ballot, and the certificate of nomination submitted by the canvassing board to the county auditor.

It is the opinion of this office that the county auditor has no authority to change the name of the nominee certified to him by the canvassing board under the facts submitted.

EARL H. A. ISENSEE,
Assistant Attorney General.

Polk County Attorney.
September 30, 1948. 28-B-2

44

Name—Omitting—County auditor does not have authority to omit name of a nominee from general election ballot because affidavit of disbursements discloses disbursements in excess of amount allowed by law. Proceedings to annul a nomination for violation of corrupt practices act must be instituted under MSA 211.35 and not under MSA 205.78.

Facts

The nominee for public office has filed an affidavit of disbursements which discloses that his disbursements exceed the amount allowed by law.

Questions

1. Does the county auditor have the power, or is it his duty, to keep the name of such nominee off the general election ballot?

2. Can one proceed under the provisions of M. S. A. 205.78 to keep the name of such nominee off the general election ballot?

Opinion

The county auditor has neither the power nor the duty to keep the name of such candidate off the general election ballot. M. S. A., Chapter 211 deals with corrupt practices and prescribes the remedies in case of a violation of the provisions of such chapter. In certain instances the county auditor is given authority to omit names from the general election ballot, but the facts submitted by you do not disclose that the provisions authorizing omission by the county auditor have been met.

M. S. A. 211.35 provides in part as follows:

> "Any proceeding to annul any nomination or election of any person for office mentioned in this chapter, must be filed in the district court of the county in which the person resides whose right to the nomination, position, or office is contested."

The quoted provision excludes by implication and expression any proceeding to annul a nomination under the provisions of M. S. A. 205.78, which provides for filing an affidavit with the supreme court or district court. It is our opinion that, if an annulment proceeding is proper, it must be instituted within the provisions of Chapter 211.

EARL H. A. ISENSEE,
Assistant Attorney General.

Jackson County Attorney.

September 29, 1948. 28-B-2

45

Name—Words of Designation—Occupation—Identical surnames make possible the employment of three words indicating occupation and residence of the candidate on the ballot—MSA 205.70.

Facts

Two candidates for the legislature in the 31st District have the identical surname of Johnson. One candidate, who is a member of the Minneapolis Board of Park Commissioners, has requested the county auditor to add to his name on the ballot the words "Park Commissioner, Minneapolis," which, the candidate states, is descriptive of his occupation and address. The county auditor states that the candidate devotes the major portion of his time to park board business and is a law student under the GI Bill of Rights.

Opinion

M. S. A. 205.70 provides in part as follows:

> "When the surnames of two or more candidates for the same or different offices apearing on the same ballot at any election are the same, each such candidate shall have added thereto not to exceed three words, indicating his occupation and residence, and upon such candidate furnishing to the officer preparing the official ballot such words, they shall be printed on the ballot with and as are the names of the candidates and immediately after his name."

If the words "Park Commissioner, Minneapolis" are furnished to the officer preparing the ballot by the candidate in question, it is the opinion of this office that the candidate has a right to have the same printed upon the ballot after his name, under the provisions of the law quoted above.

EARL H. A. ISENSEE,
Assistant Attorney General.

Hennepin County Attorney.

August 19, 1948. 28-B-2

46

Name—Words of designation—Word in parenthesis to convey the pronunciation of surname should not be placed on ballot—MSA Sec. 205.70.

Facts and Question

Whether or not the following name is a proper filing for the office of State Representative from the County of Winona, Second District (City of Winona): "Al R. Lejk" (Lake).

"Mr. Lejk filed the affidavit of candidacy in the above manner, and I have been unable to ascertain from the election laws whether that is a proper filing for the name to appear on the ballot.

"It is the opinion of the undersigned that the word in parenthesis is intended to convey the pronunciation of the surname, 'Lejk'."

Opinion

The statute makes no provision for additions to the name of a candidate for office except in one instance. Under the provisions of M. S. A. 205.70 not to exceed three words, indicating the candidate's occupation and residence, may be added to his name when the surnames of two or more candidates for the same office are the same. Our Supreme Court has held this to be "a single and exclusive circumstance under which words of designation may be added" to the candidate's name on the ballot. Ledin v. Holm, 203 Minn. 434.

The facts submitted by you do not bring the case within the rule set forth in the preceding paragraph which would permit additional words after the name. Therefore, it is the opinion of this office that if the word in parenthesis is not a part of the candidate's real name, or one he is commonly known by, the same should not be placed upon the ballot.

EARL H. A. ISENSEE,
Assistant Attorney General.

Winona County Attorney.

July 22, 1948. 28-B-2

47

Vacancy—Death of party nominee—State Central Committee to select the candidate—Certificate to be filed after the filing of the report of the state canvassing board. Eligibility of candidate—MSA 202.23, 216.02; Minn. Const., Art. 4, § 9.

Question

"Can the Board of Canvassers take notice of the death of a candidate and, of their own volition, eliminate him and the votes cast for him from consideration in their certification of returns?"

Opinion

The duties of a canvassing board as provided by Minnesota statutes are purely ministerial. Such a board is not empowered to determine that the death of a party nominee results in the nomination of the party candidate receiving the next highest number of votes. The duty of a canvassing board "is the mere mathematical one of summing up the returns * * * and declaring the results." **Taylor v. Taylor,** 10 Minn. 81.

The exact situation here involved was passed upon by the Supreme Court of the State of Iowa in 1940 in the case of **Davies v. Wilson et al.,** 294 N. W. 288. The court there said:

> "The fact that Mr. Everett (candidate for attorney general) died after the primary and prior to the statutory date for canvassing the votes did not nullify the record made by the electors, who cast their ballots for him, nor disfranchise these voters in this election. Neither did it abrogate the statutory mandate that the board should canvass the returns and certify the record. It had no other alternative than to certify, as the nominee, the person who received the highest number of votes at the election."

There appears to be no reason why this decision should not be followed in the State of Minnesota, where the statutes are sufficiently similar to those of Iowa to make the conclusion of the Iowa Supreme Court applicable to the situation here considered.

It is, therefore, my opinion that, under our statutes, the state canvassing board has no other alternative than to certify "A" as the nominee of the Republican Party for the office of railroad and warehouse commissioner if before his death he had received the highest number of votes for the Republican nomination for that office in the last primary election.

Questions

> "Assuming that the Board of Canvassers declares 'A' the nominee, how is the vacancy on the ballot caused by his death filled? When must this be done? Are members of the Legislature ineligible for this vacancy? Are any others ineligible?"

Opinion

M. S. A. 202.23 clearly provides the method of filling a vacancy after the primary election in party nominations. That section reads as follows:

> "If a vacancy occurs after nominations have been made it may be filled at any time before the general election by filing with the proper officer a nomination certificate in form and substance as hereinbefore provided, executed by the chairman and secretary of the proper committees of the political party whose voters make the original nomination, under the direction of such committee, and the chairman and secretary when so filing such certificate must attach thereto an affidavit to the

effect that such candidate has been duly selected by said committee and that the persons signing said certificate and making such affidavit as such, are the duly authorized chairman and secretary of said committee."

In the matter under consideration the State Central Committee of the Republican Party would, I believe, be the proper committee to select the candidate to fill the vacancy in question. It may be filled at any time after the filing of the report of the state canvassing board and prior to the November election, but, to get the name of the person so selected on the regular ballot for the November election, it would, of course, be preferable to file the proper certificate prior to the printing of state ballots, which the law requires the secretary of state to prepare at least three weeks before any general election.

The above named committee may designate the candidate who received the next highest number of votes in the Republican primary or any other eligible person. However, no member of the legislature is eligible for the nomination because of the following constitutional provision:

Minnesota Constitution, Article IV, § 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, and 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."

If the salaries of the members of the railroad and warehouse commission had not been increased by the 1947 legislature, the members of the house of representatives would not have been ineligible by reason of their legislative membership to hold the office of railroad and warehouse commissioner for the term beginning on the first Monday of next January. However, as such salaries were increased during the 1947 legislative session, house members are ineligible for that office until one year after the expiration of their terms of office in the legislature. State senators are ineligible for the same reason, and, in addition thereto, because the time for which they were elected does not expire until the first Monday in January, 1951.

There appear to be no other constitutional provisions which would prevent anyone entitled to vote from being selected by the Republican State Central Committee to fill the vacancy in the Republican nomination here considered. However, M. S. A. 216.02 contains the following provisions:

"No person in the employ of any railroad company or grain warehouse company or who owns stocks, bonds, or other property therein shall be eligible as a railroad and warehouse commissioner, hereafter called a commissioner; nor shall any such commissioner during his continuance in office be interested in any such stock, bonds, or other property, or in any contract for the construction, repair, or maintenance of any railroad, or accept any employment, office, or retainer under any

such company, or participate in any hearing or proceeding in which he has a pecuniary interest."

Before passing specifically on the eligibility of any particular individual, it would, of course, be necessary to know the facts which would be material and relevant in determining his right to hold the office here considered.

J. A. A. BURNQUIST,
Attorney General.

Governor of Minnesota.

September 22, 1948. 28-B-1

CANDIDATE

48

State—Qualification—Representative—Residence—Change of residence within the boundaries of district but change of voting district—MSA 202.03; Minn. Const., Art. IV, § 25; Art. VII, § 1.

Facts

A party has filed for state representative, and now he desires to move his residence within the boundaries of the same district but will change his voting district.

Question

Whether he can change his residence before the September primary, or after the primary but before the general election, without losing his qualification to hold the office.

Opinion

M. S. A. 202.03 sets forth the requirements for filing as a candidate for nomination. The party you speak of has met these requirements, filed, and is now waiting to see if he receives the nomination in the September primary. There is no obstacle facing him at this stage of the proceeding.

Under the provisions of Minnesota Constitution, Article IV, § 25, a citizen desiring to hold the office of senator or representative must have certain qualifications. The qualifications are:

(a) be a qualified voter;

(b) reside in the state one year and in the district six months immediately preceding the general election.

To be a qualified voter as required by the constitutional provision (Art. VII, § 1), one must be 21 years or over, reside in the state six months and in the election district 30 days preceding the election. If the party you speak of is going to meet the qualifications to hold the office which he seeks, he

must be prepared to meet the requirements on the day he hopes to be elected; namely, at the general election held in November.

It is the opinion of this office that the party seeking the office of state representative should be a qualified voter on the date of the general election in November. In order to be a qualified voter in the instant case, he must move his residence thirty days prior to the November election.

EARL H. A. ISENSEE,
Assistant Attorney General.

Mower County Attorney.

August 9, 1948. 184-I

CORRUPT PRACTICES

49

Circulars—Open letter—Distribution—Whether open letter signed by author and giving his address must also contain a statement that it is prepared and circulated in behalf of a particular candidate, and giving his address, in accordance with provisions of MSA 211.08, is a question of fact. If it is circulated in the interest of better government and not for a particular candidate, MSA 211.08 should not be construed so as to require, in addition to the author's name and address, the name and address of any candidate.

Facts

An open letter, printed and sent to people in the Second Congressional District in an envelope with a 1½ cent stamp thereon was addressed to residents in the district. The open letter had the address of the author and his name at the closing thereof. It was addressed to one of the candidates for Congress in the primary election in the Second District. There was a rubber-stamp inscription on the back of the envelope which gave the name of a company and its address, the company apparently belonging to the author of the letter.

Question

Does the open letter described violate the provisions of M. S. A. 211.08 because it does not contain the name and address of the candidate in whose behalf it was published?

Opinion

After reading the open letter, this office cannot state as a matter of law that the same was prepared and circulated in behalf of a particular candidate. Such determination is a question of fact which it is not the province of this office to determine.

I am attaching hereto copy of an opinion of the Attorney General addressed to Michael J. Dillon, Hennepin County Attorney, dated February 10, 1947, our file 627-J-3, wherein the Attorney General stated:

> "If, as a matter of fact, the circular in question was not prepared and distributed in behalf of any candidate but 'in the interest of better government,' it is my opinion that Minnesota Statutes 1945, Section 211.08, should not be construed to require such author to place on the literature so issued and circulated, in addition to his own name and address, the name and address of any candidate."

The statement quoted represents the opinion of this office at the present time.

EARL H. A. ISENSEE,
Assistant Attorney General.

Blue Earth County Attorney.

October 6, 1948. 627-J-3

50

Contributions—Corporations—It is unlawful for all corporations to make campaign contributions whether organized for pecuniary profit or not. For the defeat or passage of a Constitutional Amendment. (Soldiers Bonus Bill)—MSA § 211.27.

Questions

1. If an American Legion Post contributes funds for the promotion of the passage of a state bonus bill, would it violate the provisions of M. S. A. § 211.27?

2. If the local American Legion Post inserted advertising in the local paper endorsing and urging the passage of a state bonus bill, would it be in violation of the provisions of M. S. A. § 211.27?

3. Is a service organization such as an American Legion Post, even though incorporated, regarded as a corporation doing business within the state and subject to the provisions of M. S. A. § 211.27?

Opinion

Since your questions are so interrelated, they will be answered as one.

The provisions of M. S. A. § 211.27, without the penal provisions, reads as follows:

> "No corporation doing business in this state shall pay or contribute, or offer, consent, or agree to pay or contribute, directly or indirectly, any money, property, free service of its officers or employees or thing of value to any political party, organization, committee, or individual for any political purpose whatsoever, or to promote or defeat the candidacy of any person for nomination, election or appointment to any political office. * * * "

The application of the foregoing statute was treated fully by our Supreme Court in the recent case of **La Belle v. Hennepin County Bar Association**, 206 Minn. 290. The court in rendering its decision in the cited case stated in substance that the history of the statute prohibiting a corporation from contributing to campaigns indicates an intention on the part of the legislature "to enlarge the scope of the statutory prohibition so as to make it unlawful for all corporations to make campaign contributions, whether organized for pecuniary profit or not, * * * ."

In the same case the court dealt with the question of doing business in the state, and used language so broad that it appears any corporation existing within the state is doing business, and therefore comes within the provisions of the statute. This would be a question of fact depending upon the facts and circumstances in each particular instance.

Previous opinions of this office (Report of Attorney General 1916, Op. No. 241, file 627-B-2) are to the effect that under this section of the law any corporation is prohibited from making contributions toward a campaign, the purpose of which is either the adoption or defeat of a constitutional amendment.

EARL H. A. ISENSEE,
Assistant Attorney General.

Waseca County Attorney.

October 15, 1948. 627-E

51

Town meeting—During hours of annual town meeting any elector or member of the town board may express his opinion on question whether place of annual town meeting should be changed—MSA 212.02.

Question

Is it illegal for a member of a town board, while talking to the town electors at the annual meeting of the town, to express his views either in favor of or against a proposed location for the following year's annual town meeting when such matter is about to be voted upon by ballot by the town electors?

Opinion

The annual town meeting has the power to designate the place of holding the next annual town meeting. M. S. A. 212.02. The question of changing the place of the annual town meeting is a proper subject for discussion at the annual town meeting. When that subject is brought up I think that any elector of the town would have the right to express his opinion upon the question during the hours of holding the annual town meeting. I do not think it would be illegal for an elector of the town to express his opinion on that subject when the question is before the town meeting. That is what the town meeting is for—to discuss and consider such questions. It would

not be a very democratic meeting if any elector or member of the town board were precluded from expressing his opinion on this or any other subject up for discussion before the town meeting during the hours when the meeting was being held.

There is nothing in the corrupt practices act which prevents the free discussion of questions before the town meeting.

RALPH A. STONE,
Assistant Attorney General.

Fillmore County Attorney.

March 16, 1948. 434-B-13-A

FILING

52

State senators—Filing for nomination in 1948 not authorized where there is no vacancy. Constitution, Article 4, Section 24, construed.

Facts and Question

You have submitted for an opinion two communications with each of which is enclosed a copy of an affidavit whereby the maker thereof is attempting to file for nomination for the office of senator. You state that the legislative districts involved are the Forty-fifth and Fifty-seventh, and that no writ of election has been filed with your department to fill a vacancy in the office of state senator in either of such districts.

The affidavits, I assume, are submitted to the secretary of state on the theory that senators chosen in odd numbered districts should be elected in the year 1948 by reason of the constitutional provision hereinafter quoted.

Opinion

Minnesota state constitution, article 4, section 24, as amended in 1877, provides in part as follows:

> " * * * The terms of office of senators and representatives shall be the same as now prescribed by law until the general election of the year one thousand eight hundred and seventy-eight (1878), at which time there shall be an entire new election of all senators and representatives. Representatives chosen at such election, or at any election thereafter, shall hold their office for the term of two years, except it be to fill a vacancy; and the senators chosen at such election by districts designated as odd numbers shall go out of office at the expiration of the second year, and senators chosen by districts designated by even numbers shall go out of office at the expiration of the fourth year; **and thereafter senators shall be chosen for four years, except there shall be an entire**

new election of all the senators at the election of representatives next succeeding each new apportionment provided for in this article." (Boldtype supplied.)

In 1881, after the adoption of the above-quoted section of the state constitution, the legislature enacted Laws 1881, Chapter 128, entitled

"AN ACT TO PRESCRIBE THE BOUNDS OF SENATORIAL AND REPRESENTATIVE DISTRICTS AND TO APPORTION ANEW THE SENATORS AND REPRESENTATIVES AMONG THE SEVERAL DISTRICTS."

Pursuant to the last clause of section 24 of the constitution hereinabove in bold type and in compliance therewith and under the reapportionment act of 1881, there was an entire new election of all senators at the election of representatives in 1882. At the 1883 session of the legislature it appears that the question was raised as to the terms of the senators elected in 1882. At that session the senate passed a resolution, of which the following is a copy:

"Resolved, that the Attorney General of this State be and is hereby requested to furnish his opinion for the use of this Senate upon the question as to the length of the terms of the Senators elected at the last general election in 1882."

In answer thereto the then attorney general said:

"The terms of the Senators elected in 1882 is fixed by the amendment to the constitution adopted in 1877. By this amendment the terms of the Senators were to be the same as theretofore prescribed, **until** the general election in 1878, at which time an entire new election of such officers was to be had. It then goes on to provide that 'the Senators chosen **at such election**, by districts designated by odd numbers,' should hold for two years, and those designated by even numbers, for four years; 'and **thereafter** Senators shall be chosen for four years,' except that there shall be an entire new election after each apportionment. It will be seen from this amendment that it is only such senators as are chosen by odd-numbered districts at the election of 1878 who are to hold for two years. Thereafter there is to be no difference in the term: all hold for four years. The language of this amendment is too plain to admit of doubt. The Legislature is proposing, and the people in adopting, this amendment, must be deemed to have meant just what the language used clearly imports. * * * I am, therefore, clearly of the opinion that the Senators elected in 1882, whether from odd or even numbered districts, hold for four years."

The opinion thus rendered in 1883 (page 27, Attorney General's report 1884) has not been reversed by any succeeding Attorney General or by the courts for a period of more than 65 years.

It might have been argued in 1883 that the provision of the state constitution adopted in 1877 was originally intended to result permanently in elections after 1878 of one-half of the senators at one biennial election and the other half at the next biennial election. However, if such was the inten-

tion, it was held by the attorney general in 1883 to have been defeated by the last clause of above-cited section 24 which provides:

> "and thereafter senators shall be chosen for four years, except there shall be an entire new election of all senators at the election of representatives next succeeding each new apportionment provided for in this article."

In order to comply with the last quoted provision, it is apparent that after the enactment of the reapportionment act of 1881 it was necessary to elect in 1882 all senators for four-year terms. The practice so established has been followed ever since, and, even if the constitution could be construed to be ambiguous with respect to the matter in question, a practical construction for more than six decades should, I believe, be given sufficient weight to prevent, without amending the constitution, a change in the time of elections or the terms of state senators.

It is, therefore, my opinion that the secretary of state has no authority to accept and file for the 1948 election the affidavits, copies of which you have submitted, and that they, together with the fees tendered therewith, should be returned to the affiants referred to in your communications.

J. A. A. BURNQUIST,
Attorney General.

Secretary of State.

August 9, 1948. 280-G

P.S. See Supreme Court decision Kerman v. Secy. of State et al, 34 N. W. 2nd 327 filed Oct. 15, 1948.

JUDGES AND CLERKS

53

Additional—Special judges and clerks can be provided for general election only under the provisions of MSA 205.58—MSA 205.50, 205.01, 205.55, 205.58.

Facts

The city intends to create more election districts because of the recent growth. The city is not prepared to create the additional election districts for the coming primary and anticipate confusion at the polls by reason of the heavy burden cast upon the present election judges and clerks.

Questions

Does M. S. A. 205.55 refer to general elections only, and, if not, can extra judges and clerks be added to some of the election districts or precincts without adding extra judges and clerks to all the election districts in the city?

Opinion

It is the opinion of this office that the language used in M. S. A. 205.55 is plain in its provisions that one additional judge and two additional clerks, to be known as ballot judge and clerks, may be appointed in any district in cities of the first, second, and third class for general elections. General election refers to the election to be held in November, as defined by M. S. A. 205.01. This position is strengthened by the statement found in M. S. A. 205.58, which provides as follows:

> "No such additional judges or clerks shall be employed at any except a general election."

If the situation in some of your election districts presents a condition which appears to be desperate, it is suggested that the governing body of your city give consideration to the provisions found in M. S. A. 205.50, concerning relief judges, known as "counting boards."

EARL H. A. ISENSEE,
Assistant Attorney General.

Austin City Attorney.

August 9, 1948. 183-G

54

Candidate—Should not act as judge of election at annual town meeting— MS1945, § 205.47.

Question

As to the effect of a supervisor's acting as a judge of election during an election in which he seeks office. The facts relate to an election to the town board of the Town of Wrenshall in Carlton County.

Opinion

Minnesota Statutes 1945, § 205.47, provides that "no person shall be eligible as judge * * * if he be a candidate for any office." It appears from this provision that the officer seeking re-election was definitely disqualified from acting as a judge at such election.

However, the disqualification of an election judge does not make the election void. It may be voidable. If the validity of the election is to be questioned, the matter must be presented to the court for determination.

EARL H. A. ISENSEE,
Assistant Attorney General.

Carlton County Attorney.

March 17, 1948. 434-B-12

55

Compensation—In towns fixed at town meeting. When no compensation fixed, none can be paid, but such compensation may be paid when authorized at a subsequent town meeting.

Questions

"In the absence of a compensation fixed at the annual meeting of the town, what compensation should be paid to the election judges and clerks for receiving votes and for canvassing ballots?

"Would it be permissible for the township at its next annual meeting to fix the compensation within the limitation set by Subdivision 4 of Section 200.35 of Minnesota Statutes, 1945, and make this compensation retroactive to the primary and general election returns of this year?"

Opinion

As I read the statute which relates to compensation to be paid by towns for the counting and canvassing ballots to judges and clerks of election, the language being "in the case of organized townships the compensation of judges and clerks shall be fixed at the annual meeting," this means that if, at the annual meeting, such compensation is fixed, it may be paid at the rate fixed, not to exceed the amount specified in the statute. I would understand it to mean that in the event that no compensation is fixed at the annual meeting, no compensation can be paid.

It would appear to me to be perfectly proper for the town meeting next to be held to fix the compensation and to order payment thereof for services rendered by such officers in 1948.

CHARLES E. HOUSTON,
Assistant Attorney General.

Kandiyohi County Attorney.

October 8, 1948. 183-K

56

Tally sheets—Challengers—Certificate of judges of election should be that provided by Chap. 564, Laws 1947—Tally sheets should be made up as prescribed in that law—Challengers may not interfere with judges and clerks in counting ballots.

Facts

M. S. 1945, Sec. 206.45, was amended by Laws 1947, Chapter 564. This law changed the method of counting and tallying ballots after the polls are closed. Theretofore the counting had been made by piling the ballots in

different piles and counting the ballots in each pile. Under the new law ballots are inspected, read, counted and tallied, and a mark is made upon the tally sheet for each ballot cast. The method is described in said new law.

Question

As to the form of certificate which should be made by the election judges.

Opinion

The statute, as amended by Chapter 564, prescribes the old form of certificate which was used when the old method of counting ballots was followed. Nevertheless the law provides for it, and in my opinion the certificate made by the judges should follow the form prescribed in Chapter 564. Should the certificate of the judges, however, vary from that prescribed in the law, leave out the word "piled" and include the word "tallied" or other appropriate language to make the certificate correspond with the tallying method now to be followed, and I do not think it would invalidate the election. The important thing is that the votes be correctly counted and the results correctly reported.

Question

What form of tally sheet should be used?

Opinion

I think the form to be used is regulated by the method of canvassing and counting votes described in said Chapter 564.

Question

As to the right of a challenger to watch the reading of the ballots at the time the counting is being done.

Opinion

I think that a challenger may remain in the room while the counting is done, but may not come inside the railing where the judges sit, and may not interfere with or embarrass the judges in their handling and counting and tallying of the ballots. No challenger has the right to interfere with the proper performance of their duties by the election judges and clerks.

RALPH A. STONE,
Assistant Attorney General.

Minneapolis City Attorney.

January 15, 1948. 183-S

POLITICAL PARTIES

57

Party name—Use of by other than parties having legal status in Minnesota —Socialist Party candidates may appear on general election ballot only by nominating petition—Acceptance of such nominating petition by secretary of state using political designation "Socialist Workers Party" ——MSA, § § 205.72 and 200.08.

Question

Whether in the event that the Socialist Party presents by petition nominees for presidential electors your office may "accept a nominating petition or petitions for candidates to appear on the November 2, 1948 general election state or white ballot using the political designation 'Socialist Workers Party'."

Opinion

The only parties at the present time having a legal status as political parties in Minnesota are the Democratic-Farmer-Labor Party and the Republican Party.

The only method by which any person may appear on the official ballot in the fall election if not a nominee of either of the above-named parties is through nomination by petition. The law requires that the certificate of nomination of such a person shall contain, among other data, "the party or political principle he represents expressed in not more than three words."

M. S. A., § 205.72 provides:

> "A political party which has adopted a party name shall be entitled to the exclusive use of such name for the designation of its candidates on the official ballot, and no candidate of any other political party shall be entitled to have printed thereon as a party designation any part of such name. Nor shall any person be named on the official ballot as the candidate of more than one political party, or of any political party other than that whose certificate of his nomination was first properly filed."

It is, therefore, clear that any person nominated by petition cannot have printed on the official ballot in connection with his name either the name "Republican" or "Democratic-Farmer-Labor" or any part of either of such names.

As to the use of the names of other political parties or designation of principles required of a nominee by petition, Minnesota statutes place no restriction on the office of Secretary of State except that such party or principle must be expressed in three words. The Secretary of State may, therefore, accept the certificate of nomination of a person whose party affiliation or principle that he represents, if not expressed in more than three words, is designated in connection with his name, if such designation

does not include the name or part of the name of either of the two above-mentioned parties which have a legal status as political parties in Minnesota; namely, the Democratic-Farmer-Labor and Republican Parties.

If, as you assume, persons representing the Socialist Party will nominate by petition its candidates for presidential electors with the designation "Socialist Party" and another party will so nominate its candidates for presidential electors with the party designation "Socialist Workers Party," you inquire as to whether you may legally accept such nomination certificates of both of these parties.

As above stated, there is no state statute forbidding the acceptance of both of such certificates because the only parties to which M. S. A., § 205.72, protecting a party name, apply are those defined in M. S. A., § 200.08. Neither the Socialist Party nor the Socialist Workers Party qualifies as a political party within the meaning of that section.

The Secretary of State is required, I believe, to accept any certificate of nomination issued in compliance with the election statutes of Minnesota. Whether any political party not recognized as such under "Minnesota Election Law" has the legal right in any particular case to prevent the use of its name, or any part thereof, by any person nominated by petition, is a matter for the courts to determine. If there are legal reasons why the use of a party name should not be permitted, notwithstanding the election statutes of this state, the party organization objecting to the use of its name should, in my opinion, be obliged to resort to the courts to remedy the situation as the Secretary of State is not clothed in such a matter with facilities to determine either facts or law and has no judicial power to render a decision thereon.

J. A. A. BURNQUIST,
Attorney General.

Secretary of State.

July 29, 1948. 672-B-7

SPECIAL

58

Procedure—To create a special election and assessment district—Ballots—Judges and clerks—Hours—MS, Secs. 212.38, 212.37, 213.37, 212.10, 205.45, 205.47. MSA, Sec. 413.05.

Facts

The village of Urbank has been established and officers have been elected, and it now desires to create a special election and assessment district.

Questions

1. "Will a ballot substantially as follows be sufficient:

'Shall the Village of Urbank, Minnesota, have a separate election and assessment district?'

2. "Will the new village council determine the date of this election after having decided to submit it to the voters, upon at least ten days' notice?

3. " * * * between what hours must the polls be open?

4. "Does Section 212.10 apply, and, if so, could the polls be open between 10 A. M. and 5 P. M.?

5. "Would it be necessary for the village council to appoint one clerk and two judges of election, or does Section 212.09 apply? In other words, what officers should be appointed by the village council to conduct this special election?"

Opinion

It is my opinion that the ballot should state the question in substance as follows:

"Shall the village of Urbank, Minnesota, constitute a separate election and assessment district?

YES ☐ NO ☐ "

Of course, this ballot will be preceded by an appropriate heading and will be authenticated by the facsimile signatures of the proper officers.

The village council will determine the date of the election if and when it decides to submit the question to the voters. For a special election, the same notice will be given as in case of any special election. If the question is submitted at a general election as authorized in Sec. 413.05, the notice calling the general election must specify the question.

M. S., Sec. 212.37, which relates to special elections requires at least ten days' posted and one week's published notice in a legal newspaper in the village, if there be one, of the special election.

M. S., Sec. 212.38, provides that all village elections shall be conducted in the manner provided by law for town meetings except as otherwise provided in Sec. 213.37. Sec. 212.10, which relates to town meetings, requires that the polls be opened any time between 9 o'clock A. M. and one o'clock P. M. They close at 5 o'clock P. M. These hours apply unless by a previous resolution at least 30 days before the election different hours were fixed.

Sec. 212.37 requires that judges and clerks shall be appointed as in the case of annual village elections. This section relates only to special elections.

Sec. 205.45 relates to general elections in towns and makes the members of the town board the judges unless they all belong to one political party, in which case, not more than two, determined by lot unless otherwise agreed upon, shall act as judges. The town clerk acts as clerk. Sec. 205.47.

CHARLES E. HOUSTON,
Assistant Attorney General.

Attorneys for Village of Urbank.

September 17, 1947. 472-I

SUPPLIES

59

County Auditor—Delivery of election supplies to precincts by county auditor —County auditor receives no additional compensation and no mileage for delivering ballots to precincts—Laws 1947, Chapter 110.

Facts

Laws 1947, Chapter 110, provides that the county auditor may send by registered mail, insured parcel post, express, or deliver in person election supplies to the various precincts.

Question

Whether the county auditor is authorized to be paid for delivering said ballots. If so, how much, and also if authorized to get paid for mileage incurred in making such delivery.

Opinion

The county auditor receives no additional compensation for his services in connection with elections. There is no authority for paying him anything for delivering election ballots to the various precincts. There is no provision for paying him mileage for making such delivery.

RALPH A. STONE,
Assistant Attorney General.

Swift County Attorney.

September 22, 1947. 19

LABOR

RELATIONS

60

Collective Bargaining—Certification of representative for collective bargaining—Election—Majority of employees voting required for certification—MSA § 179.16.

Facts

On August 23, 1948, the Labor Conciliator was served with a request by Local 113 AFL for investigation and certification of representatives for collective bargaining of certain employees of a named hospital. A hearing on the request was duly held pursuant to notice to the parties by the Labor Conciliator. After considering the evidence adduced at the hearing and such other information as is contained in the records of the Labor Conciliator, the latter ordered that an election be held for the selection of a representative for collective bargaining purposes after first posting on the hospital premises a notice of the election and a list of the names of 83 employees eligible to vote at the election. The ballot at the election submitted the question whether the employee wanted Local 113 AFL to represent him for collective bargaining purposes. The election was held on September 28, 1948. The results of the election were 35 votes "Yes," 5 votes "No," 2 void ballots, 1 challenged ballot. Thus a total of 43 out of 83 employees voted. On September 30, 1948, the Labor Conciliator certified that as a result of the election Local 113 AFL had received a majority of the votes cast and, also, certified Local 113 AFL as the exclusive representative for collective bargaining purposes of the employees of the hospital in the bargaining unit.

Question

Is the certification valid under M. S. A., Sec. 179.16?

Opinion

Your question is answered in the affirmative.

The pertinent language of M. S. A., Sec. 179.16, Subd. 1, is:

> "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining * * * ."

The pertinent language of the National Labor Relations Act before and after its amendment by the Labor Management Relations Act, 1947, 29 U. S. C. A., Sec. 159 (a), is identical with that quoted above, except that in the federal act the word "purpose" appears in the plural as "purposes."

The pertinent language of the federal Railway Labor Act, 45 U. S. C. A., Sec. 152, Fourth, is substantially of the same effect and provides:

"The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter."

The precise question before us was before the Supreme Court of the United States with reference to the Railway Labor Act in **Virginian Ry. Co. v. System Federation No. 40,** 300 U. S. 515, and the court said on page 560:

"Section 2, Fourth, of the Railway Labor Act provides: 'The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act.' Petitioner construes this section as requiring that a representative be selected by the votes of a majority of eligible voters. It is to be noted that the words of the section confer the right of determination upon a majority of those eligible to vote, but is silent as to the manner in which that right shall be exercised. Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election. **Carroll County v. Smith,** 111 U. S. 556; **Douglass v. Pike County,** 101 U. S. 677; **Louisville & Nashville R. Co. v. County Court of Davidson County,** 1 Sneed (Tenn.) 637; **Montgomery County Fiscal Court v. Trimble,** 104 Ky. 629; 47 S. W. 773. Those who do not participate 'are presumed to assent to the expressed will of the majority of those voting.' **Cass County v. Johnston,** 95 U. S. 360, 369, and see **Carroll County v. Smith, supra.**

"We see no reason for supposing that § 2, Fourth, was intended to adopt a different rule. * * * "

Again, we find that the precise question before us was before the U. S. Circuit Court of Appeals, Fourth Circuit, with reference to the National Labor Relations Act in **National Labor Relations Board v. Standard Lime & Stone Co.,** 149 F. 2d 435, and the court said on page 437:

"And we see no reason to think that a different rule was intended by the National Labor Relations Act. The pertinent language of that act is: 'Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining,' 29 U. S. C. A. § 159. There would seem to be no material difference between the meaning of this provision and of that contained in the Railway Labor Act. That the provision quoted from the National Labor Relations Act was intended to apply to the selection of bargaining agents by employees the political principle of majority rule, is expressly stated in the Report of the House Committee accompanying the bill, where it is said: 'Section 9 (a) incorporates the majority rule principle, that representatives designated for the purpose of collective bargaining by the majority of the employees in the appropriate unit shall be the exclusive representatives of all the employees' etc. Report No. 1147 of the House Committee on Labor to accompany S.1958, June 10, 1935, 74th

Cong., 1st Sess., p. 19. The majority rule principle was that which had been adopted in the Railway Labor Act. Its application in ordinary political elections to situations where a majority of the votes cast was less than a majority of those qualified to vote had been settled in Carroll County v. Smith, supra, and other decisions of the Supreme Court. The Virginian Railway decision gave it the same meaning when applied to industrial elections that it had when applied to ordinary political elections, and we see no reason to give it any different meaning here.

"Although there is no decision of the Supreme Court holding that a majority of the votes cast in an election is sufficient for the choice of a bargaining representative under the National Labor Relations Act, this is the holding of the Labor Board and of all of the Circuit Courts of Appeals which have had occasion to pass upon the question. See N. L. R. B. v. Central Dispensary & Emergency Hospital, App. D. C., 145 F. 2d 852, certiorari denied 65 S. Ct. 684; New York Handkerchief Mfg. Co. v. N. L. R. B., 7 Cir., 114 F. 2d 144, 148-149, certiorari denied 311 U. S. 704, 61 S. Ct. 170, 85 L. Ed. 457; N. L. R. B. v. National Mineral Co., 7 Cir., 134 F. 2d 424, 426-428, certiorari denied, 320 U. S. 753, 64 S. Ct. 58, 88 L. Ed. 448; N. L. R. B. v. Whittier Mills Co., 5 Cir., 111 F. 2d 474, 477, 478; Marlin-Rockwell Corporation v. N. L. R. B., 2 Cir., 116 F. 2d 586, 588, certiorari denied 313 U. S. 594, 61 S. Ct. 1116, 85 L. Ed. 1548; Matter of Western Foundry Co., 42 N. L. R. B. 302; Matter of Spring City Foundry, 11 N. L. R. B. 1286; Matter of R. C. A. Mfg. Co. Inc., 2 N. L. R. B. 159, 173. There are no contrary decisions."

Likewise, we see no reason to think that a different rule was intended by the Minnesota Labor Relations Act. The similarity of the provisions of the latter act and the federal laws has been pointed out above. " * * * the rationale of decisions under the federal act is applicable to cases arising under our act insofar as the provisions of the two acts are similar or the objects or purposes to be attained are the same." Sam Nemo, d. b. a. Roman Cafe v. Local Joint Executive Board, et al. Minn. (Decided Dec. 24, 1948). In our opinion, implicit in the certification of the Labor Conciliator must be a finding that the vote at the election was substantial and representative.

It is our conclusion that the certification of Local 113 AFL as the exclusive representative for collective bargaining purposes of the hospital in the bargaining unit is valid under M. S. A., Sec. 179.16.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Labor Conciliator.

December 29, 1948. 270-D-12

LIQUOR

INTOXICATING

61

Election—Local option—Election in villages—May be held in any year in which proper petition is filed within the required time—MSA 340.20, 340.21.

Facts

"It appears our village voted 'for license' under section 340.20 Minnesota Statutes 1941, at village election in December 1947.

"A Municipal Liquor Store was set up and has been operating this year."

Question

"The question has arisen if legal voters of the village, by petition, can force a vote on the question of sale of intoxicating liquor, at the next annual village election, to be held in December this year, or if under section 340.26, no election can be ordered held on this question within three years subsequent to the election hereinbefore mentioned, which was held in December, 1947."

Opinion

M. S. A. 340.20 provides that the village recorder of any village shall, upon the petition of ten legal voters filed 15 days before the annual village election, give notice at the same time and in the same manner as the notice of such election that the question of granting license in such village for the sale of intoxicating liquor will be voted upon.

Section 340.21 provides that if a majority of the voters are in favor of license, the council may grant license for the sale of intoxicating liquors. From this it follows that the village may in such event establish a municipal store. Section 340.21 further provides "but if such majority shall be 'against license' then no such license shall be granted and such vote shall remain in force until reversed at a subsequent annual election at which the question of license is again in like manner submitted."

It seems plain that upon the filing of a proper petition 15 days before the annual village election, the village clerk is required to give notice of election upon the question. The question may be voted upon in any year in which a proper petition is filed 15 days before the annual village election.

RALPH A. STONE,
Assistant Attorney General.

Fertile Village Attorney.

November 4, 1948. 218-C-3

62

Election—Petition—Signers—Withdrawal—Election to determine question for or against sale of intoxicating liquor under provisions of MSA 340.20. Person filing petition with recorder has no right to withdraw the same. Signers of petition may withdraw therefrom, providing they do so before the recorder has taken official action on the petition.

Facts

On November 16, 1948, petition, signed by 76 persons, was presented to the village recorder, asking for submission to the voters at the annual election to be held on December 7, 1948, of the question of granting a license for intoxicating liquor pursuant to MSA 340.20. At a meeting held on November 20, 1948, representatives of the local churches, WCTU, and other persons who signed the petition authorized the chairman who had been instrumental in obtaining the signatures to the petition and who presented the same to the recorder to withdraw the petition from the files of the recorder so as to avoid the submission of the issue to the voters.

Questions

1. May the chairman withdraw the petition without first obtaining the written consent of each individual signing, or at least all except nine or less of the signers?

2. May the signers of the petition withdraw their names?

Opinion

It is the opinion of this office that the chairman may not withdraw the petition under any circumstances, and the signers of the petition may withdraw their names by doing so in writing, providing they take action before the recorder has taken official action on the petition.

EARL H. A. ISENSEE,
Assistant Attorney General.

Hibbing Village Attorney.

November 29, 1948. 218-C-3

63

License—Clubs—Club licensee is subject to regulatory provisions of the state law, as to hours and days on which liquor may be sold.

Question

"Is there no law which compels the American Legion and VFW clubs to close at all, day or night, Sundays and all?"

Opinion

The law provides that a club license for the sale of liquor to members only may be issued to certain incorporated clubs which comply with certain requirements.

The licensee holding such a club license is subject to all the regulatory laws of the state relating to the hours and days during and on which intoxicating liquors may be sold and relating to the persons to whom sales may be made.

Therefore, it would be unlawful for a club licensee to sell intoxicating liquor on Sunday, or between the hours of midnight and eight o'clock a. m. on any day. It would be unlawful for the club licensee to sell intoxicating liquor before three o'clock p. m. on Memorial Day, and before eight o'clock p. m. on Election Day (the regulations vary slightly in first and second class cities).

It is also unlawful for any such club licensee to sell intoxicating liquor to a minor.

The person who submitted the inquiry to you was concerned about sales to a minor.

However, the state law does not require such a club licensee to close the doors of the club for all purposes during the hours when the sale of intoxicating liquor is prohibited. The club can remain open for other legitimate club purposes during the prohibited hours, but not for the sale of liquor.

RALPH A. STONE,
Assistant Attorney General.

Hon. Luther W. Youngdahl, Governor.

June 11, 1947. 218-J-1

64

License—Club—May not be issued for a portion of a year—MSA 340.11 Sd. 6.

Question

"May the Village Council issue an 'On Sale' (intoxicating liquor) license to a private club for a portion of a year only and pro-rate the license fee mentioned in Subdivision 6 of the aforementioned statute?"

Opinion

The license fee for a club license provided by M. S. A. § 340.11, Subd. 6, is $100. There is no provision for issuing a license for a portion of a year or prorating the license fee.

RALPH A. STONE,
Assistant Attorney General.

Deerwood Village Attorney.

April 22, 1948. 218-G-15

65

Licenses—Issuance—Ordinance—An ordinance providing for the issuance of licenses by casting lots would be illegal—M. S. A. 614.01.

Question

"In view of the provisions of M. S. A. 614.01, defining a lottery, and the prohibition contained in Article 4, Section 31, of the constitution—'the legislature shall never authorize any lottery or the sale of lottery tickets,' has the City Council the power to provide by ordinance, when there are more applicants for liquor licenses than there are licenses available, and all applicants are equally qualified to secure licenses, that the disposition of the licenses shall be determined by drawing lots, the fees paid by the unsuccessful applicants to be returned to them?"

Opinion

I think such an ordinance would be invalid. It is not a question of the violation of the lottery statute. The law imposes upon the city council the duty of exercising its discretion in granting liquor licenses. That discretion cannot be exercised by casting lots. The city council must decide in the exercise of its discretion as to who should receive liquor licenses and who should not.

RALPH A. STONE,
Assistant Attorney General.

Minneapolis City Attorney.

February 20, 1948. 218-G-1

66

Municipal store—Establishment—Initiative provision in city charter permitting people to vote on question—M. S. 1945—475.14, 340.11, sd 10.

Questions

If the ordinance carries in this special election, is it mandatory under our charter to establish a municipal liquor store and, if so, when must this be done?

If it is mandatory to establish a municipal liquor store, must a bond issue be floated in order to raise the money to do so?

Assuming it is mandatory, will the city be forced to go out of the liquor business in 1950 if the population has then reached 10,000?

How should the provision "the governing body of such municipality may establish" a liquor store be construed?

Opinion

If the proposed ordinance neither provides the funds for the establishment of a municipal liquor store nor fixes the time for the commencement of its business, and if it does not direct the city council to establish such store and to provide funds for that purpose, the ordinance would by itself be insufficient until followed by supplementary ordinance.

If the proposed ordinance directs the village council to establish a municipal liquor store at once and to provide funds for that purpose, the council, after the adoption of the ordinance, must act immediately to put into effect the provisions thereof as soon as it can legally be done.

If no time is fixed in the ordinance for the establishment of the liquor store and the method of raising funds for such purpose by the council is not provided therein but the council is by the ordinance directed to establish such store and provide funds therefor, it must, in my opinion, be established, and funds provided for such purpose by the council, within such reasonable time and in such manner as the council may determine to be most expedient under your charter provisions and the laws of the state. The authority for the issuance of bonds is limited as provided in Minnesota Statutes 1945, Section 475.14.

If the store is established and the population of the city increases to such an extent that it becomes under the 1950 census a city of the class which is not authorized to operate a municipal liquor store, it will be subject to the laws applicable to the class of cities to which it then belongs.

With reference to the statutory provision that "the governing body of such municipalities may establish or permit to be established for dispensation of liquor either 'On sale' or 'Off sale,' or both" (Minn. Stat. 1945, § 340.11, subd. 10), it is my opinion that, within the meaning of the quoted provision, the governing body of a city with a charter such as yours is the legislative authority possessing the power to legislate. Up to date the only court decision to which my attention has been called construing the term in question is that in the case of **Anselm Rudnicki v. City of Morris,** which was appealed to the supreme court but dismissed by the appellant before a decision. There the district court said:

> "It seems significant that the legislature, having in mind the provisions of the various home rule charters of cities of the fourth class, used the words 'governing body' instead of 'commission' or 'council' or some other restrictive term. The term is broad enough to include the electorate."

When the legislature enacted the provision that the governing body of certain municipalities "may establish" a municipal liquor store, its intent was, I believe, to authorize local legislation with respect to the establishment of such a store by the use of the methods provided by home rule charters for the enactment of such legislation. Where home rule charters provide for the initiative and referendum, the governing body, which in the matter under consideration is obviously intended to be the legislative authority for the enactment of an ordinance, must necessarily include the body of electors when a sufficient number thereof legally initiates an ordinance or legally petitions for a referendum thereof and the majority of the electors voting on any measure so initiated or referred is necessary to make it an ordinance.

Therefore, it is my opinion that, if the proposed ordinance is in proper form and is adopted by a vote of the people at the election on April 8th, the ordinance will be valid for the purpose of establishing a municipal liquor store.

J. A. A. BURNQUIST,
Attorney General.

Attorney for Village of Robbinsdale.

March 27, 1947. 218-G-13

67

Municipal stores—Establishment—In a newly organized village—M. S. 1945, § 340.11, subd. 15.

(Opinions dated Feb. 14, 1947, April 23, 1941, No. 162, 1942 Report reversed.)

Question

A consideration of opinions heretofor rendered, relative to M. S. 1945 § 340.11 sd 15 is requested.

Opinion

The subdivision here considered reads as follows:

> "Subd. 15. No license for the sale of intoxicating liquors shall be issued by any newly incorporated village, until the expiration of two years from the date of incorporation."

It is clear that the above quoted subdivision applies only to the issuance of a license. As a municipal liquor store does not require a license, it is my opinion that although the provision in question prohibits newly organized villages from issuing a license for the sale of intoxicating liquor until the expiration of two years from the date of incorporation, it does not prohibit such village from establishing a municipal liquor store before the expiration

of said two years, for, as stated above, no license is required to operate such municipal liquor store.

This opinion supersedes any previous opinion giving to Minnesota Statutes 1945, Section 340.11, subdivision 15, a different construction from the one herein contained.

J. A. A. BURNQUIST,
Attorney General.

Cass County Attorney.

May 24, 1947. 218-G-13

68

Municipal store—Profits—Pledge of must be authorized at a general or special election called for that purpose. The words "general election" mean annual village election—L. 1945, C. 273, M. S. A. 426.19.

Opinion

L. 1945, C. 273, M. S. A., Sec. 426.19, relates exclusively to the profits derived by a municipal corporation from the operation of a municipal liquor store. By the terms of this section, with the consent of the people expressed by their vote, the municipality is authorized to make certain use of such profits. Before such profits may be pledged for a specific purpose by the governing body of the municipality, the question whether such profits shall be so pledged must be put to a vote of the people and must be approved by a majority of the voters voting on the question at either a general election or special election called for that purpose.

Since the only matters involved in this section relate to municipal government, it is my opinion that the words "general election" have no reference to the general election for state and county officers. It must mean the regular village election, the time of holding of which is fixed by law. The word "general" is used as distinguished from "special." The reference, in my opinion, is to the annual village election.

CHARLES E. HOUSTON,
Assistant Attorney General.

Kenyon Village Attorney.

October 14, 1948. 218-R

69

Municipal store—Renting of building for—Village cannot pay as rent for municipal store building a percentage of the gross receipts of the municipal store.

Question

Can the village rent a building for use as a municipal liquor store and pay as rent therefor two per cent of the gross receipts of the municipal liquor store business?

Opinion

It is my opinion that this question should be answered in the negative. Such an arrangement would amount to putting the village into partnership with the owner of the building. The purpose of the municipal liquor store law is to remove the motive of private profit from the liquor business. Such an arrangement would run contrary to that purpose.

This office has held that it would be improper for a village to hire a bartender and pay him for his services a percentage of the receipts of the store. Your question is somewhat similar to that situation.

A conflict of interest might arise between the owner of the building and the village. The village council might determine that it was to the interest of the inhabitants to have the liquor store close at 6 p. m. or at some earlier hour than the statutory hours. It would be to the interest of the owner of the building to have the store remain open for the full permissible period. Such a conflict of interest might give rise to disputes and trouble.

I think the lease should be for a specified amount per annum with a provision for termination in the event the operation of the municipal store in the village should become illegal.

RALPH A. STONE,
Assistant Attorney General.

Slayton Village Attorney.

September 20, 1948. 218-R

70

Public drinking places—Defined—M. S. A. 340.941.

Opinion

It is my opinion that the words "public drinking place," as used in M. S. A. 340.941, must be given the meaning which the words have according to their common and approved usage as required by M. S. A. Sec. 645.08.

In **State v. Northern Pacific Ry. Co.**, 139 Minn. 334, the court in the opinion on page 335 recognized a definition of public drinking places as it was defined in the law then in force, G. S. 1913, Sec. 3162, as "saloons, public bars, and other places of business or public resort where liquor is commonly sold in quantities less than five gallons, or to be drunk on the premises." That definition seems to be a common-sense definition, giving

the meaning to the words which may be commonly understood to be their meaning. It seems to me that the thought conveyed by the words "public drinking place" is complete irrespective of whether the place is licensed to sell intoxicating liquors or not. It is not the liecnse that makes it a public drinking place. It is the use to which the place is put. If, in fact, it is a place of business or public resort where liquor is commonly sold in quantities of less than five gallons, or if it is a place of business or public resort where liquor is commonly sold to be drunk on the premises, then it is a public drinking place.

CHARLES E. HOUSTON,
Assistant Attorney General.

Winona County Attorney.

October 13, 1948. 218-E

71

Sale—Habitual drunkard—Posted notice—M. S. A. 340.73, Subd. 2, M. S. A. 340.78.

Facts

A parent prepared notices pursuant to M. S. A. 340.73, to prevent liquor dealers from selling liquor to her drunkard son. The peace officer served these notices on the liquor stores. The notices advised any person against serving liquor to her son.

Question

Must this notice be posted in the liquor stores, or is it sufficient to serve same on the proprietor thereof?

Opinion

I will quote you the applicable statutes.

M. S. A. 340.73, Subd. 2: "It shall be unlawful for any person except a licensed pharmacist to sell, give, barter, furnish or dispose of, in any manner, either directly or indirectly, any spirituous, vinous, malt or fermented liquors in any quantity, for any purpose, whatever, to any spendthrift, habitual drunkard, or improvident person, within one year after written notice by any peace officer, parent, guardian, master, employer, relative, or by any person annoyed or injured by the intoxication of such spendthrift, habitual drunkard, or improvident person, forbidding the sale of liquor to any such spendthrift, habitual drunkard, or improvident person."

Under this statute if the written notice is served upon the individual charged with making the illegal sale it is sufficient.

Of course if the sale were made by a bartender and the bartender had no knowledge of the notice or of the fact that the purchaser was an habitual drunkard, the prosecution would fail for insufficiency of evidence. Under this statute notice must be brought home to the individual who makes the sale. That could be done either by serving the notice upon him personally or by posting it in the barroom where the sales are made.

The other applicable statute is M. S. A. 340.78, which reads as follows:

> "Every person selling liquor to a minor, habitual drunkard, or person under guardianship, after written notice by a parent, husband, wife, child, guardian, master, or employer of such minority, habitual drunkenness, or guardianship, or in the case of an habitual drunkard after written notice by the mayor, chief of police, or any member of the council of the municipality in which such habitual drunkard resides, or member of the county board of the county in which such habitual drunkard resides, and within one year after such notice in case of an habitual drunkard, and in other cases during the continuance of the minority, or guardianship, shall be punished by a fine of not less than $50.00, nor more than $100, or imprisonment in the county jail for not less than 30, nor more than 90, days."

Under this section it has been held that notice forbidding sale to a drunkard served on the bartender was actual notice to the proprietor after it had been seen and examined by him. State v. Provencher, 129 Minn. 409, 152 N. W. 775.

What is said above also applies to the service of notice under this section.

After service of the notice upon the proprietor, if the same is then posted and kept posted in the barroom, it would be continual notice to the proprietor and the bartender that sales to the individual in question were prohibited.

RALPH A. STONE,
Assistant Attorney General.

Aurora Village Attorney.

April 13, 1948. 218-E

72

Sale—Indians—Laws 1947, Chap. 87, M. S. A. 340.73.

Facts

> "The City of Tower operates a municipal on- and off-sale liquor store, and is concerned with the construction of Chapter 87, Session Laws of Minnesota, 1947, which prohibits the sale of liquor to 'any person of Indian blood who has not adopted the language, customs and habits of civilization.'

"In the immediate vicinity of the City of Tower is the Vermillion Lake Reservation, on which about 150 Indians of the Chippewa tribe live. Many of these Indians own timber allotments, and when timber is sold by the United States, money resulting from the sales is doled out monthly to the beneficiary. Some of these Indians are on Old Age Pensions, some get direct relief from the County; very few of them work steadily.

"As a group, it could be said that generally they have adopted the customs, habits and language of civilization.

"Letter from superintendent of the Consolidated Chippewa Agency at Cass Lake, giving his opinion that all of these Indians have adopted the habits, language and customs of civilization is enclosed.

"It may be a question of fact as to whether an individual Indian or whether a group, as a group, have adopted the habits, language and customs of civilization. However, it would seem to be a question of law as to whether the language in this statute should be considered as applicable to a group or whether it should apply to the individual Indian who presents himself in a liquor store demanding that he be served with liquor.

"As individuals, many of them cannot carry on a conversation in English except a very limited one, but all of them will have sufficient words to ask for the kind of liquor desired.

"Pending in Congress is a bill which, if passed, will wipe out the prohibition against the selling of liquor to Indians, and in anticipation of the passage of that Act, the Tower officials desire a construction of the language of the statute that is quoted in this letter."

Question 1

"Can the language in the statute be interpreted as applicable to these Indians as a group or must it be applied to them as individuals? They are nearly all in the same position, except as to their ability to speak English."

Opinion

The language in this statute must be interpreted as applying to Indians individually, and not as a group. In each case it will be a question of fact as to whether the Indian who desires to buy intoxicating liquor has adopted "the language, customs and habits of civilization." In any group of Indians in a saloon there might be one or more who has not adopted the language, customs and habits of civilization, and such a one would not be entitled to purchase liquor.

The language of the statute was taken from the State Constitution. See Article VII, Section 1, paragraphs Second and Third.

I cannot see how the language of the statute could be interpreted as permitting the sale of liquor to an Indian who has not adopted the language,

customs and habits of civilization just because he is accompanied by other Indians who have done so.

Question 2

"Assuming that they are to be treated as individuals, to what extent must they have a knowledge of the language of civilization?"

Opinion

This raises the question of what is meant by "the language of civilization."

The North American Indians were classed as savages and not as civilized people. Roche v. Washington, 19 Ind. 53, 56, 81 Am. Dec. 376. Therefore, their language was the language of savages and not the language of civilized people.

By requiring that an Indian must have adopted "the language of civilization," the legislature must have intended that such Indian should have adopted a language different from that which he used in his savage state.

Therefore, it is my opinion that in order to qualify for the purchase of intoxicating liquor, an Indian must have to some extent a knowledge of some language different than the language which he used as a savage, that is to say, he must have a knowledge of some language used by civilized people and not alone by savages.

It is impossible to draw a line as to how much knowledge of a language of civilization an Indian must possess in order to purchase liquor. He must have some knowledge of a civilized language, but it is impossible to set any definite standard.

Question 3

"If these Indians are treated as individuals, rather than as a group, the officials of Tower will appreciate your comment concerning the application of the language in question to the problem confronting a bar-tender when one of these Indians presents himself at the bar asking for liquor in the English language."

Opinion

About the only comment that can be made on this question is that the bartender is confronted with the question of fact which may be very difficult for him to determine. The bartender would have the right to question the Indian as to whether he could speak any other language than the Chippewa language and as to whether he has adopted the customs and habits of civilization and what customs and habits of civilization he has adopted. The bartender should be instructed to use his best judgment.

Question 4

"In spite of the language of the state law cited above, is it permissible for the City of Tower to adopt an ordinance prohibiting the

sale of liquor within the City of Tower to persons of Indian blood, regardless of whether they have adopted the language, customs and habits of civilization? Or, to prohibit the agents of the Tower liquor store by rule from furnishing liquor to any persons of Indian blood?"

Opinion

No. The statute which you have quoted in my opinion very definitely indicates that the state legislature has adopted the policy of permitting the sale of liquor to Indians who have adopted the language, customs and habits of civilization, and I do not believe that a municipality would have a right to further restrict such sales.

In this connecton I call your attention to M. S. A. 327.09, reading as follows:

"No person shall be excluded, on account of race, color, national origin, or religion from full and equal enjoyment of any accommodation, advantage, or privilege furnished by public conveyances, theaters, or other public places of amusement, or by hotels, barber shops, saloons, restaurants, or other places of refreshments, entertainment, or accommodations. * * * "

Under this statute, if an Indian qualifies as one entitled to purchase liquor because he has adopted the language, customs and habits of civilization, he could not be excluded from the right to purchase liquor.

Question 5

"If the governing body of the City of Tower believes it is advisable for public safety and for the public interest to prohibit the sale of non-intoxicating malt liquor (3.2) to all persons of Indian blood, within the City of Tower, could the governing body adopt an ordinance to that effect? In this connection, it is my information that some of these Indians have spent money for non-intoxicating malt liquor at times when their children were half-starved and half-clothed. They have not been furnished with any intoxicating liquor or non-intoxicating liquor at the Tower municipal store."

Opinion

The answer to Question 4 is also an answer to this question. It is my opinion that the city council could not by ordinance prohibit the sale of 3.2 beer to all persons of Indian blood.

As to the sale of intoxicating liquor to spendthrifts, habitual drunkards, or improvident persons, I call your attention to M. S. A. § 340.73, Subd. 2; also M. S. A. 340.78.

Question 6

"It is also reported that some of these Indians have at some grocery store either within or without the City of Tower been able to purchase

lemon extract to use as a beverage and which is harmful. Can the City of Tower, by ordinance, prohibit the sale of lemon extract to be used as a beverage or prohibit the sale of lemon extract to any person of Indian blood?"

Opinion

As it would be impossible for the seller of the lemon extract to know at the time he made the sale whether the same was to be used as a beverage, I think it would be very difficult to enforce such an ordinance even if it were permissible.

It certainly would be discriminatory to prohibit the sale of lemon extract to any person of Indian blood.

Question 7

"The specific question we have in mind involves the interpretation of the word 'adopted,' as used in Chapter 87, Laws of 1947. If an Indian has adopted the customs and habits of civilization, it follows that he has given up the habits and customs of a savage condition. Would the same implication be true as to language? In other words, must the language used by the Indian in question be principally the English language? We also ask this question: If there is no definite standard under this law as to the extent of knowledge of the language of civilization required of an Indian in order to be qualified to purchase liquor, is not the statute void for uncertainty?"

Opinion

I do not think that the statute is void for uncertainty. In any particular case the state would be required to prove beyond a reasonable doubt not only that the sale was made to a person of Indian blood but that the person to whom the sale was made had not adopted the language, customs and habits of civilization. The case would not be submitted to the jury unless the state would prove beyond a reasonable doubt that a particular Indian to whom the sale was made had not adopted the language, customs and habits of civilization.

If the state would produce enough evidence to go to the jury on this point, then the jury would have to decide whether the Indian had adopted the language, customs and habits of civilization or not. In other words, the jury would be confronted with the same question which the bartender had to decide when making the sale. I feel that as a practical matter if the bartender questioned the buyer and others who might be present as to whether the particular Indian had adopted the language of civilization and made a decision thereon, there would be little prospect of obtaining a conviction, particularly if the evidence were much in dispute.

In my opinion to adopt "the language of civilization" the particular Indian must be able to express simple thoughts in simple words in the English language (or some other civilized language) and to understand

simple words when spoken to him in that language. He would not have to have an extended knowledge of the language so as to be able to understand all words spoken to him; neither would he have to be able to read and write in that language.

I do not think that the statute should be declared void for uncertainty because a question of fact arises in applying it. It is proper to submit such a question of fact to a jury if the evidence warrants it.

I do not think that because an Indian has given up the habits and customs of a savage condition that it must be implied that he has adopted a civilized language.

Furthermore, I do not think that the officials of the city of Tower would be under any criminal liability of the city's bartender should inadvertently make a sale to an Indian who had not adopted a civilized language. They undoubtedly would not have knowledge of the sale and could not be held personally liable in a criminal proceeding.

RALPH A. STONE,
Assistant Attorney General.

Tower City Attorney.

April 7, 1948. 218-J-9

NONINTOXICATING

73

License—On sale—3.2 beer licenses may be issued to the proprietor of an on sale exclusive liquor store—M. S. 1945 340.07 as amended by L. 1947, C. 342.

Question

Whether an on sale license for the sale of nonintoxicating malt beverages may be granted to the proprietor of an on sale exclusive intoxicating liquor store.

Opinion

The definition of an "exclusive liquor store" was changed by Laws 1937, Chapter 421, so as to include a place "for the sale of intoxicating liquors, cigars, cigarettes, all forms of tobacco, nonintoxicating malt beverages, and soft drinks at retail, either on-sale or off-sale."

This law now appears as Minnesota Statutes 1945, Section 340.07, as amended by Laws 1947, Chapter 342. This law indicates that intoxicating liquors may be sold in an establishment where nonintoxicating malt beverages are sold, or vice versa.

It has been held that it is permissible to sell 3.2 beer on sale in a place licensed for the sale of intoxicating liquor on sale. That is the opinion of this office.

RALPH A. STONE,
Assistant Attorney General.

Attorney for Village of Cuyuna.

June 10, 1947. 217-B-5

74

License—Sale—Boat—Dancing on deck—Boat navigating waters of county is licensed by county board. Such license is not authority of licensee to sell within limits of village on lake. License required for compounding soft drinks, but not for selling. Deck of boat described, devoted to dancing, is public dancing place. If communication afforded between public dancing place and room in boat where nonintoxicating malt liquors are sold containing more than one-half of one per cent of alcohol by volume, license for public dancing place prohibited—M. S. A., Secs. 340.01, 340.02, Subd. 2, 34.01, Subd. 2 and 3, 34.02-34.04, 617.42, 617.46.

NOTE: This opinion overrules opinion to City Attorney, Sauk Centre, Minn., dated Oct. 26, 1945, as to what constitutes intoxicating liquor under dance law.

Facts

"'A' contemplates building a boat to be operated by him on Lake Minnetonka and to be used to carry passengers for sightseeing and pleasure purposes. He expects to have three decks on this boat—one deck below the water line, one deck on the water line and one deck above the water line. It is contemplated the deck below the water line will be used as a place in which to sell 3.2 beer and soft drinks, that the deck on the water line will be used to seat passengers and that the upper deck will be used for dancing. The three decks will be connected by halls and stairways enabling a person to go from one deck to another. The boat will be operated by means of a steam engine.

"The boat will carry about 500 passengers. It will operate from a dock in the Village of Excelsior and will make trips around the lake and return to the starting place without stopping at other docks. Each passenger will be charged one fare for his transportation and will have the privilege of dancing without extra charge but will have to pay extra for beer and other refreshments."

Questions

1. "(a) May 'A' secure a license to sell 3.2 beer on this boat while it is being operated on the lake under Section 340.01 to 340.06 inclusive, Minnesota Statutes 1945, bearing in mind the fact that no part of the

lake is located within the towns, villages or cities along its shore line and also bearing in mind the fact that a small part of the lake is located in Carver County? If so from whom? (b) Would this license permit him to sell beer while the boat is tied up to the dock at Excelsior? If such a license can be issued from whom can it be secured? (c) Is a license necessary to sell soft drinks and if so, from whom may it be secured?

2. "Would the deck of the boat on which dances are conducted be a public dancing place within the meaning of Section 617.42, Minnesota Statutes of 1945?

3. "If the upper deck of this boat would be a public dancing place could 3.2 beer be sold on the other decks of the boat?"

Opinion

M. S. A., Sec. 1.03, **reads:**

"The concurrent jurisdiction of any county now or hereafter formed and of all courts and officers exercising jurisdiction throughout the county shall extend over such water area as would be included if the boundary lines of the county were produced in the direction of their approach and extended across these waters to the opposite shore."

So, Lake Minnetonka being contained almost entirely within Hennepin County except for a small portion situated in Carver County, it would appear that the county board of Hennepin County has authority over those waters within the county, which is almost the entire lake. It would appear that under authority of M. S. A., Sec. 340.01 the county board has authority to license the sale of 3.2 beer to be sold on a boat navigating upon the waters of Lake Minnetonka within Hennepin County. It would appear that the boat is an establishment "for the sale of non-intoxicating malt beverages" within the meaning of Sec. 340.02, Subd. 2.

The authority to license and regulate the business of vendors at retail of nonintoxicating malt liquors within their respective jurisdictions is conferred upon the governing body of each county, city, village and borough. I understand that so far as this authority applies to cities, villages and boroughs, it means that license to conduct such business within the boundaries thereof may be granted by such municipality. It is my understanding that the authority of the county board to issue a license to conduct such business in a town, and not within the boundaries of a city, village or borough, is granted. So, the question whether such boat, when tied to the dock at Excelsior, could sell 3.2 beer would depend upon whether the boat was then within the boundaries of the village. If within the boundaries of the village, a license from the village would be required. If the boundary of the village is the water's edge, then the boat would be beyond such boundary and would not require the village license.

The terms "soft drinks and other non-alcoholic beverages" are defined in M. S. A., Sec. 34.01, Subd. 2. Carbonated beverages are defined in Subd. 3 of the same section.

The regulation in respect to such soft drinks appears to be with reference to the manufacture, mixing or compounding thereof, not the sale. M. S. A., Sec. 34.02-34.04.

It appears to me that the language of M. S. A., Sec. 617.42, is broad enough to include the deck of a boat intended and used for public dancing. In other words, the boat deck, when so used, is a public dancing place within the meaning of Sec. 617.42.

The facts stated show that the boat will be a place which has communication between the public dancing place and the room in which the 3.2 beer will be sold. So, if 3.2 beer is intoxicating liquor within the meaning of Sec. 617.46, such public dancing place could not be licensed. The term "intoxicating liquor," according to Sec. 617.42, means a beverage containing one-half of one per cent or more by volume of alcohol. The question whether the beverage is intoxicating under that definition is one of fact.

CHARLES E. HOUSTON,
Assistant Attorney General.

Hennepin County Attorney.

October 28, 1948. 217-F-4

75

Sale—Off sale—Hours—3.2 beer may not be sold off sale between the hours of one a. m. and seven a. m. on any day except Sunday, and between the hours of two a. m. and 12 m. on any Sunday—M. S. A. 340.021.

Question

"May the holder of an on and off sale 3.2 beer license sell beer off sale between the hours of 1:00 a. m. and 7 a. m. on week days and between the hours of 2:00 a. m. and 12 p. m. on Sundays?"

Opinion

Laws 1939, Chapter 402, is entitled "An act relating to the closing hours for the on sale of non-intoxicating malt liquors." The body of the act makes no reference to the on sale of such liquors. It reads:

"No non-intoxicating malt liquors containing from one-half of one per cent by volume or 3.2 per cent of alcohol by weight shall be sold in this state between the hours of 1:00 A. M. and 7:00 A. M. on any day except Sunday, and between the hours of 2:00 A. M. and 12:00 M. on any Sunday."

This statute now appears as M. S. A. § 340.021. As contained in the Minnesota Statutes, no reference is made to the title of the act which limits its operation to the sale of beer on sale.

M. S. A. 340.021 is headed "Closing hours for sale of non-intoxicating liquors." Then follows the language as stated.

In an opinion dated May 8, 1939, (Opinion No. 162, Attorney General's Report for 1940) it was held that this 1939 act was limited by its title to the on sale of non-intoxicating malt liquors, and that it did not affect the closing hours as to off sale non-intoxicating malt liquors. This opinion was rendered before the adoption of the 1945 law hereinafter referred to and before the decision of the court in the case next herein cited. Clearly this opinion was right when it was rendered.

The question arises whether that opinion should now be changed on account of the position taken by our court in the case of **State ex rel. Bergin v. Washburn**, 28 N. W. 2d 652. That opinion refers to the act approved March 8, 1945, and cited in the preface to M. S. A. Vol. 3, page III. That statute reads as follows, which language was quoted by the court in the opinion last cited:

> "The compilation and revision of the general statutes of the state of Minnesota of a general and permanent nature, prepared by the revisor of statutes under the provisions of Laws 1943, Chapter 545, and filed in the office of the secretary of state on December 28, 1944, is hereby adopted and enacted as the 'Minnesota Revised Statutes'."

Then the court goes on to say:

> "The statute thus adopted and enacted as the 'Minnesota Revised Statutes' must be given effect as 'the latest expression of the legislative will'."

The statutes as adopted in 1945 apply to both the sale of 3.2 beer at on sale and off sale. Until the Supreme Court shall modify the effect of the case above cited, M. S. A. 340.021, which contains no reference limiting it to the on sale of beer, must be given effect as it appears in the Minnesota Statutes under the ruling of the case cited.

Following the decision in the Washburn case, it would appear that the off sale of 3.2 beer is prohibited between the hours stated.

RALPH A. STONE,
Assistant Attorney General.

Le Center Village Attorney.

July 15, 1948. 217-F

76

Sale—School—Within 1500 feet of a closed public school building—M. S. 1945 § 340.72.

Question

In view of M. S. 1945, Sec. 340.72, which prohibits the sale of intoxicating liquors within 1500 feet of a public school outside a municipality, is

the sale of 3.2 beer within this distance from a school which has been closed for several years prohibited?

Opinion

If the school building referred to in your question has been closed for several years, it cannot in our opinion be considered a school within the meaning of M. S. 1945, Sec. 340.72, and for that reason the section under consideration is not applicable.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.

April 19, 1947. 217-F

77

Sale—Sundays—Hours for sale of beer—Village may adopt ordinance to prohibit sale of beer on Sundays and make same effective during the life of outstanding licenses.

Facts

An ordinance of the village of Donaldson permits the sale of beer on Sunday afternoons. Beer licenses are issued on January 1 to expire on the following December 31. It is proposed that the present ordinance be amended so as to prohibit the sale of beer on Sundays.

Question

Can the council put such amended ordinance into effect at once after its adoption and publication, or would the enforcement thereof have to be delayed until January 1 when new licenses are issued?

Opinion

The holder of a beer license has no vested right which would be impaired by a change in the terms of the ordinance as respects the hours of sale. It is my opinion that the village may prohibit the sale of beer on Sundays and make the ordinance effective immediately notwithstanding there are outstanding beer licenses.

See Ruppert v. County of Scott, 28 N. W. 2d 642.

I call your attention to the following quotation from 17 Ruling Case Law 474, Sec. 5:

> " * * * Following the general principle that a license is not a contract, it is clear that it does not in itself create any vested right, or permanent right, and that free latitude is reserved by the legislature

to impose new or additional burdens on the licensee, or to alter the license, or to revoke or annul it. * * * "

RALPH A. STONE,
Assistant Attorney General.

Attorney for Village of Donaldson.

September 8, 1947. 217-F

MILITARY

SOLDIERS AND SAILORS

78

Reserve officers—Military leave without pay—M. S. A. 192.261.

Facts

"The City of Duluth has a number of civil service employees holding reserve commissions in the various reserve components of the armed forces. Under the present program of expansion of the armed forces of the United States, the United States Army has inaugurated a campaign to solicit reserve officers to voluntarily enter upon active duty with the Army for periods normally of three years. Under this voluntary plan the Reserve Officer is solicited informally to accept active duty status and if he assents, then he is ordered to active duty in the same manner as though called regardless of desire on his part. It is considered that if this voluntary program should fail due to a lack of volunteers, the Army will then order reserve officers to active duty regardless of their desires.

"The Civil Service Commission of the City of Duluth has inquired of this Department as to the status of these civil service employees if called to active duty, whether under the voluntary plan or whether ordered to active duty regardless of desire on their part."

Questions

"1. If a civil service employee of the City of Duluth holding a reserve commission in the Army of the United States is called to active duty under the voluntary plan mentioned above, will his civil service rights and status be protected under the provisions of 1945 Minnesota Statutes, Section 192.26 and Section 192.261, or any other laws of the State of Minnesota applicable thereto?

"2. If a civil service employee of the City of Duluth holding a reserve commission in the Army of the United States is called to active

duty regardless of his desire in the matter, will his civil service rights and status be protected under the provisions of 1945 Minnesota Statutes, Section 192.26 and Section 192.261, or any other laws of the State of Minnesota applicable thereto."

Opinion

Your questions differentiate between a reserve officer who is called to active duty under what you term "a voluntary plan" and a reserve officer who is called to active duty regardless of his desire in the matter. It is my understanding that, under Section 37a of the National Defense Act, a reserve officer may not be called for active duty for more than fifteen days in any calendar year without his own consent except in time of national emergency expressly declared by Congress. To the best of my information, there is not now any national emergency so declared by Congress. There seems to us no basis then for differentiating between reserve officers on the basis of their call to active duty. It is possible, in rare instances, that a reserve officer who has not attained his twenty-sixth birthday may be inducted under the Selective Service Act of 1948, in which case he would, for our purposes, be in the same class as any other inductee. Therefore our answer will apply alike to all reserve officers ordered to duty.

As we understand your question, it is directed to the status of reserve officers who are called to active duty for a period in excess of fifteen days. Hence, M. S. A., Sec. 192.26 does not apply. The applicable provision of law is M. S. A., Sec. 192.261. Subd. 1 thereof provides:

> "Subject to the conditions hereinafter prescribed, any officer or employee of the state or of any political subdivision, municipal corporation, or other public agency of the state who engages in active service in time of war or other emergency declared by proper authority in any of the military or naval forces of the state or of the United States for which leave is not otherwise allowed by law shall be entitled to leave of absence from his public office or employment without pay during such service, with right of reinstatement as hereinafter provided. This shall not be construed to preclude the allowance of leave with pay for such service to any person entitled thereto under section 192.26."

The test to apply here is: Is the reserve officer engaging "in active service in time of war or other emergency declared by proper authority?" As we have stated, we are not informed of the existence of any "other emergency declared by proper authority." There remains the first condition, "active service in time of war." Peace has not as yet been concluded with the nations with whom a state of war with the United States was declared to exist on December 7, 1941. It follows then, until such time as the provisions of M. S. A., Sec. 192.261, may be amended or repealed or until a state of war no longer exists, that a reserve officer, otherwise eligible, who is called to active duty with military or naval forces of the United States, is placed by operation of law on a leave of absence without pay from his public office or employment during such service with right of reinstatement as provided

by M. S. A., Sec. 192.261, Subd. 2, and right to other privileges provided by law for persons on such leave of absence. This answers your questions.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Duluth City Attorney.

October 6, 1948. 310-H-1-A

VETERANS' PREFERENCE

79

Benefits—Period within which service will entitle ex-servicemen of World War II otherwise eligible to benefits under Veterans' Preference Law begins December 7, 1941, and ends December 31, 1946, both dates inclusive—Minn. Stat. 1945, § § 197.45-197.47.

Question

You ask: With reference to World War II, what are the first and last dates of the period within which service will entitle ex-servicemen of that war otherwise eligible to the rights and privileges of the Veterans' Preference Law (Minn. Stat. 1945, § § 197.45-197.47)?

Opinion

The Attorney General over a period of many years in passing upon similar questions with reference to the other conflicts enumerated in the Veterans' Preference Law has uniformly construed the law to refer to periods of actual hostilities. Applying this long-established construction to the problem submitted by you, we find that Congress has recognized that actual hostilities commenced on December 7, 1941 (See Public Laws, Chapter 329, 77th Congress, First Session), that the President by proclamation declared hostilities to have ceased on December 31, 1946, and that the period within which service will entitle ex-servicemen of World War II, otherwise eligible to the rights and privileges of the Veterans' Preference Law, is the period commencing on December 7, 1941, and ending on December 31, 1946, both dates inclusive.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Duluth City Attorney.

May 12, 1948. 85

80

Merchant marine—Member of merchant marine not a veteran within meaning of M. S. 1945, § 197.45.

Question

Whether a member of the merchant marine is entitled to the veteran's preference provided for by Minnesota Statutes 1945, § 197.45.

Opinion

Section 197.45 defines "veteran" to include any man or woman honorably discharged from the army, navy, marine corps, or women's auxiliary army corps of the United States.

It is our opinion that these components of the armed forces do not include seamen of the merchant marine. Cf. American Law of Veterans, § 8, § 264.

KENT C. VAN DEN BERG,
Assistant Attorney General.

Albert Lea City Attorney.

April 21, 1948. 85-A

81

Reduction of force—Transfer of departments—M. S. 1945, § § 197.45-197.46.

Facts

For ten or twelve years prior to 1947, X, an honorably discharged veteran of World War I, was employed by the city of Virginia as a watchman. His place of employment during the first few years was at the Virginia Airport. Subsequently, his place of employment was transferred to the Virginia municipal golf course where he continued to perform duties as watchman until his separation. In April, 1947, the city council of Virginia adopted the following resolution:

"RESOLVED, by the city council of the City of Virginia, that

"WHEREAS, in order to curtail expenses, the City Council of the City of Virginia has determined that the Park Commission of the City of Virginia shall assume possession, supervision, and maintenance of the municipal golf course located in this city,

"NOW THEREFORE, BE IT RESOLVED, by the City Council of the City of Virginia that the Park Commission of the City of Virginia is hereby directed to assume the possession, supervision, and maintenance thereof, and the Mayor and City Clerk of the City of Virginia are

hereby directed to transfer the sum of Fifteen Thousand Dollars ($15,000.00) from the general fund to said Park Commission for the supervision and maintenance of said municipal golf course for the period of one year from the date of this resolution. Said Park Commission is further directed that any and all income collected by said Park Commission at said golf course may be kept for the purpose of defraying costs of supervision and maintenance."

Thereafter the park commission abolished all watchmen's jobs.

Question

Whether or not X has preference over non-veterans who are employed as watchmen by the city at places other than the golf course.

Opinion

We assume the transfer of the management of the golf course to the park commission and the subsequent abolition of all watchmen's jobs was done in good faith and was not designed to evade the soldiers' preference laws, Minnesota Statutes 1945, Sections 197.45-197.46.

If X is to be treated in the same category as the other watchmen of the city, the principles of law applicable are clearly set forth in **State ex rel. Boyd v. Matson,** 155 Minn. 137, and **State ex rel. Evens v. City of Duluth,** 195 Minn. 563. See also opinion of attorney general dated March 7, 1946, copy of which is enclosed.

Whether or not X can be treated in the same category as other watchmen depends largely upon the characterization of facts, and in the event of a contest will depend upon the evidence presented in the particular case. Consequently, this opinion is of necessity limited to the particular facts disclosed in your inquiry.

We assume that until the resolution of the city council X was an employee of the city as a unit, subject to assignment to various departments of the city, rather than an employee of any department thereof. The question is whether X's status is changed by virtue of the resolution passed by the city council.

The park commission is created by Chapter XI of the Virginia charter. It consists of five members appointed for a term of five years by the mayor, subject to the approval of the council (Section 201, Home Rule Charter, City of Virginia, 1926). The commission shall appoint such employees as it deems necessary (Section 203, ibid). The commission has its own seal, and the president is to sign all contracts and orders for the payment of money (Sections 204, 205, ibid). It has exclusive power over the system of public parks and parkways (Section 214, ibid).

It would seem clear from the above sections of the charter that the park commission, in the exercise of its charter powers, is an employing unit separate and distinct from the other departments of the city.

This raises the question of whether these charter provisions apply to the commission's operation of the golf course. In this connection it should be noted that the commission's exclusive management and control powers apply to the park fund and all lands which may be acquired for parks or parkways (Section 211, ibid). Land for park purposes may be acquired by the commission by gift, devise, purchase, or condemnation (Section 212, ibid). The city council may, by resolution, set aside any street or avenue or section thereof as a parkway and place the same under the supervision of the commission for such specific and limited purposes as may be named in the resolution (Section 213, ibid).

If the golf course were acquired by the park commission as a part of the parkway system, then X, at the time of the transfer, would have become an employee of the park commission as distinguished from an employee of the city. However, it would seem that the golf course was not incorporated into the park system. The golf course had, in the past, been maintained separately from the park system, and the resolution adopted April 1, 1947, does not purport to transfer the golf course to the commission to be incorporated into the park system of the city. The appropriation to the commission is not to be paid into the park fund created by section 128 of the city charter but is specifically earmarked for costs of operation of the golf course and income received therefrom is subject to the same limitation. The employees of the city assigned to the golf course will be paid from those funds. The employees of the park commission are paid from the park fund created by section 128. There appears to have been no act on the part of the park commission to incorporate the golf course into the park system and thus bring it within the exclusive control of the commission.

It is, therefore, our opinion that the park commission, in operating the golf course, does not have the broad and exclusive charter powers which attaches to its operation of the park system, and which includes the authority to hire and fire employees in its own name. What powers the commission has over the golf course arise from the delegation by the council, and are not derived from the charter. Consequently, it is our opinion that the transfer of the golf course to the park commission did not affect the status of X as an employee of the city, and that he is entitled to such preference over other watchmen employed by the city as would be the case had no transfer occurred.

KENT C. VAN DEN BERG,
Assistant Attorney General.

Virginia City Attorney.

September 9, 1947. 85-A

VETERANS

82

Records—Necessary number of certified copies of discharge to be provided
—L. 1947—C. 169.

Facts and Question

"The act (Laws 1947, Chapter 169) is so drawn that by its language it embraces the issuance of a given document in the singular, that is, it provides for but one of such documents fee free to the veteran applicant. The Register of Deeds poses the question whether he might run into difficulties if a veteran applied for two, three, or more certified copies of given documents. The Clerk of the District Court is likewise interested in this question for his guidance. Both officials want to be assured that in event that they issue more than one document under their certificate that they will have no difficulty in obtaining payment therefore on making their claim to the County Board. Both officials feel that when the request is made of them for certified copies of documents in excess of one, particularly, that either a service officer or an authorized employee of the veterans' administration should provide advice that a number greater than one of such certified documents is required to assist a veteran in presenting his claim in a proper, due and legal manner."

Opinion

Minnesota Statutes 1945, Section 197.63, subdivision 1, as amended by Laws 1947, Chapter 169, provides, among other things, that upon request of a veteran "a certified copy" of his discharge shall be furnished him without charge. Subdivision 2, ibid, provides that when the salary of the officer issuing such "a certified copy" consists wholly or in part of fees, the county board is directed to pay the fee.

The canon of construction recognized in this state is that the singular includes the plural, unless such a construction would be inconsistent with the manifest intent of the legislature. Section 645.08.

It is therefore our opinion that the veteran should be supplied with sufficient number of certified copies of discharge so that he may properly file a claim for veterans benefits, and in a proper case the officer issuing such certified copies is entitled to payment of his fees from the county.

KENT C. VAN DEN BERG,
Assistant Attorney General.

Lake of the Woods County Attorney.

May 20, 1947. 310

MUNICIPALITIES

AERONAUTICS

83

Airports—County—Expenditure for airports to be paid from county general revenue fund—MS 1945, § 360.037, subd. 1. **Funds—Transfer—Borrowing**

—MS 1945, § 375.18, subd. 7; § 385.32. **Tax levy—Limitation**—MS 1945, § 275.09, as amended by L. 1947, C. 268. **Levy may be made before July meeting**—MS 1945, § 275.03. **Warrants issued in anticipation of tax collection**—MS 1945, § 475.22.

Facts and Question 1

You state that the county wishes to acquire land for an airport; that at present there are not sufficient moneys in the county general revenue fund to pay for the acquisition of the land. You state that there may be a surplus in the county welfare fund and inquire whether such surplus may be used for the acquisition of the land in question.

Opinion

The Minnesota Airports Act provides that expenditures by counties for airport purposes shall be made out of the general revenue fund only. M. S. 1945, § 360.037, subd. 1.

I call your attention, however, to M. S. 1945, § 375.18, subd. 7, which provides as follows:

> "The county board of each county shall have power:
>
> * * * * *
>
> "(7) To transfer by unanimous vote any surplus beyond the needs of the current year in any county fund to any other such fund to supply a deficiency therein, except in counties having over 75,000 inhabitants; * * * ."

It is our opinion that, if the county board found that there was a surplus in the county welfare fund, it could by unanimous vote transfer that surplus to the general revenue fund and thereafter use such funds for the acquisition of the land in question.

I also call your attention to a possible alternative method provided for by M. S. 1945, § 385.32, which provides as follows:

> "With the approval of the county board and of the county auditor, the treasurer of any county, in order to save payment of interest on county warrants drawn upon a fund in which there shall be temporarily insufficient money in the treasury to redeem the same, may borrow temporarily from any other fund in the county treasury in which there is a sufficient balance to care for the needs of such fund and allow a temporary loan or transfer to any other fund and the treasurer may pay such warrants out of such funds; provided it shall first be determined that the amount of such transfer may be returned to the fund from which borrowed before there is need for same in such fund and, in any event, within six months; and any such money so transferred shall be returned to the fund from which drawn as soon as money shall come in to the credit of such fund to which it has been loaned."

It should be noted that under § 385.32 the treasurer is authorized to borrow only upon the approval of the county board and the county auditor and that the section is designed to apply in cases where there is a temporary deficiency in one fund. This section also looks toward a repayment to the "creditor fund" before there is need for such moneys in that fund and, in any event, within six months after the transaction.

Facts and Question 2

You state that the present tax levy for the county general revenue fund is 5.12 mills, which yielded $84,992.40, and inquire whether the tax limitation statute would permit this levy to be increased.

Opinion

M. S. 1945, § 275.09, as amended by L. 1947, C. 268, provides that the rate of tax for county purposes shall be such amount as may be levied by the county board and in counties with less than 100,000 inhabitants shall not exceed 8 mills, subject to certain limitations not applicable to your county.

It is our opinion that the levy for your county general revenue fund may be raised to include 8 mills.

Question 3

Whether, if the county were to levy a tax for the general revenue fund, warrants could be issued in anticipation of tax collection.

Opinion

It is our opinion that warrants in anticipation of tax collection may be issued after a tax has been levied. This is, however, subject to M. S. 1945, § 475.22, which prohibits the issuance of such warrants in an amount in excess of the average amount actually received in tax collections on the levy for the three previous calendar years plus 10%.

Question 4

Whether a tax levy for the general revenue fund could be made prior to the July meeting of the county board.

Opinion

M. S. 1945, § 275.03 provides that the county taxes shall be levied by the board at its July meeting. It is our opinion that the fixing of the July meeting is directory only, and not mandatory, and that, therefore, the

county could prior to the July meeting levy taxes for the county general revenue fund.

KENT C. VAN DEN BERG,
Assistant Attorney General.

Freeborn County Attorney.
April 20, 1948. 234-B 519-D

BIDS AND CONTRACTS

84

Advertising—Counties—Must advertise for bids on contracts mentioned in MSA Sec. 375.21, if they have a population of less than 75,000 where the contract exceeds $1,000. L. 1947, C. 138, by necessary implication, repealed MS, Sec. 164.22 and 160.39 so far as sections apply to counties, but did not repeal those sections in their application to other municipal corporations.

Facts

M. S., Sec. 164.22, prohibits a county, town, village or city of the fourth class from entering into a contract for the construction of a bridge where the contract price of the bridge exceeds $500 without advertising for bids as therein provided.

Sec. 160.39 prohibits a county or town from contracting for the construction or improvement of a road where the contract price exceeds $500 until advertisement for bids has been published as there provided.

M. S. A., Sec. 375.21, (L. 1947, C. 138, Sec. 1) relates to counties having a population of less than 75,000. It prohibits the county from making a contract for work or labor, or for the purchase of furniture, fixtures or other property, or for the construction or repair of roads, bridges or buildings, the estimated cost or value of which exceeds $1,000 without first advertising for bids in some newspaper of the county. Before amendment the dollar limitation was $500 where it is now $1,000.

Question

In counties of less than 75,000 population, is it now required that the county advertise for bids before entering into a contract where the price exceeds $500 (1) for the construction or improvement of any road, and (2) for the construction or erection of a bridge?

Opinion

In counties of less than 75,000 inhabitants, there is no limitation on the power of the county board to enter into a contract for the construction or repair of roads, or bridges, the estimated cost or value of which does not exceed $1,000. But if the estimated cost or value thereof exceeds $1,000,

then M. S. A., Sec. 375.21, requires advertisement for bids before the contract is made. It appears that so far as the first two cited statutes apply, they were repealed by necessary implication in so far as they relate to counties of less than 75,000 inhabitants. But as those statutes apply to counties having a population of more than 75,000 inhabitants, and as they apply to other municipalities and counties, they are still in force. There is no necessary implication of their repeal except as they apply to counties.

CHARLES E. HOUSTON,
Assistant Attorney General.

Public Examiner.

June 18, 1947. 707-A-7

85

Construction contracts—Liquidated damages for delay in construction—Stipulation in contract for payment of certain sum per day for each day's delay in completing contract as liquidated damages is enforcible.

Facts

"The Village of Aurora entered into a contract with H. C. T. Company to seal coat certain streets within the Village, specifications of which were on file with the Village. Mr. T. filed surety company bond with the Village for the performance of this contract. The contract provided as follows:

" 'The contractor further covenants and agrees that he will commence work on or before August 15, 1947, and will have the same completed in every respect to the satisfaction and approval of the Village Council, on or before September 1, 1947, it being expressly understood and agreed that in case of failure on the part of the contractor, for any reason, except with the written consent of the Village Council, to complete the job on or before the date aforesaid, and the party of the first part shall have the right to deduct from any money due or which may become due the contractor, the amount of ten dollars ($10.00) per day for each and every day elapsing between the time stipulated for the completion. And the actual date of completion, in accordance with the terms thereof, or if no money shall be due the contractor, the party of the first part shall have the right to recover said sum; said deduction to be made or said sum to be recovered, not as a penalty but as liquidated damages.'

"The contractor did not complete the work in the time specified, but completed it thirty (30) days subsequent to the date provided for in the contract, and furthermore, he was approximately eight hundred sixty (860) some gallons short in the amount of oil he should have put on the streets."

Question

"Whether or not the Village is justified in deducting the ten dollars ($10.00) per day as provided in the contract, as liquidated damages for not completing the work in the time specified in the contract."

Opinion

I quote the following from Dunnell's Digest, Vol. 2, title Damages, p. 503:

> " * * * In construction contracts a provision giving liquidated damages for each day's delay is an appropriate means of inducing due performance, or of giving compensation, in case of failure to perform; and courts give it effect in accordance with its terms. * * * "

The above quoted language is found in the case of Robinson v. U. S., 261 U. S. 486, 488.

County of Blue Earth v. Bisballe Construction Co., 171 Minn. 20, 213 N. W. 30, involved a contract for the construction of a public ditch which contained a provision for the payment of $10.00 as liquidated damages for each day that the ditch remained uncompleted after the time specified in the contract. The court held that as against the contractor, the stipulated damages may be recovered for delay in completing the work, citing the case of Robinson v. U. S. supra.

I suggest that you read the article on liquidated damages found in 2 Dunnell's Digest, Sec. 2536, et seq.

I also refer you to 15 A. J. title Damages, Sec. 249, p. 681, which I quote as follows:

> "In the determination of whether the amount stipulated for is to be regarded as a 'penalty' or as 'liquidated damages,' the court will generally take into consideration its reasonableness—that is, whether it bears some reasonable proportion to the loss actually suffered. A stipulation for a sum as liquidated damages in an amount which is not disproportionate to the damage that might probably result from a breach of the contract will usually be regarded as one for liquidated damages, at least unless the actual damages are readily ascertainable or the real intention of the parties, under the recognized rules, shows it to be a penalty. But agreements to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach will not be enforced as agreements for liquidated damages. Moreover, if the sum stipulated is so large as to be out of all proportion to the probable or presumptive loss, and is therefore not a fair measure of the damage actually sustained, it will generally be regarded as a penalty, especially where the actual damage resulting from the breach may be readily ascertained or where the contract discloses no intention to fix the sum as liquidated damages or leaves the intention in this regard in doubt. In other words, the damages stipulated for must be such

as to amount to compensation only, and if the principle of compensation has been lost sight of, the sum named will be treated as a penalty."

I do not know what the total amount of the contract was. Therefore I can draw no comparison between the amount of liquidated damages specified and the amount of the contract. It would be impossible to say definitely whether the village was justified in deducting the $10.00 per day. That would be a question for the court. The Council, however, is not obliged to waive this provision of the contract, and may make the deduction and let the matter go to court for decision if the contractor is so advised.

RALPH A. STONE,
Assistant Attorney General.

Attorney for Village of Aurora.

November 14, 1947. 844-A-3

86

Contractor—Payment—Contractor who started work before contract was awarded to him and completed the work in accordance with its terms is entitled to be paid in accordance with the contract.

Facts

"In the issues of November 8th and November 15, 1945, of the Hennepin County Review, the official paper for the village of Hopkins, appeared a notice for bids stating that 'The Village of Hopkins will receive sealed proposals until 7:30 o'clock P. M. November 26, 1945, at the village hall for construction of storm sewer mains in Parkridge Addition, in said village, in accordance with plans and specifications which are on file with the village clerk.' The notice also contained the usual additional provisions common to notices for bids.

"The minutes of the meeting of November 26, 1945, show that one bid was received for the construction of these storm sewers and this bid was accepted and the village was authorized to enter into a contract with the bidder for such construction.

"There is on file with the village clerk a contract covering this storm sewer work between the contractor and the village dated the 27th day of November, 1945.

"It appears that this contractor had another contract with the village for the installation of sanitary sewers in the Parkridge area and was engaged in this work during the summer of 1945; that through some misunderstanding the contractor actually started construction on the storm sewer project prior to the time that his bid for the storm sewer was submitted and his storm sewer contract entered into so that some portion of the work was done prior to November 26, 1945; that

the contractor completed the installation of the storm sewers and that there is due him $10,553.00 for the same according to his bid; that the storm sewer is in and is working satisfactorily and the village is receiving the benefit of it but the contractor has not yet been paid for his labor and material.

"The cost of this storm sewer is not to be assessed against benefited property owners but is to be paid from the general fund of the village and no bonds are to be issued for its construction so that there is no particular question involved as to complying with any of the laws relating to special assessments or bond issues. So far as I know the only applicable provision of the statutes is that portion of Minnesota Statutes 1945, Section 412.21, reading as follows: 'All contracts for the purchase of merchandise, materials or equipment or for any kind of construction work undertaken by the village which require an expenditure of $100 or more, if not to be paid from road or poll tax, shall be let to the lowest responsible bidder, after public notice of the time and place of receiving bids'."

Question

Whether the fact that the contractor began the work before the contract was actually let to him would make it illegal to pay him the balance of the contract price.

Opinion

I think the balance due under the contract may legally be paid. The fact that the work was commenced before the contract was awarded is a mere irregularity which would not deprive the contractor of his right to compensation upon completing the contract thereafter awarded to him.

RALPH A. STONE,
Assistant Attorney General.

Hopkins Village Attorney.

February 20, 1948. 707-C

CHARTER

87

Amendments—Proposed—Expending money out of current expense fund for purpose of advising people as to provisions of the proposed amendments.

Question

"May the City of Minneapolis spend money out of its current expense fund for the purpose of advising the people in the city as to the provisions of the proposed amendment to the city charter? * * * "

Opinion

In searching for court decisions by which to determine the validity of the expenditure of public funds by a city council for the purpose of advising the people of the city as to the provisions of a proposed amendment to their city charter in addition to the publication thereof required by the constitution, we have found the following cases in which the facts appear to be analogous to those in the matter which you submit for an opinion.

In the case of **Elsenau v. City of Chicago,** 165 N. E. 129, the supreme court of Illinois held that no statutory provision requires a campaign for the discussion of the merits of the proposed bond issue at public expense and that the ordinance appropriating money therefor is unauthorized and void. The court said:

> " * * * The conduct of a campaign, before an election, for the purpose of exerting an influence upon the voters, is not the exercise of an authorized municipal function and hence is not a corporate purpose of the municipality. * * * "
>
> "In State v. Superior Court, 93 Wash. 267, it was held that a port district in the nature of a municipal corporation had no implied authority to spend money in a political campaign to defeat, on a referendum, an act increasing the number of port commissioners and limiting the bonded indebtedness of port districts."

In the case of Mines v. Del Valle, 201 Cal. 273, the supreme court of California decided that public service commissioners could not use municipal electric plant funds to secure a favorable vote in an election on a bond issue because necessary to correct misinformation.

In the first case above cited, it was admitted that the advertising did not purport to be an impartial statement of facts for information of the voters but was used to induce voters to act favorably upon the bond issues. Whether the court would have decided the case differently if city funds had been used solely for the purpose of circulating an impartial statement of facts cannot be definitely determined from its decision.

However, in this state the only authorized public expenditure under the state constitution and statutes in the matter of publicity in connection with the submission of a proposed charter amendment to the people is for the publication of such amendment once a week for four weeks in at least one newspaper of general circulation in the city. The legality of expending public funds for publicizing a proposed amendment beyond the constitutional and statutory authority for the publication of the entire proposed amendment itself in a newspaper of general circulation even if impartial information alone is used is, in my opinion, of such a doubtful nature that the Attorney General is not justified in holding that the proposed expenditure of

public money in the matter of impartially advising the electorate with reference to proposed charter provisions submitted to the voters would be valid.

J. A. A. BURNQUIST,
Attorney General.

Minneapolis City Attorney.

November 22, 1948. 58-C

88

Amendment—Submission—To voters at the next election—Charter commission—Not necessary to resubmit proposed amendment to city council due to failure to publish notice required by statute—MSA, § § 410.10, 410.12. State Const., Art. IV, § 36.

Question No. 1

Whether the proposed amendment numbered 11 submitted to the Mayor of Minneapolis by the City Charter Commission on July 30, 1948, and by him on the same date to the city council may be voted upon at the general state election on November 2 next or whether the 90 day provision of the statute requires that it must be submitted prior to that date or some time prior to October 28.

Opinion No. 1

Unless otherwise noted, section references herein made are to those in Minnesota Statutes Annotated.

Section 410.12 provides that:

"Amendments shall be submitted as in the case of the original charter * * * ."

The State Constitution, Article IV, Section 36, provides for the acceptance of the proposed amendment "by three-fifths of the qualified voters of such city or village voting at the next election and not otherwise; * * * ."

Section 410.10 contains the provisions with reference to the submission to the voters of the original charter. As above stated, Section 410.12 requires charter amendments to be submitted as in the case of the original charter. Therefore, the provisions of Section 410.10 apply to the submission of amendments as well as to the original charter.

The material provisions in Section 410.10 read as follows:

"Upon delivery of such draft, the council or other governing body of the city or village shall cause the proposed charter to be submitted at the next general election thereafter occurring in the city or village within six months after the delivery of such draft, and if there is no

general city or village election occurring in the city or village within six months after the delivery of such draft, then the council or other governing body of the city or village shall cause the proposed charter to be submitted at a special election to be held within 90 days after the delivery of such draft. The council or other governing body may call a special election for that purpose only at any time. If the election is held at the same time with the general election, the voting places and election officers shall be the same for both elections. * * * "

Section 410.10 was originally Laws 1899, Chapter 351, Section 4. It has since been amended from time to time but is now in the form above quoted.

Laws 1899, Chapter 351, Section 4, as amended by Laws 1901, Chapter 323, providing for the submission of a proposed new charter at a general or special election was held to be constitutional in **State ex rel. Nichols v. Kiewel,** 86 Minn. 136. The relator's contention was that as the constitution provides for the submission to the voters of a proposed charter "at the next election" after the submission of a proposed charter amendment to the chief magistrate of a city, the only election at which a proposed charter could be voted upon was the next regular municipal election, and that the words "at the next election thereafter" of the Constitution could not be given a construction permitting special elections.

The Supreme Court in that case said:

"The question is not free from doubt, but we are of the opinion that the constitutional mandate in question was intended, not to limit the power of the legislature to regulate the manner of submitting the charter, but to speed its submission * * * ."

As Section 410.10 is a continuation of Laws 1899, Chapter 351, Section 4, as modified by amendments for the purpose of regulating the manner of submitting the proposed charter, and is also by Section 410.12 made applicable to proposed charter amendments, we are justified in assuming that the Supreme Court would uphold the constitutionality of Section 410.10 for the same reasons that it held Laws 1899, Chapter 351, Section 4, as amended, constitutional in 1902.

The answer to your question must, therefore, depend upon the interpretation given the provisions of Section 410.10.

There are several cases, such as **State ex rel. Lowe v. Barlow,** 129 Minn. 181; **State ex rel. Andrews v. Beach,** 155 Minn. 33; **and Godward v. City of Minneapolis,** 190 Minn. 51, which assume the constitutionality of submitting such a proposed charter amendment as is here involved at a general state election held in November of even-numbered years within six months of the delivery of such amendment to the chief magistrate of the city.

It is, therefore, my opinion that the submission of the proposed amendment in question at the November 2, 1948, election would be valid, and, under the decision in **Godward v. City of Minneapolis,** above cited, the charter amendment would be considered approved if three-fifths of those voting thereon voted in favor of its acceptance.

In view of the fact that there is no general city election, as distinguished from a general state election, in the city within six months after the delivery of the proposed amendment to the Mayor of the city, one provision of Section 410.10 authorizes the submission of the proposed charter amendment at a special election within 90 days after its delivery to the Mayor. As the two above-mentioned provisions appear to be somewhat in conflict but both methods are authorized, it is my opinion that the city council has the authority to use its discretion in the matter of selecting the time of holding the election upon the charter amendment. In doing so, it is assumed that the council will weigh the need for early submission thereof against the additional expense incident to a special election and consider such other matters as may be material. In any circumstances, I believe that the law requires submission of the proposed amendment not later than the next general state election.

Question No. 2

Whether there is any further duty on the part of the Charter Commission by way of resubmitting the amendment to the Mayor and any duty on the part of the Mayor to resubmit it to the city council.

Opinion No. 2

In the case of **State ex rel. Andrews v. Beach,** the court said:

> "The duty to submit them (charter amendments) is not at an end because respondents did not comply and no longer can comply with the directions of the statute. It is within their power at any time to call a special election and lay amendments before the people for ratification or rejection."

In my opinion, as the charter amendment has already been delivered to the Mayor and the city council, and, as the duty of the city council to submit the proposed amendment to the people for their vote thereon continues until performed, it would not appear necessary to have the proposed amendment resubmitted by the Charter Commission to either the Mayor or the city council.

J. A. A. BURNQUIST,
Attorney General.

Minneapolis City Attorney.

August 25, 1948. 58-C

89

Amendment—Taxation and finance—To provide for imposition of a graduated income tax—MSA § § 205.78, 410.10. Minn. Const., Art. 4 § 3.

Question

As to power of the City of Minneapolis to amend its home rule charter to provide for the imposition of a graduated income tax.

Opinion

There is no decision of our supreme court on the right of a Minnesota city to adopt a graduated income tax through amending its charter or by an ordinance of the city council. Our attention has been called to no city where such a tax is imposed by a city charter or ordinance in Minnesota or elsewhere. It is therefore impossible to say definitely what the position of our courts will be.

The purpose of this opinion is to call attention to the legislative powers of a home rule charter city under our statutes, constitution and court decisions and to the decisions of courts of other states concerning the legality of measures of a somewhat similar character, as well as to state the legal objections that can be made to the proposed amendment in the form in which it has been submitted to this office.

There are no Minnesota statutes which expressly limit the power of municipalities to impose taxes of the type here considered. The court said in **Board of Education of City of Minneapolis v. Erickson,** 209 Minn. 39, that "until the legislature has acted to create a lack of harmony between its law and the provisions of the charter, the legislative power exercised by the electorate of Minneapolis has the same force and effect as if exercised by the legislature itself."

A decision in this state applicable to taxation by municipalities is the case of **Park v. City of Duluth,** 134 Minn. 296, which involved the power of a home rule city to impose a wheelage tax upon the privilege of using streets. In that case the court said:

> " * * * The imposition of such a tax by a city, if authorized by the legislative power of the state, is reasonable and lawful, and has quite generally been sustained. * * *
>
> "The Constitution and general laws of the state confer upon the people of a city the power to frame and adopt its own charter. The adoption of such a charter is legislation. The authority which it furnishes to city officers is legislative authority. The people of a city in adopting a charter have not power to legislate upon all subjects, but as to matters of **municipal concern** they have all the legislative power possessed by the legislature of the state, save as such power is expressly or **impliedly withheld.** * * * " (Boldface supplied)

However, in the case of **State ex rel. Oliver Iron Mining Co. v. City of Ely,** 129 Minn. 40, our supreme court held that the power of taxation is not inherent in municipal corporations which have only the power in respect to taxation which has been granted to them by the constitution or the statutes. In Minnesota there is no expressed statutory authority for municipalities to

levy taxes of the type here considered. It is for that reason, I assume, that it is now proposed to amend the city charter so as to provide for the imposition of a tax of that nature.

It, therefore, becomes necessary to consider the question as to whether a graduated income tax amendment can be legally adopted by the city at this time when there is in effect a state graduated income tax. As heretofore stated, a power to enact a tax of that kind has not been expressly granted to a city either by the Minnesota constitution or any of its statutes. The enactment by the state of such a graduated income tax law may, therefore, be construed by the court as an implication that our municipalities do not have the authority to amend their charters to impose such a tax until the graduated income tax enacted by the state is no longer in force or municipalities through legislation are expressly granted the power to enact that type of a tax.

The most recent case to which my attention has been called is the Carter Carburetor case in the State of Missouri, 203 SW 2d 438, decided on June 9, 1947, on which a rehearing was denied on July 5, 1947. In the city charter of St. Louis, authority was given to the city council to enact any form of tax on any subject or any object within its discretion. Notwithstanding such broad power, the supreme court of Missouri held that the enactment of an income tax by the city was invalid, holding that in the State of Missouri the taxing power is exercised solely by the general assembly, except when it grants the power to municipalities.

In the 1947 session of our legislature, two laws were enacted, one of which expressly granted to the voters of the City of Minneapolis the right to vote on the question of imposing a one per cent gross income tax, and the other, the right to the city council to submit to the people the question as to whether a wheelage tax should be adopted. Such authority, I assume, was conferred upon Minneapolis largely on the theory that without such legislation it did not have the power to impose taxes of that nature.

In the State of Pennsylvania, the state has specifically provided by law that a municipality may levy any tax which has not been imposed by the state. However, if subsequent to the enactment of a tax by a municipality the state invades the same field, the municipal tax automatically is suspended. Therefore, the **Butcher v. City of Philadelphia** case, 6 A. 2d, page 298, upholding the income tax imposed by that city, would not be an authority in support of such a tax by the City of Minneapolis. In Ohio, the cases of **State ex rel. Zielonks v. Carrel**, 99 Ohio State 220, 124 N. E. 134; **City of Cincinnati v. American Telephone and Telegraph Company**, 112 Ohio State 493, 147 N. E. 806; and the case of **Firestone v. City of Cambridge**, 113 Ohio State 57, hold specifically that if the state has already imposed a tax of a particular kind, there exists an implication that a municipality may not levy a similar tax.

Therefore, if our supreme court should follow above cited decisions, it would find the proposed graduated income tax amendment invalid for it would hold that a state having enacted a form of tax has thereby preempted

the field for that kind of a tax unless otherwise provided by law; that a graduated income tax in effect as a state tax if enacted by a municipality would reduce to some extent the income tax paid to the state and could, therefore, be considered as an invasion of the state's field of taxation; and that as the graduated income tax amendment now proposed for your city affects not only citizens who reside in the City of Minneapolis, but other citizens within the State of Minnesota, as well as those outside of its limits, the tax is not one of purely local concern.

It is also clear that the proposed income tax amendment as now framed is subject to a variety of legal objections which may require the courts to find it invalid and to some of which reference is hereinafter made.

The proposed amendment provides for the computation of taxable income on returns under the federal income tax law. The proposed Minneapolis income tax, if adopted, will, therefore, vary according to the changes in the federal law from time to time. Such a provision would in a sense be a delegation to Congress of the right to legislate in the matter of certain features of the city tax law. No city has the power to transfer to the federal government or any of its agencies the power to determine what taxes are to be imposed by it for its own municipal purposes.

Under Section 1 (e), trusts, except those taxable as corporations, however created, by residents or nonresidents or by foreign or domestic corporations, will be taxed. The wording in connection with the imposition of this tax on trusts appears to be so broad and indefinite that the provision for such a tax might for that reason be construed by the courts as null and void.

If it is intended by the act to tax a nonresident individual by Section 2 (b) (3) on the income earned within the City of Minneapolis, it is difficult to see how the proposed amendment would be effective for that purpose. If the nonresident earns his income in Minneapolis and is entitled, as provided by Section 2 (b) (3), to deduct therefrom the gross income designated in Section 2, paragraph 2a, he would be apt to pay no income tax whatsoever to the City of Minneapolis, as it would appear that the amount of the gross income he is permitted to subtract from his Minneapolis income would always be the same or larger than the income he received from Minneapolis sources.

I assume that in the matter of deductions for dependents a wife was intended to be included, but under the federal law a wife is not a dependent, and unless it is specifically stated that she is to be included among dependents, there would be no deductions so far as she is concerned.

Another objection to the proposed amendment is its indefiniteness in so far as the tax on corporations is concerned. Section 1 (a) provides for the imposition of a tax for the privilege of transacting business within the city, while under Section 2, paragraph a, the tax is referred to as a privilege and income tax. The language is not clear as to whether a franchise or an income tax is imposed on corporations. Ordinarily a tax levied for the privilege of doing local business is a franchise tax. Assuming that the tax intended to be imposed by the proposed amendment is a franchise tax, such

a tax would be an ad valorem property tax under a Minnesota supreme court decision. The imposition of an ad valorem property tax will, of course, have effect upon the limits that have been provided in so far as an ad valorem tax on property is concerned.

A provision that should be included in all income tax acts is a cut-off date as of the basic date of the act. There is no such provision in the proposed amendment. In addition, the federal tax return, on which the city income tax is based, includes a tax on the income from United States bonds. As it is unconstitutional for either the state or a municipality to levy a tax on the income from United States bonds, such income should be excluded in computing a state or local income tax.

Another matter that deserves consideration is the fact that the Internal Revenue Code of the United States requires secrecy as to the returns made to the federal government. Such returns cannot be divulged by the United States government to any governmental unit that does not provide for the same secrecy. There is no provision of that nature in connection with the proposed amendment. Without access to the federal income tax records there could be no verification of the correctness of the city income tax returns which under the proposed amendment are intended to be based on the taxpayers' representations to the federal government.

Section 2 (b) reads as follows:

> "The income taxes on estates and trusts, other than those taxable as corporations, on resident individuals, and on non-resident individuals, on the income received from sources in the City of Minneapolis only, shall be computed * * * ."

From the manner in which that sentence is constructed, it is difficult to determine whether the clause "on the income received from sources in the City of Minneapolis only" was intended to apply to the income taxes on all four types mentioned in the above quoted section or only to nonresident individuals. If it applies to resident individuals, those residents who earn all their income outside of Minneapolis will be paying no income taxes to the city.

There are other features of the proposed graduated income tax amendment which need clarification, but what has been hereinabove said is sufficient to indicate the legal difficulties and extended litigation that may be encountered if the suggested tax should be imposed by the adoption of a charter amendment such as that which you have submitted for the consideration of the Attorney General.

Question

"In view of the above opinion, must the City Council submit the proposed amendment to the electors?"

Opinion

In the above opinion it was held that no Minnesota decision had been found directly in point, but that, if our courts will follow the supreme court decisions of other states cited in that opinion, the proposed amendment will be held invalid.

Ordinarily, the duty to submit a proposed charter amendment is mandatory. However, in **Andrews v. Beach,** 155 Minn. 33, the court said:

> " * * * We do not hold that an amendment to a charter must be submitted even though it is manifestly unconstitutional."

In **Winget v. Holm,** 187 Minn. 78, in construing what is now M. S. A., § 205.78, our supreme court said:

> " * * * There can be no essential difference between submitting to the voters a candidate who has no legal right to appear on the ballot and submitting a proposed amendment to the constitution in a form therein prohibited."
>
> " * * * There seems to be no good reason why the court should not interpose to save the trouble and expense of submitting a proposed constitutional amendment to a vote, if it be not proposed in the form demanded by the constitution, so that, though approved by the electors, the courts would be compelled to declare it no part of the constitution."

Likewise, if there appears to the council to be no good reason why it should, in the circumstances, permit, before a judicial decision on question involved, the incurring of the great expense incident to a city-wide election and to the activities connected therewith by submitting to the electors the proposed amendment where its validity is as doubtful as was stated in my previous opinion, the council, may in its discretion, refuse the submission thereof until ordered to do so by the court.

If, notwithstanding the situation hereinabove referred to, the council shall determine that the proposed amendment should nevertheless be submitted to an election by the voters before the courts shall so order, your second question needs an answer. That question reads as follows:

> " * * * may the City Council submit the proposed charter amendment to the electors at a special election to be held on the same day as the primary election for the nomination of candidates for state and county offices which is to be held on September 14, 1948, or must the City Council call a special election within ninety days from April 16, 1948, the date when the Charter Commission delivered the draft of this amendment to the Mayor?"

Article 4, Section 36 of the state constitution provides that a proposed amendment to a city charter may be accepted by three-fifths of the qualified voters of such city or village voting at the next election and not otherwise. M. S. A., § 410.10 reads in part as follows:

"Upon delivery of such draft, the council or other governing body of the city or village shall cause the proposed charter to be submitted at the next general election thereafter occurring in the city or village within six months after the delivery of such draft, and if there is no general city or village election occurring in the city or village within six months after the delivery of such draft, then the council or other governing body of the city or village shall cause the proposed charter to be submitted at a special election to be held within 90 days after the delivery of such draft. The council or other governing body may call a special election for that purpose only at any time. * * * "

In **State ex rel. Nichols v. Kiewel**, 86 Minn. 136, the court held that what is now M. S. A., § 410.10 is constitutional. We must, therefore, assume its provisions to be valid until reversed by the supreme court. Under such assumption, it must be held, as provided in that section, that, if the proposed amendment in question is to be submitted, it must be submitted at "the next general election" if such election occurs within six months after delivery of the amendment draft to the mayor, and, if such election does not so occur, the proposed amendment must be submitted at a special election within ninety days after such delivery.

The primary election this year occurs on the second Tuesday of September. Such primary is for the nomination of candidates and not an election of officers. It is clear that, as heretofore held by this office, a primary election is not "a general election" within the meaning of § 410.10; and, as the "next general election" referred to in § 410.10 occurs more than six months after April 16, 1948, the date of the delivery to the mayor of the draft of the proposed amendment, the section under consideration must be construed to provide that such amendment shall be submitted at a special election within ninety days after April 16, 1948. Because the 1948 primary election will not be held within ninety days after the delivery of the draft of the proposed amendment, the date of the primary cannot legally at this time be designated as the date for a special election on the adoption of the proposed amendment. If the delivery of the draft had not been made until a date within the ninety days immediately preceding the date of the primary election, a special election on the charter amendment provision could have been called to be held on the same date as that of the primary election.

Therefore, it is my opinion that, if the council shall at this time designate a day for an election at which the voters of Minneapolis shall cast their ballots for or against the proposed amendment, the election must be a special election, and the date therefor must be so designated that the special

election will be held within ninety day from April 16, 1948, the date of the delivery of the draft to the mayor of the city.

J. A. A. BURNQUIST,
Attorney General.

Minneapolis City Attorney.

August 15, 1947.

May 11, 1948. 58-C

90

Amendment—Taxation and Finance—Imposition of a tax at the rate of one cent per copy on each newspaper published in said city—Minn. Const. Art. I Sec. 3.

Facts

"The City Charter of the City of Minneapolis, adopted November 2, 1920, is hereby amended by adding a new section, to be known and designated as 'Section 41', to Chapter V of said Charter relating to 'Taxation and Finance,' as follows:

'Section 41. There is hereby imposed on every person, firm or corporation engaged in the business of publishing daily newspapers in the City of Minneapolis a tax at the rate of one cent per copy on each newspaper published in said city. The proceeds of such tax, less the expense of administration thereof, shall be paid to the Board of Education of the City of Minneapolis.

'The city shall provide by ordinance for the method, manner and time of collecting such tax.'

"This amendment shall be in force and effect upon the date of its adoption."

Question

As to the power of the City of Minneapolis to adopt the proposed amendment above quoted.

Opinion

It is apparent that numerous legal principles are involved. Among them are the classification requirements for tax purposes. Such classification must not be discriminatory or arbitrary. It must have a rational basis. A tax based on a classification which can be shown to be invidious and unreasonable is invalid, and, although a particular group of taxpayers may be placed in one class when grounds therefor are reasonable, there must be no discrimination by imposing a tax on a portion of that class and omitting others similarly situated. Such omission would render a tax measure illegal.

In passing on the constitutionality of the proposed charter amendment, which is intended to tax publishers of daily newspapers and no others, the state and federal constitutional provisions guaranteeing freedom of the press must also be taken into consideration. An unusual tax measure arbitrarily applied to publishers of newspapers and resulting directly in unduly restricting the circulation of their publications would be an infringement of their constitutional rights.

Another matter entitled to consideration is the extent to which the proposed tax of one cent on each copy of newspapers published locally but circulated not only in Minnesota but through several different states would constitute a burden on interstate commerce.

The proposed tax is in the nature of an occupation or privilege tax on every person, firm, or corporation engaged in the business of publishing daily newspapers in the City of Minneapolis. As I understand the situation, there are only two publishers of daily newspapers in that city. Taxing one of these two publishers at the rate of one cent on each copy of its daily newspapers will amount to approximately $2,000,000 annually. To single out a newspaper corporation for the imposition of such a large and unusual tax would obviously be so arbitrary and unfair as to render it unconstitutional.

In addition, the tax would not be imposed on all who are engaged in the business of the publishing of newspapers, periodicals, and other publications. The classification is limited to a portion of the class so engaged. Many others engaged in the same occupation are omitted from the operation of the proposed amendment. Therefore, if adopted, the amendment would, I believe, be held unconstitutional on the ground that the tax therein provided is discriminatory and not established on a just or uniform basis. A tax provision must operate alike on all persons and property similarly situated.

The proposed tax would apply only to publishers of dailies. It is not a tax levied on those engaged in other lines of business. It is not an ordinary tax. It is an unusual tax, imposed on a very limited group of publishers. Its effect would be the curtailing of the circulation of their newspapers. Article I, Section 3, of the State Constitution provides:

"The liberty of the press shall forever remain inviolate, * * * ."

The Fourteenth Amendment of the United States Constitution precludes the states from abridging the freedom of the press. Under the decision of the United States Supreme Court in **Grosjean v. American Press Co.**, 297 U. S. 233, the proposed tax would be an invasion of that freedom and, therefore, unconstitutional.

The daily newspapers in question have a circulation not only in Minneapolis but throughout Minnesota and in other states. The following cited cases indicate that the courts might hold the proposed amendment invalid in so far as the tax thereby imposed would be one on interstate commerce.

In **Western Union Telegraph Co. v. Texas**, 105 U. S. 460, a state occupation tax upon telegraph companies doing business within the state of one

cent on each telegram for which full rate was paid and one-half cent on each telegram for which less than the full rate was paid was held to be unconstitutional as applied to messages sent to points outside the state. In **Fisher's Blend Station v. Tax Commission**, 297 U. S. 650, the attempt to apply an occupation tax measured by the gross receipts of a radio station was held unconstitutional as the station was engaged in interstate commerce.

For reasons above stated, I am of the opinion that the proposed amendment, if adopted, would be held invalid under both our state and federal constitutions.

J. A. A. BURNQUIST,
Attorney General.

Minneapolis City Attorney.

June 11, 1948. 58-C

91

Organization—Defective—Officers—Defacto existence—MS1945, § § 410.23, 410.24, and 410.25.

Facts

"The City of Jackson is one of the Home Rule Charter cities of the Fourth Class, which recently adopted a new charter pursuant to the provisions of the State Law, which has been recently declared invalid by our supreme court.

"Prior to the adoption of the new (revised) charter the office of the Mayor was a one year office. By such revision the term was extended to two years. The mayor was elected at our annual April election in 1947 for a period of two years."

Question

If a substantial number of citizen voters would write into the 1948 election ballot at the election to be held April 6th the name of some eligible voter, other than the incumbent, there being no prepared ballot providing for the election for mayor, and such write-in candidate receive a plurality, what is the status of the present mayor and the write-in candidate?

Opinion

This opinion is based upon an assumption of fact that the City of Jackson is operating under a home rule charter adopted in good faith in accordance with Minn. Stat. 1945, § § 410.23, 410.24, and 410.25, declared unconstitutional by our Supreme Court in Leighton v. Minneapolis Charter Commission, 31 N. W. 2d 646; that such statute was complied with when the charter was adopted; and that the city has been operating thereunder for some time.

In such circumstances Minnesota has adopted the majority view which recognizes the existence of a de facto municipal corporation.

The Marckel Company v. Zitzow, 218 Minn. 305;
Evens v. Anderson, 132 Minn. 59;
Bales v. Bailey, 106 Minn. 138;
State v. District Court of Ramsey County, 90 Minn. 118;
St. Paul Gas Light Co. v. Village of Sandstone, 73 Minn. 225;
Burt v. Winona & St. P. R. Co., 31 Minn. 472.

The headnote found in 136 A. L. R. p. 195 sets forth the principles of law expressing the majority view in clear and concise language. It reads as follows:

> "In 1 Dillon on Municipal Corporations, 5th ed. § 67, it is said that 'Where a reputed corporation is acting under forms of law, unchallenged by the state, neither the nature nor the extent of any illegality in the organization can affect the existence of the reputed corporation. Where these requisites occur there is a de facto corporation.' And it would seem to be the general rule that municipal corporations, particularly those whose existence is consistent with the paramount law and the general system of law in the state, are corporations de facto, even though organized under an unconstitutional statute."

Under the foregoing rule of law the City of Jackson is a de facto municipal corporation.

A person elected or appointed to fill an office in a de facto municipal corporation has the status of a de facto officer. His status cannot be greater than that of his creator; that is, a de facto existence.

The Marckel Co. v. Zitzow, supra;
Bales v. Bailey, supra;
Burt v. Winona & St. P. R. Co., supra;
State v. Eveleth, 189 Minn. 229.

It necessarily follows that the present officers of the City of Jackson are de facto officers.

A de facto municipal corporation with de facto officers continues to function as such and must be respected until the attorney general intervenes by quo warranto and, through judicial action, secures the actual ouster and removal of the incumbents in office.

State ex rel. Attorney General v. Mayor, etc. of Dover, 62 N. J. L. 138, 41 A. 98;

Emery v. Hennessy, 331 Ill. 296, 162 N. E. 835;
Bales v. Bailey, supra.

So long as the state does not see fit to interfere and terminate the existence thereof by direct proceedings brought by the attorney general, a municipal corporation, such as the City of Jackson, which has been created by a statute subsequently declared unconstitutional may exercise upon the

citizen, through its officers, the powers conferred upon it by statute as fully and completely as if it were created by a law valid in every particular.

37 Am. Jur. § 13, p. 631;

Bales v. Bailey, supra;
St. Paul Gaslight Co. v. Village of Sandstone, supra.

In conclusion it is my opinion that, under the assumed state of facts, the City of Jackson and its officers are de facto clothed with the same authority as though enjoying a de jure existence and will so continue until the state, through its attorney general in a direct attack, secures a decision of the court to the contrary. The votes cast at the April 6, 1948, election for a write-in candidate for mayor are a nullity in view of the fact that the office is now occupied by an incumbent whose two-year term does not expire until April, 1949.

J. A. A. BURNQUIST,
Attorney General.

Jackson City Attorney.

April 23, 1948. 58-O

92

Submission—New or amended charter—Special election may be held on same day as state primary election—Minn. Const., Art. 4, § 36; MS 1945, § § 410.10 and 410.12, subd. 4.

Question

"Would the state primary election be considered a general election under the statute regarding the holding of an election to submit a new or amended city charter? This statute authorized the Council to call a special election unless a general election is to be held within 6 months."

Opinion

Minnesota Constitution, Art. 4, § 36, contains the provisions for the adoption and amendment of city and village charters, which provisions are as follows:

"Such charter * * * may be amended by proposal therefor * * * published for at least once each week for four successive weeks in a legal newspaper * * * and accepted by three-fifths of the qualified voters of such city or village voting at the next election and not otherwise; but such charter shall always be in harmony with and subject to the constitution and laws of the state of Minnesota."

Our courts have approved the legislative construction of the phrase "at the next election thereafter" used in the above cited constitutional provision for the adoption of a charter to mean that the charter may be submitted at either a general or a special election. **State v. Kiewel,** 86 Minn. 136, 90 N. W. 160. It will be noted that the same phraseology, "at the next election," is used in connection with the submission of amendments. There can be no logical reason why the same interpretation should not be given in regard to amendments as was given to the adoption of the original charter permitting the submission thereof at either a general or a special election.

The constitutional provision cited above regarding amendments to charters is not self-executing. It requires the legislature to provide the necessary machinery for carrying its provisions into effect. **State v. Kiewel, supra.** The Constitution, Article 4, § 36, provides as follows:

> "The legislature may prescribe the duties of the commission relative to submitting amendments of charter to the vote of the people, * * *. The legislature may provide general laws relating to affairs of cities, * * * which shall be paramount while in force to the provisions relating to the same matter included in the local charter herein provided for."

In compliance with the above cited constitutional provision, the legislature did pass a law, MS 1945, § § 410.10 and 410.12, which provides the machinery for adopting an amendment to the charter. MS 1945, § 410.12, subd. 4, provides as follows:

> "Amendments shall be submitted as in the case of the original charter, and the proposal shall be published once a week for four weeks in at least one newspaper of general circulation in such city."

M. S. 1945, § 410.10, contains the provisions for the submission of the original charter referred to in § 410.12, subd. 4, **supra,** as follows:

> "Upon delivery of such draft, the council or other governing body of the city or village shall cause the proposed charter to be submitted at the next general election thereafter occurring in the city or village within six months after delivery of such draft, and if there is no general city or village election occurring in the city or village within six months after the delivery of such draft, then the council or other governing body of the city or village shall cause the proposed charter to be submitted at a special election to be held within 90 days after the delivery of such draft. The council or other governing body may call a special election for that purpose only at any time."

The **general election** referred to in the foregoing citation means a general city or village election and not a general election throughout the state. In the case of **Godward v. City of Minneapolis,** 190 Minn. 51, at page 53, the court said:

> "The city council in submitting the proposed amendment did not designate the election upon the amendment as a special election, but we

have no difficulty on that account in construing that election in so far as it related to the acceptance and adoption of the amendment as being a special election. Whatever may be the situation where there is a general city or village election and the amendment is submitted at the same time, since L. 1903, C. 238, it is obviously the intention of the legislature that when the amendment to the city charter is submitted at the same time as a general election such as that held on November 8, 1932, the voting upon the amendment shall be considered to be a special election. The reference in the statute to 'both elections' cannot be otherwise interpreted. In our opinion the trial court was correct in so holding."

Under the provisions of § 410.10, "if there is no general city or village election occurring in the city or village within six months after the delivery of such draft," then it is the duty of the city council to "cause the proposed charter (amendment) to be submitted at a special election to be held within 90 days after the delivery of such draft. The council or other governing body may call a special election for that purpose only at any time."

The above laws have been held constitutional. **State v. Kiewel, supra.** Mandamus will lie to force the governing body to call an election if they fail to do so. In the case of **State v. Beach,** 155 Minn. 33, 191 N. W. 1012, the court said:

"It is within their power (governing body) at any time to call a special election and lay amendments before the people for ratification or rejection."

If a general city or village election is not to be held in the city or village within six months after the delivery of the amendment to the city council and the state primary election falls within 90 days from the date of the delivery of such amendment, the city council may call a special election to be held on the same day as the state primary election.

EARL H. A. ISENSEE,
Assistant Attorney General.

Benson City Attorney.

April 16, 1948. 58-I

CIVIL SERVICE

93

Police examinations—Commission may adopt rules specifying minimum and maximum age limits for promotional examinations—MSA 419.06 (9), MSA 419.06.

Question

"Under M. S. A. 419.06, does the (Police Civil Service) Commission have the right to establish a minimum and/or maximum age limit for various promotional examinations in the Police Department of the City of Rochester? Or would this be discriminatory on seniority rights?"

Opinion

I do not know what your seniority rules are, and therefore cannot answer the question as to whether there would be any inconsistency between the seniority rules and the establishing of age limits for taking promotional examinations.

Under M. S. A. 419.06, the Commission is required to make and amend rules to promote efficiency in the Police Department. Under M. S. A. 419.06 (9) the rules are to cover promotion based on competitive examinations. If the Commission is of the opinion that it will promote efficiency in the police department service to adopt rules specifying the age limits within which an applicant for promotion may take an examination for any particular higher position, I think such rules would be valid. I think the Commission has the right to require that applicants for promotion to a certain position should have attained a certain age, and also to require that applicants for promotion to a higher position should not be over a certain age.

The Commission should be careful not to adopt unreasonable age limits and should also be careful to avoid making the rules inconsistent.

RALPH A. STONE,
Assistant Attorney General.

Rochester City Attorney.

October 19, 1948. 120

94

Police—Powers of Village Council or President—Suspension—Physical examinations—President has no power to suspend chief of police where Police Civil Service law is in effect—Has no power to file charges against an officer of the police department—Village Council may pass resolution requiring physical examination for policemen or firemen, but eligibility of the officer would have to be determined under the rules of the commission—MSA § 419.

Question 1

Has the president of the village council of the village of Hibbing the power to suspend the Chief of Police or any other officer without pay, not exceeding 60 days?

Opinion

M. S. A. § 419.06, and Subd. 10 thereof, make it the duty of the Police Civil Service Commission to make rules providing for the suspension of police officers with or without pay for not longer than 60 days. Suspension should be made in accordance with such rules. However, the chief of police would have authority to suspend a subordinate for a reasonable period, not exceeding 60 days, for the purpose of discipline or pending investigation of charges when he deems such suspension advisable—See M. S. A. § 419.07.

Question 2

Has the president of the village council as a peace officer the right and power to file charges against any of the officers of the police department who are under civil service?

Opinion

M. S. A. § 419.11 provides:

> "Charges of inefficiency or misconduct may be filed with the secretary of the commission by a **superior officer** or by any member of the commission of his own motion, and thereupon the commission shall try the charges after no less than ten days' written notice to the accused. * * * "

Your inquiry raises the question whether the words "superior officer" refer to an officer whose rank in the department is superior to that of the accused person. I have not found any case in which the same question has been raised under a similar statute. Giving a rather literal construction to the language used, I am of the opinion that the words used, "superior officer," refer to an officer in the police department who is superior in rank to the accused person; and that the president of the council has no right to file charges against an officer in the department. He has the right, and it probably is his duty to report the facts to the commission and request the filing of charges, but he could not compel such charges to be filed.

Question 3

Can the village council by motion or resolution fix the date for a physical examination for all members of the police department and fire department?

Opinion

I assume for the purpose of answering this question that the members of the fire department are under the firemen's Civil Service law which is similar to that applied to policemen.

The qualifications of the members of the police department and fire department are determined by the appropriate commission and by the rules established by such commission. The council could pass a resolution requiring policemen and firemen to take a physical examination. The council would have no power of removal in the event the policemen refused to take the examination or in the event the examination showed physical deficiencies. The power to remove is vested only in the commission.

RALPH A. STONE,
Assistant Attorney General.

Hibbing Village Attorney.

January 29, 1948. 785-E-2

EMPLOYEES

95

Sick leave—Authority vested with power to prescribe conditions of employment may provide for sick leave prospectively only.

Statement

"The City Employees Union are demanding that they be granted sick leave. That is, they shall be allowed a definite number of days a month or year as sick leave and that it shall be accumulative. The reason for the demand is that the D. M. & I. R. Ry. has such a program.

"I can find no law for this in a city of this class—Fourth Class.

"The D. M. & I. R. can use earnings as it sees fit within the rules of the company. The funds are private funds and accountable only to the stockholders. In the case of a city of this class it is tax money and public funds or public money and that money can be used only for certain purposes and I cannot find authority for expending public money to pay city employees who work by the hour. I think it would be nice if we could."

Question

"Can the City of Two Harbors grant a specific number of days a year or a month as sick leave and pay public employees out of tax money for time they do not work because of sickness?"

Opinion

The privilege of sick leave is part of the compensation paid to employees. The city charter of the City of Two Harbors confers upon the city council and others the power to prescribe the conditions of employment of employees in the several departments of the city.

The city council may by ordinance make reasonable provisions for sick leave for employees whose employment is placed under its jurisdiction by the city charter. Such provisions must be prospective in their operation and cannot be retroactive. Provisions for sick leave for employees not under the jurisdiction of the city council must be made by the authority which is vested with the power to make rules and regulations relating to employment for each particular agency as, for example, the mayor and the chief of the fire department under Chapter 19, Section 4, of the city charter. Such provision for sick leave may be based on one days' leave each month as sick leave for which no deduction in salary shall be made, or on such other basis as the authority vested with the power to prescribe the conditions of employment may determine to be proper, subject always to the requirement that such provision must be reasonable.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Two Harbors City Attorney.

Sepember 11, 1947. 59-A-41

FINANCES

96

Bond issue—Club house—For the purpose of constructing club house on public golf course—L. 1947, Ch. 296, Sec. 4, amending MS 475.14, MSA 448.04.

Question

Whether the city of Detroit Lakes would have authority to issue bonds for the purpose of building a club house on its municipal golf course.

Opinion

The city's statutory authority to issue bonds is set out in Laws 1947, Chapter 296, Sec. 4, amending M. S. 475.14. As there expressed, the power exists to issue city bonds "for the acquisition, equipping and construction of parks and parkways and playgrounds and stadia."

By M. S. A. 448.04, a city of the fourth class is authorized and empowered to acquire lands within or adjacent to the city, not exceeding 100

acres, for use by the public for a park or golf course and for park purposes. That statute authorizes the city to "provide for the improvement thereof by the planting and preservation of trees and shrubs, by enclosing, ornamenting, and protecting the same, and in such other ways as may be necessary to make such lands suitable for the uses of a public park or golf course."

In an opinion given to you on August 30, 1935 (59-B-11), it was held that the city of Detroit Lakes had authority to acquire and maintain a public golf course.

In **Booth v. City of Minneapolis,** 163 Minn. 223, it was held that authority to acquire and maintain parks includes the authority to acquire and maintain a public golf course.

If the city finds it advisable to improve the golf course by erecting thereon a club house for the use and convenience of the patrons of the golf course and others enjoying the facilities of the park, I think it would have authority to issue bonds for that purpose. Such bonds would be authorized within the meaning of the words "for the acquisition, equipping and construction of parks and parkways and playgrounds and stadia."

RALPH A. STONE,
Assistant Attorney General.

Detroit Lakes City Attorney.

December 8, 1948. 59-A-7

97

Bond issue—Library bonds—City council may delay construction of library for reasonable time after bonds are voted—May issue part of the authorized bonds for the purpose of employing an architect to prepare preliminary plans and estimates—May not use part of the proceeds of the first bonds sold to buy an automobile before the new building has been started—Such automobile or "book-mobile" would not be equipment for the new library.

Facts

On February 25, 1947, the city council adopted a resolution providing for the issuance of $75,000 in negotiable bonds of the City of Waseca "for the purpose of constructing and equipping a public library building in the City of Waseca."

The question of issuing said bonds was submitted to the electors at an election on April 7, 1947, and a majority voted in favor of the bond issue. The bond issue was officially declared carried. No bonds have been issued since that time for the purpose aforesaid.

There is considerable feeling in the community over the failure of the city council to take action to build and equip a library building.

A request has been filed with the council by the library board asking that the council issue $5000 of the $75,000 approved for the purpose of employing an architect to prepare preliminary building plans and construction estimates and "to purchase a book-mobile to be used in serving patrons of the library residing throughout Waseca County, as well as the City of Waseca."

The council recently passed a motion directing the city treasurer and yourself to arrange for the issuance and sale of $5000 in bonds out of the $75,000 approved—the proceeds of the sale of the $5000 in bonds to be used in part for employing an architect for the aforesaid purposes and in part for assisting the library board to purchase a "book-mobile."

Question

May the common council of the City of Waseca be legally compelled to issue and sell bonds in the amount of $75,000 and to arrange for the construction of a public library building at the present time, or does the council have the discretionary power to delay action until it considers building conditions to be more favorable even though such delay may extend over a period of several years.

Opinion

I refer you first to the case of State ex rel. Boynton v. City of Topeka, 41 P. (2d) 260, and I quote from the syllabus in that case:

> "In absence of statute requiring municipal bonds to be issued within specified time after election authorizing them, when bonds shall be issued rests in sound discretion of municipality.
>
> "Authorized bonds may be issued by municipality from time to time and in its discretion as necessity therefor arises.
>
> "Issuance of bonds by municipality should not be restrained unless it clearly appears that no necessity therefor exists or that conditions have so changed since authorization of bonds that issuance would be inequitable."

In this case it appeared that at an election held November 2, 1926, the voters of Topeka authorized the issuance of bonds to the amount of $165,000 to acquire sites and construct fire stations. One station was erected at a cost of $92,000. In October 1934, the governing body of the city passed a resolution to purchase another site and construct a fire station thereon, and to issue additional bonds under the authority theretofore given. The decision was as expressed in the syllabus above quoted. The opinion in this case cites 19 R. C. L. 1000, from which I quote as follows:

> "A provision that the question whether bonds shall be issued for a certain purpose shall be submitted to the taxpayers to be affected

thereby does not cause a vote in the affirmative to lapse upon the completion of the assessment roll for the following year, even though there may have been changes in the body of the taxpayers in the meantime. All that is required is that the municipality shall proceed with reasonable promptness to exercise the authority given to it at the election, and if this is done the fact that the body of the taxpayers may have changed since the election was held does not affect the validity of the bonds issued as security for the debt."

In the case of Stokes v. City of Montgomery, 203 Ala. 307, 82 So. 663, it was sought to prevent the issuance and sale of bonds of the City of Montgomery in the sum of $50,000 for the purpose of building and equipping a city hospital. The bonds were voted upon in October, 1908, and the result was in favor of the bond issue.

On May 7, 1919, the governing board decided to issue and sell the bonds so authorized. It appears that there was nothing in the constitution or in the statute or ordinances which would prevent the board of city commissioners from issuing the bonds in 1919. The court said:

"We are of opinion that the bonds in question may be issued and sold at this time, that the proceeds of such sale may be expended for the specific purpose authorized by the people and in accordance with the declared judgment of the board of commissioners."

The opinion cites McQuillin on Municipal Corporations, Vol. 5, § 2297, p. 4847, as follows:

"No rule can be laid down as to within what time bonds must be issued after they have been voted for or their issuance directed by the council (Chickaming Tp. v. Carpenter, 106 U. S. 663, 1 Sup. Ct. 620, 27 L. Ed. 307); but it has been held that the fact that bonds are not issued until nearly two years after the ordinance making provision for their payment is immaterial."

See Covington v. McInnis, 144 S. C. 391, 142 S. E. 650. It appears in this case that in April, 1920, bonds were voted in the sum of $50,000 for the purpose of building and maintaining a school building. Seven years later it was proposed to issue a part of the bonds authorized. At the time the bonds were issued there was an eight per cent limitation on indebtedness, but this was later raised to a 16 per cent limitation, and after the increase the additional bonds were proposed to be issued. The court said:

"The only limitation which should affect the right to issue bonds under these circumstances is where the purposes for which the bonds were originally voted have ceased to be necessary, or where the conditions have so changed that it would be inequitable to allow the bonds to be issued, * * * ."

While the cases cited deal with your question from an opposite point of view, yet they indicate that the council has discretionary power to delay action in the issuance of bonds if it in good faith believes that more favor-

able conditions will be met with following a reasonable delay, and that the power to issue the bonds would not be lost even though the delay might be a period of years.

Question

May the City of Waseca legally issue and sell $5000 of a duly approved and authorized bond issue of $75,000, and use all or such part of such $5000 as may be necessary to employ an architect for the purpose of preparing preliminary plans and specification estimates for the construction of a public library building in the City of Waseca?

Opinion

I believe that it would be legal to issue a part of the bonds authorized and use the proceeds for the purpose of hiring an architect to prepare preliminary plans, specifications and estimates. I refer you to the case of Hager v. Board of Education, 254 Ky. 791, 72 S. W. (2d) 475. The court said:

> "It is the settled rule that a county or municipality is not required to issue all the bonds voted at an election at one time, but may issue them as needed and a delay in issuing a part or all of the bonds, at least for a reasonable time, does not bar the right to issue them when necessity arises. Thus in the case of Sutherland et al. v. Board of Education of City of Corbin et al., 209 Ky. 351, 272 S. W. 887, the bonds were authorized in 1922 and issued and sold in 1925. Their issuance was upheld. So too in Young v. Fiscal Court of Trimble County, 190 Ky. 604, 227 S. W. 1009, where the bonds were authorized in 1916 and issued and sold in 1921, and in the City of Dayton v. Board of Education of City of Dayton, 201 Ky. 566, 257 S. W. 1021, where the bonds were authorized in 1919 and issued and sold in 1922, and in Nall v. City of Elizabethtown, 200 Ky. 321, 254 S. W. 893, where the bonds were issued four years after they were authorized. In the light of these authorities, and especially that of the Young case, we cannot say that more than a reasonable time has elapsed since these bonds were authorized and that therefore the board of education is not precluded by the lapse of time from requiring the city of Ashland to now issue them."

It is quite common practice to issue bonds from time to time within the authority granted, and not to issue and sell all the authorized bonds at the same time.

Question

May the City of Waseca legally issue and sell $5000 of a duly approved and authorized bond issue of $75,000, and transfer a part of the $5000 to the city library fund to be used by the library board in financing in part the purchase of a library book-mobile?

Opinion

I think it would be stretching the authority granted by the voters to hold that authority to construct and equip a public library building would include authority to buy an automobile for the use of the library board before the library building has ever been started, and the council does not yet know when it will start to construct the library building. The authority was to issue bonds to build and equip a new library building. The equipment was for the new building to be constructed, and not for the equipment of an old building already in existence.

RALPH A. STONE,
Assistant Attorney General.

Waseca City Attorney.

October 26, 1948. 59-A-7

98

Funds—Appropriations—Beyond statutory authority—When permitted—Sheriffs expenses—L. 1947, C. 457, § 2. MSA, § § 383.01, 383.02.

Question

Whether the Board of County Commissioners may appropriate money for the operation of the automobiles of the sheriff of Ramsey County in excess of the maximum of $11,000 fixed by L. 1947, C. 457, Sec. 2?

Opinion

The weighing of the facts and the determination of what the facts are, in short, the determination of questions of fact, are the responsibility and duty of the agency exercising administrative or legislative powers in the particular matter in question. The attorney general has neither the power nor the authority in matters of this nature to determine questions of fact. It is his duty to advise the agency of the rules of law which are applicable to the matter pending before it. For these reasons, the attorney general will not determine the questions of fact involved in the situation in which the sheriff finds himself and in which the board of county commissioners must determine the action to be taken by them. With this understanding of the duties of the respective officers, we will proceed to determine the applicable rules of law. While we have been unable to find any authorities dealing with the expenditure of money under emergency conditions, we have found opinions dealing with tax levies under such conditions. As the question of ultimate expenditure of tax moneys is inherent in the question of tax

levies, it seems clear that there is no difference in the principle of law involved in both questions and that the authorities which we have found dealing with tax levies are decisive of the question before us.

As long ago as December 15, 1909, (file 519-D), Attorney General Lyndon A. Smith rendered an opinion holding that "when the alternative arises between a county ceasing to perform its functions, or levying a tax in excess of the statutory limit, the county must levy the tax necessary to enable the county to perform its absolute duties. The courts must be maintained, elections held, and such other essential duties which are entrusted to county government performed, though a tax in excess of five mills must be raised in order to do so." Again on September 2, 1932, opinion No. 243, 1932 report—the attorney general in effect recognized that the county must carry out the functions imposed upon it by law, notwithstanding that the expenses thereof may exceed the statutory limitations imposed by the legislature, but such expenditures when the maximum amount permitted by statute has been expended can be made only for the absolutely essential requirements of the county. See **Upton v. Stromme**, 101 Minn. 97. An emergency authorizing the exceeding of tax limitation rate has been defined as meaning "an unforeseen occurrence or combination of circumstances calling for immediate action." 14 Words & Phrases (Permanent Edition), p. 310. It appears clear that expenditures in excess of the statutory limitation are not to be lightly authorized or made and that such expenditures will not be approved if made under ordinary circumstances but only if they are absolutely and unquestionably necessary in order to enable the county to "maintain its existence as a county, and perform the duties entrusted to it by the constitution and laws of the State of Minnesota."

The foregoing discussion has made clear, we believe, the conditions under which the board of county commissioners may appropriate money for county purposes in excess of the statutory limitation. If the county board after examining and weighing the facts with reference to the performance of his duties by the sheriff hereinbefore determines that the conditions discussed above as prerequisite to exceeding the statutory limitations on expenditures are present, the board of county commissioners may, in our opinion, appropriate additional money to the sheriff to maintain the services which it deems absolutely essential to protect life and property and to prevent the breakdown of law enforcement in Ramsey County.

We have considered the applicability of the emergency provisions contained in M. S. A., § 383.02. It appears clear to us that these provisions apply only to funds which under § 383.01 are fixed in amount by the county board. It is improbable that it was intended thereby to vest in the county board the authority to over-ride maximum limits of expenditure fixed specifically by the legislature. For these reasons, in our opinion, additional money may not be appropriated to the sheriff by the county under authority of § 383.02 in excess of the maximum fixed by L. 1947, C. 457, § 2. The conclusion reached in this paragraph as to lack of authority to act under § 383.02 does not in any way affect or limit the power of the board of county commissioners to appropriate money to the sheriff from any funds subject

to transfer by the board provided that the board determines that there exist the conditions prerequisite to such appropriation set forth in the paragraph preceding this paragraph.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Ramsey County Attorney.

November 12, 1948. 107-B-1

99

Funds—Appropriation—May not appropriate money received from Cigarette tax fund to Boy Scout organization—MSA 297.13 sd. 5.

Question

Whether the city council may appropriate money to a Boy Scout organization.

Opinion

Without special authority, the council could not make such an appropriation. I have found no statute which confers such a power upon the council of the city of Jordan.

That city is organized under Special Laws 1891, Chapter 4, and I find no delegation of such authority in that statute.

The cigarette fund to which you refer is a public fund composed of public moneys raised by taxation, and I find no authority to give it away to a Boy Scout organization.

Laws 1947, Chapter 619, Sec. 13, Subd. 5, being M. S. A. 297.13, Subd. 5, does not confer such authority.

RALPH A. STONE,
Assistant Attorney General.

Jordan City Attorney.

May 21, 1948. 59-A-3

100

Funds—Appropriation—Municipal liquor stores—Funds arising from operation of the municipal liquor store may be expended for free musical

entertainment in the village—Not more than $500 may be so expended annually—MSA 449.01-449.02.

Facts

"The Village of Walker has heretofore made a levy of one mill for a music fund to help with the band during the summer months. This levy has not been adequate to raise the necessary funds with which to carry out this activity, and the music organization has requested that the village transfer additional funds from the profits from the liquor store into that fund, for purchase of equipment and for payment of salary to the director."

Question

Can the village legally transfer funds from the liquor dispensary fund for this purpose?

Opinion

A village is authorized by law to expend money for free musical entertainment to the public. M. S. A. § § 449.01, 449.02. The surplus funds of the municipal liquor store can be transferred to the general fund and used for such authorized purpose.

Question

Are there any limitations on the amount which may be so used?

Opinion

M. S. A. § 449.01 limits the expenditure to not exceeding $50 annually. However, the following section provides for the levy of an annual tax not exceeding one mill, and also provides that in the village the total sum that may be levied or expended in any one year shall not exceed $500.

The Attorney General had occasion to consider these two questions in an opinion dated November 25, 1946, 469-C-1. In that opinion it was held that, giving to said sections a practical construction, the village could expend up to $500 in any one year without levying a tax.

It would therefore be my opinion that if surplus funds exist in municipal liquor store fund to the extent of $500, such amount could be transferred to the general fund and expended for musical entertainment in the village.

RALPH A. STONE,
Assistant Attorney General.

Walker Village Attorney.

May 6, 1948. 218-R

101

Funds—Depositories—County—Designation of depositories—Approval of bonds and collateral—MSA, Sec. 118.01.

Question

Is the board of auditors or the county board, or both, to approve collateral of county depositories and substitutions of new collateral for collateral withdrawn?

Opinion

It appears that the opinion of the Attorney General, dated June 26, 1925, 1926 Report, No. 144, wherein it was stated that the collateral must be approved by the county board of auditors, was reversed by the opinions of the Attorney General in the 1930 Report, Nos. 191 and 192, wherein he said that the collateral must be approved by the governing body, or the county board, rather than the board of audit. In opinion No. 191, it was stated that the term "municipality" in the law under consideration included counties. The opinion also said that this amendment supersedes the provision requiring the approval of the collateral by the board of auditors.

Since these opinions were rendered, the opinion in the 1934 Report, No. 199, followed the opinion mentioned as No. 191. Since that time, the legislature has met repeatedly. It has not seen fit to change the law and it may fairly be said that it has accepted the practical construction placed thereon by the Attorney General.

Accordingly, it appears to me that the county is safe in pursuing the practice of having such collateral or bonds approved by the county board without first having them approved by the county board of auditors. The duty still remains that the county board of auditors designates the depositories.

CHARLES E. HOUSTON,
Assistant Attorney General.

Ramsey County Attorney.

May 7, 1948. 140-F-2

102

Funds—Expenditures—Lobbying—May not spend public funds for lobbying to induce favors for area.

Opinion

The problem may be stated: May counties, towns and villages expend public funds to be paid to lobbyists who seek to induce the Congress and its administrative officials to enact favor legislation for the benefit of a particular area?

As I gather the underlying thought, it is to spend public money in order to induce members of Congress and administrative officers to use their influence where necessary to effect the desired end. These administrative officers and the members of Congress have duties defined by the Constitution and laws. It is presumed, of course, that they will perform their duties. Should it be necessary that public money belonging to the counties, villages and towns be spent in order to insure this performance of duty? If it is not necessary, it cannot be legally spent.

The public policy of the United States is to be considered by the officers in Washington who have authority to spend money for the Government. The Government knows about the situation. It has employed its agencies to discover the facts. When the United States Army conducted hearings for the discovery of the facts and when surveys were made, those disbursements were legitimate to aid officers at Washington and furnish them the knowledge necessary to intelligently act upon the subject in hand. They had that information. I presume that the inhabitants in your area were given an opportunity to furnish evidence at such hearings. It must not be presumed that the evidence thus gathered will be disregarded. We cannot presume that persons going from your area to Washington would seek to induce the public officers to act contrary to such evidence, or to influence any public officer to act in the premises contrary to his duty. As stated in **Goodrich v. Northwestern Telephone Exchange Co.**, 161 Minn. 106, 110:

> "Private citizens—much less public officials—cannot sell their personal influence over a city council; and public officials cannot bargain away their future judgment and discretion upon matters of public concern. Such contracts are contrary to a sound public policy and void. Obviously they lead to inefficiency in the public service."

And again on page 111 in the same case, the court said:

> "In short, contracts for the purchase of the influence of a majority of a city council and contracts for the purchase of the influence of private persons upon the action of present and future city councils are against public policy, and for that reason are void. Influence in this sense is not a salable article under our system of laws and morals."

In **Hollister v. Ulvi**, 199 Minn. 269, it was held that there is a clear distinction in the law respecting favor legislation and legislation which provides means for the settlement of debts or obligations founded upon contract or violation of a generally recognized legal right, the latter being generally referred to as "debt legislation." If a contract comes within the second class mentioned, it is generally recognized as a valid obligation.

But here the communities seeking this legislation are seeking a favor from the United States. They are not seeking the payment of a debt.

In 67 A. L. R. 685, you will find a note on lobbying contracts. Many states have prohibited lobbying. Lobbying for favor legislation by state employees is against public policy.

Moreover, persons disbursing county, village and town funds have authority to make those disbursements only which are authorized by the legislature. The legislature has not authorized disbursements of this character.

Accordingly, it is my opinion that the county, villages and towns may not disburse public funds either for compensation or the expense of persons engaged to lobby in Congress or to go to Washington to induce administrative officers to spend money of the United States Government in order that a particular area may be favored by legislation or administrative action.

CHARLES E. HOUSTON,
Assistant Attorney General.

Kandiyohi County Attorney.

April 17, 1947. 107-B

103

Funds—Expenditures—Locker plant—Village may not use public funds for the purpose of investing in a locker plant.

Facts

"In the Village of Holt there is a privately owned and operated corporation Locker Plant. The people of the village are very much in favor of the continued operation of this locker plant, and want to have the village assist in its continued operation.

"It has been proposed that the Village itself buy shares of stock in the corporation operating the locker plant. The question of the purchase of such shares of stock would be submitted to the voters of the village for their approval."

Question

Has the village the right to expend village funds to buy shares of stock in a private locker plant, assuming that an election on the question is held and the voters vote in favor of that question?

Opinion

The question is answered in the negative. Public funds cannot be invested in a private enterprise. The courts are unanimous in holding that public funds cannot be diverted to private purposes. I enclose copy of opinion dated August 2, 1946, file 476-B-2, holding that a village could not invest in a building for a manufacturer.

In addition it should be said that there is no authority for holding an election on any such question. It would be beyond the power of the village to pay for the expense of holding such an election.

RALPH A. STONE,
Assistant Attorney General.

Thief River Falls Village Attorney.

November 19, 1948. 476-B-1

104

Funds—Transfer—County—Maintenance of courthouse—MSA, Sec. 375.18.

Facts

The courtroom in the courthouse is in need of repair. M. S. A., Sec. 375.18 (3), imposes the duty upon the county board to maintain the courthouse. The county has no specific fund created for this purpose. The balance in the revenue fund is insufficient to pay this expense in addition to other current expense. But it appears that in the poor fund, the road and bridge fund, and in the revenue fund, there is a surplus beyond the needs of the current year, which surplus is invested in United States bonds. It appears that the county board considers that if it is permitted by law to do so, it should transfer such surplus funds from the respective accounts now charged therewith to a building fund. The building fund would be established by the resolution of the board. No such fund now exists. The board has in mind that this would be done under the power conferred in M. S. A., Sec. 375.18, Subd. 7.

Questions

1. Is it allowable to create a building fund by this means?
2. If not, could the surplus in the road and bridge and poor funds be transferred to the revenue fund to cover a deficiency in the revenue fund created by the expenditure for building repair?
3. Is it necessary that a deficiency be created before the transfer be made?

Opinion

It appears to me that the first two questions should be answered "yes" and the third question should be answered "no."

The board has the power to create a new fund if it considers that it should be done. But I see no reason why the money may not be paid from the revenue fund without the creation of a new fund.

Sec. 375.18 (7) grants the power to the board to transfer by unanimous vote any surplus beyond the needs of the current year in any county fund to any other such fund to supply a deficiency therein. This applies to counties of the class of McLeod. The fund need not be entirely depleted before the transfer is made.

CHARLES E. HOUSTON,
Assistant Attorney General.

McLeod County Attorney.

August 9, 1948. 107-A-12

HIGHWAYS

105

Cartway—Town line—Two towns acting under authority of MS, Sec. 163.18 may establish a cartway on a town line which is also a county line. Statute does not require that the two towns acting be in the same county. This opinion supersedes opinion of May 8, 1920, and May 5, 1931, No. 186, 1932 Report in so far as inconsistent.

Question

Does M. S. A. section 163.17 apply to a cartway, the center line of which would be on the county line?

Opinion

The words "town road" and "town roads" shall mean "those roads and cartways which have been or may be established * * * under the authority of the several town boards * * * and not within the limits of any city or village, including roads therein established by use." M. S., Sec. 163.18. So, we see that a cartway is a town road within the definition.

It appears to me to be regular that two towns acting under authority of this section establish a cartway on a town line which is also a county line. The statute does not require that the two towns acting be in the same county.

On May 8, 1920, File 379-C-8 (b), an opinion of the Attorney General was rendered wherein doubt was expressed concerning the right of two towns, being in different counties, to lawfully, by joint action, establish a road on the line between the two towns, such line being also a county line. The reason for this doubt, as stated in that opinion, was that the statute did not then seem to afford machinery for an appeal from the action of the two towns acting jointly.

In **Rolf v. Town of Hancock,** 167 Minn. 187, it was held that the question whether a public highway should be vacated is legislative. The determination of the local governing body cannot be disturbed unless its act is arbitrary or oppressive or fraudulent or manifestly against the best interests of the community. In this case it was held that the statute, by the appeal which it authorizes, confers jurisdiction; but it creates no substantive right. It does not make the act of the local governing body judicial. It affords a convenient method of attacking it if invalid within the tests stated, and applied again and again in appeals from orders of county and town and school boards. So, it would seem that this right of appeal is not a substantive right. The law would be good if no right of appeal was granted. Appeal is purely a creature of the law. Where no appeal is afforded, the validity of the action of the town boards acting together can be tested by proceedings in certiorari. So, it would appear to me that the reason for the opinion of May 8, 1920, supra, is not sound and it is intended that this opinion shall supersede that one in so far as inconsistent.

CHARLES E. HOUSTON,
Assistant Attorney General.

Brown County Attorney.

July 22, 1947. 379-C-8-B

106

Culverts—Roads outside of city limits—MSA § 441.26—City may replace culvert on road leading into city without the city limits.

Facts

"At the last meeting of the common council of Madison the board of supervisors of Madison Township appeared to request financial aid from the city in the installation of a new bridge or culvert in one of the township roads.

"The present culvert under the road in question conducts the water of the county ditch, into which flows the water released from the city sewage disposal plant, through the grade. The board of supervisors claim that the water from the disposal plant contains certain corrosive ingredients which have eaten away the material in the galvanized steel

culvert and that except for the action of these corrosive ingredients the present steel culvert would have lasted almost indefinitely. It would appear that in the first instance the city obtained and paid for permission to empty the water from the disposal plant into the ditch."

Question

Whether the city of Madison on these facts would have authority to use city funds in assisting the township to purchase and install a new culvert to replace the present culvert which is now out of repair.

Opinion

I direct your attention to M. S. A. § 441.26, reading as follows:

"The council of any village or of any city of the fourth class may appropriate and expend such reasonable sums as it may deem proper to assist in the improvement and maintenance of roads lying beyond its boundaries and leading into it and to improve and maintain bridges and ferries thereon whether they are within or without the county in which it is situated."

It occurs to me that the installation of a new culvert to replace a worn out culvert would be the "improvement" or "maintenance" of a road outside the city boundaries within the meaning of this section if the road is one which leads into the city.

RALPH A. STONE,
Assistant Attorney General.

Madison City Attorney.

April 24, 1948. 642-B-4

107

Load restrictions—Power of local authorities to impose—When local authorities fail to act, Subd. 2 applies—MSA, Sec. 169.87, Subds. 1 and 2.

Facts

L. 1947, C. 505, M. S. A., Sec. 169.87, Subd. 2 thereof reads:

"Except where restrictions are imposed as provided in Subdivision 1, no person shall operate any vehicle or combination of vehicles upon any county or town road during the period between March 20 and May 15 of each year where the gross weight on any single axle as defined in Minnesota Statutes 1945, Section 169.83, exceeds 8,000 pounds; * * * ."

Question

In view of the exception quoted, is the county board authorized under Subd. 1 to restrict the gross weight to 15,000 pounds and the period of time from March 20 to April 20?

Opinion

M. S. A., Sec. 169.87, Subd. 1, gives the county board, with respect to highways under its authority, the power to either prohibit the operation of vehicles or impose restrictions thereon as to weight. These restrictions are intended to prevent deterioration of the highway by reason of excessive moisture. The local authorities ought to know the local conditions. If the local authorities fail to act in this respect, then Subd. 2 applies. Where the local authorities act, there is no reason to apply Subd. 2 and by its terms, it does not apply.

CHARLES E. HOUSTON,
Assistant Attorney General.

Rice County Attorney.

March 15, 1948. 989-A-12

LOCAL IMPROVEMENTS

108

Sewer—Assessments—Corner lot already has sewer—Whether it may be again assessed for another sewer depends upon whether or not the lot is specially benefited thereby—MSA, § 429.01; Dunnell's Digest, § 6862.

Facts

It appears that the borough of Belle Plaine has laid a lateral sewer pursuant to the provisions of Laws 1925, Chapter 382, M. S. A., Sec. 429.01. A certain corner lot abutting the new sewer was assessed some years ago for a main sewer passing upon the west side of the lot. The lateral passes the north side of the lot. A proper petition for the sewer was duly signed by more than 51 per cent of the abutting owners and jurisdiction to levy an assessment was acquired.

Question

The question arises whether the owner of the corner lot having once paid an assessment for a sewer passing his property may be again assessed for the construction of the new sewer on another side of his property.

Opinion

Special assessments for local improvements rest upon the theory that the property so assessed is specially benefited by the improvement, and a special assessment which exceeds the amount of such special benefit is, as to such excess, a taking of private property for public use without just compensation. See Dunnell's Digest, Section 6862, and cases therein cited.

Therefore the lot in question may be assessed for the new sewer if it is specially benefited thereby and then only not to exceed the amount of the special benefit. Whether it is specially benefited or not is a question of fact which this office cannot decide.

I refer you to the case of In re Assessment for Improving Superior Street, 172 Minn. 554, quoting from the syllabus:

> "When an assessment for a public local improvement has been made by the proper municipal board or officers, * * * such assessment is prima facie valid, and the burden rests upon the objector to prove its invalidity. An assessment so made, in the absence of fraud, mistake or illegality, is conclusive upon the courts, except that the question of whether or not the property assessed received any special benefit from the improvement and whether or not the assessment made, to a substantial amount, exceeds the special benefits received, are open for review by the courts."

The ultimate test to be applied is that the assessment for any improvement may not exceed the benefit thereby conferred upon the property sought to be assessed. In re Assessment for Hazel Park Sewer System, 176 Minn. 62.

Therefore the council will first determine whether the lot in question has been specially benefited by the new sewer. If it has, it may be assessed, but not to exceed the amount of the special benefit conferred by the new sewer.

RALPH A. STONE,
Assistant Attorney General.

Belle Plaine Borough Attorney.

August 10, 1948. 387-G-1

109

Streets—Vacation—City being the owner of the property should file petition for vacation, and Laws 1895 Ch. 8 § 150 should be strictly followed.

Facts

The City of Red Lake Falls is incorporated under Laws 1895, Chapter 8. The city owns three blocks of land. Between these blocks are public

streets. Running through the blocks are public alleys. It is found desirable to vacate the streets and alleys.

Question

"The City itself being the owner of this property, can the Council now vacate the streets and alleys by ordinance or resolution without any such petition, or would the mayor as the executive officer of the City execute a petition to the Council which in effect would be the City petitioning itself for the vacation."

Opinion

I think that the city should strictly follow the provisions of Laws 1895, Chapter 8, Sec. 150, relating to the vacation of streets, even though the city itself is the owner of the property where the streets and alleys in question are located. The statute requires a public hearing after four weeks' published notice. The city council at the time and place set for the hearing have authority by resolution and by three-fourths vote of all members to vacate the streets and alleys. The resolution must be published, as in the case of ordinances, and a certified transcript of the resolution filed with the register of deeds, whereupon the vacation shall take effect.

The statement of facts contained in your letter of December 2 suggests other questions that might be raised with reference to the matter which the city has in mind. I refrain from referring to or discussing these, inasmuch as I have answered the question asked in your letter.

RALPH A. STONE,
Assistant Attorney General.

Red Lake County Attorney.

December 3, 1948. 396-C-18

110

Streets—Vacation—May not be vacated reserving a right to lay water and sewer mains—M.S.A. § 412.25.

Question

May a village vacate a public street, reserving the right to lay sewer and water mains within the limits of the vacated street?

Opinion

This question is answered in the negative. The power to vacate streets is conferred upon villages by M. S. A. 412.25, reading as follows:

"On petition of a majority of the owners of land abutting on any street or alley, or any part thereof, in any village, the council may by resolution vacate the same, or any part thereof, if it shall appear for the interest of the public so to do, first giving one week's published and posted notice of a hearing to be had thereon, but such vacation shall not become effective until a certified copy of such resolution shall be filed for record with the register of deeds."

The power which is conferred is the power to vacate absolutely and not upon condition or with reservations.

This office has heretofore held that a street may not be vacated on the condition that if it should thereafter be needed at any time for a street it could be opened again for public use.

In the case of **Gable v. Cedar Rapids,** 150 Iowa 108, 112, 129 N. W. 737, the court held that the statute authorizing the vacation of streets on petition of owners "does not authorize the court to vacate streets and reserve to the city the right to use such streets for water and sewer pipes." The court said:

"The very fact that it was considered necessary to reserve to the city the use of these streets for water and sewer pipes shows that they will also be needed for the use of the general public. We also very much doubt the authority of the court to only partially vacate a street, as was done here. If the use of the street is necessary for the public utilities of the city, what authority has the court to say that the city can only use it in conjunction with a private owner? Manifestly the statute gives no such authority."

The above case is cited to the same effect in 44 C. J. Title Municipal Corporations, page 895, § 3617, from which text the following is quoted:

"A power to close and vacate streets does not confer power to close streets conditionally, as, for example, with a reservation of a privilege of reopening them, or with a proviso that upon a certain contingency the vacation should be void. * * * "

RALPH A. STONE,
Assistant Attorney General.

Murdock Village Attorney.

October 14, 1947. 396-G-16

OFFICES

111

Incompatible—City councilman and county surveyor are not incompatible.

Question

Whether the offices of county surveyor and councilman of the city of Litchfield are incompatible.

Opinion

I cannot see that there is anything in the duties imposed upon these officers which renders the offices incompatible.

This is in line with former opinions of this office which hold that the office of county surveyor and village councilman are not incompatible.

RALPH A. STONE,
Assistant Attorney General.

Litchfield City Attorney.

November 22, 1948. 358-A-7

112

Incompatible—County commissioner incompatible with duties of member of county school survey committee—MSA 122.54, 122.40; Laws 1947 Ch. 421 § 15.

Opinion

L. 1947, C. 421, Sec. 15, authorizes the county board to levy taxes to be used to defray the expense of administration of this act. A county commissioner being a member of the county board would participate in any action that the county board took upon this subject, so, he is acting in two capacities if he also acts as a member of the county school survey committee. The two positions are incompatible.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.

December 8, 1947. 358-A-3

113

Incompatible—County supervisor of assessments and town clerk are not incompatible—L. 1947, C. 531.

Question

Whether the office of county supervisor of assessments and the office of town clerk of a town within the county are incompatible.

Opinion

The town clerk has nothing whatever to do with the assessment of property within the county for taxation purposes.

The county supervisor of assessments appointed pursuant to Laws 1947, Chapter 531, may hold the office of town clerk.

RALPH A. STONE,
Assistant Attorney General.

Anoka County Attorney.

October 9, 1947. 358-E-6

114

Incompatible—County welfare board—Member and town clerk not—MS1945, 393.01 subd. 6.

Opinion

The position of a member of the welfare board authorized by M. S. 1945, Sec. 393.01, Subd. 6, is compatible with the office of clerk of the town board in a county which has the county system of administering relief to the poor. I see no conflicting duties in the two positions.

CHARLES E. HOUSTON,
Assistant Attorney General.

Itasca County Attorney.

January 22, 1947. 358-A

115

Incompatible—Justice of the peace and clerk of the probate court are not.

Question

Are the offices of justice of the peace and clerk of the probate court incompatible?

Opinion

In **State ex rel. Hilton v. Sword,** 157 Minn. 263, we read 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." **Kenney v. Goergen,** 36 Minn. 190, **State ex rel. v. Hays,** 105 Minn. 399.

The office of justice of the peace requires the performance of judicial duties. It is a court of limited jurisdiction. The office of clerk of the probate court is connected with the judiciary but the probate court operates in a field exclusive to itself in which a justice of the peace has no authority. There is no appeal from one court to the other. I know of no duty to be performed by the clerk of the probate court which in any way relates to the office of justice of the peace. I fail to see that the functions of the two offices are inconsistent or that the performance of the duties of one office results in antagonism and conflict of duty in respect to the other. I fail to see that there is any duty on the part of the incumbent of one office which he cannot discharge with fidelity and propriety if he, at the same time, holds the other office.

It is, therefore, my conclusion that the two offices are not incompatible and that one person can hold both of them at the same time.

CHARLES E. HOUSTON,
Assistant Attorney General.

Carver County Attorney.

March 3, 1947. 358-D

116

Incompatible—Justice of the peace and deputy registrar of motor vehicles not incompatible.

Question

As to whether the offices of village justice of the peace and deputy registrar of motor vehicles are incompatible.

Opinion

I cannot see any incompatibility between the two offices. A deputy registrar of motor vehicles merely performs the clerical duties of registering motor vehicles and collecting the fees. The duties required of him as a

deputy registrar of motor vehicles would not prevent him from impartially performing the duties of justice of the peace.

RALPH A. STONE,
Assistant Attorney General.

Todd County Attorney.

September 14, 1948. 358-D-3

117

Incompatible—Village clerk and town supervisor of the town in which the village is located are incompatible—MS1945—365.18, 441.26.

Question

Whether the offices of village clerk and town supervisor of the town in which the village is located are incompatible?

Opinion

"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." State v. Sword, 157 Minn. 263.

Such a conflict of duty and antagonism might arise as between the office of village clerk and town supervisor of the town in which the village is located. It will be sufficient to point out instances in which such conflict and antagonism might arise:

The village clerk is a member of the council, and as such takes part in the making of contracts on behalf of the village. The town supervisor being a member of the town board takes part in the making of contracts on behalf of the town.

When the electors of a town have authorized the providing of fire protection or of apparatus therefor, and have determined the amount of money to be raised for that purpose, the town board is authorized to enter into a contract with the village located within the town for the furnishing of certain fire protection and the care, maintenance and operation of such apparatus. Minnesota Statutes 1945, Section 365.18. Manifestly it would be inconsistent for the town supervisor to take part in negotiating such a contract with the village when at the same time he is a member of the council of the village with which the negotiations would have to be carried on.

If the county has the township system of poor relief, a dispute might arise between the village and the town as to which is the place of settlement of a pauper.

Again the same person could not represent both the town and the village in case of such a dispute.

Other instances of antagonism might arise. A village is authorized to appropriate and expend village moneys for the improvement and maintenance of roads in the town in which the village is located. Minnesota Statutes 1945, Section 441.26. A conflict might easily arise between the town and village as to where such improvement should be made by the village and the character and nature of such improvements and of such maintenance. In such a case the same person could not very well represent both the village and the town.

It is my opinion that the offices of village clerk and town supervisor of the town in which the village is located are incompatible.

RALPH A. STONE,
Assistant Attorney General.

Public Examiner.

February 19, 1947. 358-E-7

118

Incompatible—Village deputy clerk and president of village council are incompatible—MS1945—412.11.

Facts

"The Village of Excelsior wishes to employ a deputy recorder to take over the routine duties of the Village Recorder, and the Council is contemplating having these duties handled by the president of the Village Council."

Question

" * * * whether or not the positions of deputy recorder and president of the Village Council are incompatible, or if both of these positions could be held by the same person."

Opinion

Excelsior is now operating under the 1905 village law, and the title of "recorder" is properly "village clerk." By Minnesota Statutes 1945, Section 412.11, the clerk is authorized to appoint a deputy with the consent and approval of the council. Said section further provides:

" * * * The village council shall fix the salary of such deputy clerk and he shall be paid by the village."

It would, of course, be improper for the president of the council to vote on the approval of his own nomination for deputy clerk and to vote on the question of his compensation. Therefore, the two offices are incompatible.

RALPH A. STONE,
Assistant Attorney General.

Excelsior Village Attorney.

March 12, 1947. 358-E-7

119

Incompatible—Village firemen disqualified from holding membership on Police Civil Service Commission—MS 419.02.

Question

Whether a person who is a member of the village volunteer fire department is eligible for membership on the police civil service commission?

Opinion

The statute, M. S. 419.02, provides as follows:

> " * * * No commissioner shall, at the time of his appointment or while serving, hold any other office or employment under the city or village, the United States, the State of Minnesota, or any public corporation or political division thereof, other than the office of notary public. * * * "

This language is very broad. I think it is broad enough to disqualify a member of the volunteer fire department from holding office on the police civil service commission. A member of the volunteer fire department is at times employed under the village and paid by the village.

RALPH A. STONE,
Assistant Attorney General.

Ironton Village Attorney.

September 15, 1947. 358-E-1

120

Incompatible—Volunteer firemen—Office of justice of the peace or municipal judge not incompatible.

Question

"Is membership in the Volunteer Fireman's Organization and the office of the Justice of Peace or Municipal Judge or Special Municipal Judge inconsistent?"

Answer

I find nothing inconsistent between membership in the volunteer fire department and the office of justice of the peace and municipal or special municipal judge.

RALPH A. STONE,
Assistant Attorney General.

Shakopee City Attorney.

July 23, 1947. 358-E-4

OFFICERS

121

City alderman—Vacancy—Removal from ward from which he was elected—Power of council to fill the vacancy—MSA, § 351.02.

Question

Whether, under § 35 of the Chisholm City charter, an alderman is entitled to hold his office until his successor is appointed and qualified.

Opinion

Section 35 reads as follows:

"Terms of Office. The mayor and aldermen shall be elected for a term of two years. The term of each elective officer shall commence on the first day of January next after his election and each hold office until his successor is elected and qualified. The terms of all elective officers of the city shall be construed as continuing until their respective successors have been elected and shall be qualified."

A voluntary permanent removal by an alderman from the ward from which he was elected whereby he intentionally abandons his office clearly creates a vacancy under your charter and the laws of the state. If the office is thus actually vacated, the incumbent would not, in my opinion, be legally entitled under § 35 to continue therein until his successor is appointed and qualified. However, if he does continue to serve and no successor is legally appointed or judicial proceedings had declaring this office vacant, he would appear to be an alderman **de facto**.

The principle of law involved is, I believe, correctly stated in Throop on Public Officers, § 631, where is found the following statement:

> "Thus, where a justice of the peace has removed from the county, whereby, under the statute, he has vacated his office, but he nevertheless continues to exercise the same; he is a justice of the peace **de facto** until ousted by legal proceedings, and his acts as such are valid within the rule."

If the alderman in question continues to serve in the office to which he was elected even if he has permanently changed his residence to another ward, he, in my opinion, will be held to be an alderman **de facto** until his occupancy of the office is legally terminated. Whether his removal from one ward to another was intended to be temporary or permanent, was voluntary or involuntary, was or was not of a nature to constitute an abandonment of his office so as to create a vacancy therein, are questions of fact that cannot be determined by the Attorney General.

Question

Whether in the event that the council shall act to fill by appointment the alleged vacancy, the vote required to do so must be a majority of all the members of the council.

Opinion

If the office is, as a matter of fact, vacant, the council has the power by a majority vote of all its members, and not otherwise, to fill the vacancy for the unexpired term.

The charter of your city does not appear to give the council power to remove an elected official. If the alderman here considered refuses to give up his office, the council has no charter power to remove him, but, if it comes to the conclusion that there is a vacancy in that office, it may by a majority of all its members appoint a successor. If the present incumbent after such appointment refuses to give up the office, it will be a matter for the institution of proper court proceedings. If the final judicial determination is that a vacancy existed in the office at the time of the council's action to fill it by reason of the act of the incumbent's removal to another ward, the appointee so named will be entitled to the office. If the final judicial determination is that the vacancy did not exist at the time the council attempted to fill it, the present incumbent, who was duly elected to represent his ward, will, of course, continue as alderman for the remainder of his term.

However, with or without action by the council to fill the alleged vacancy, **quo warranto** proceedings may be instituted at any time by any citizen to determine the incumbent's right to the office, if the consent of the Attorney General to such proceedings is first procured, but, as stated above, the council has no authority to vacate the office. In a similar matter in **State v. Hays**, 105 Minn. 399, in connection with the removal powers of the

board of county commissioners, the court said "its powers are confined to filling an office after it has been vacated by proper judicial proceedings or by the act of the incumbent."

J. A. A. BURNQUIST,
Attorney General.

Chisholm City Attorney.

October 1, 1948. 63-A-11

122

County—Board of audit—Quorum—May act when quorum of two is present and united in action taken—MSA § 385.06.

Facts

The county board of auditors consists of three members. It meets on the call of the chairman, who is the chairman of the county board, or upon the call of two members.

Question

Is it possible for a majority of the board to conduct the work of the board without the third member being present?

Opinion

In my opinion, after a meeting of the board has been duly called, it is possible for two members of the board to meet at the specified time and conduct the work of the board without the third member being present; but in such case, the two members who do meet must agree upon all that is done. In case of a disagreement between them, nothing is accomplished. Were this not so, a minority member of the three might accomplish his will by remaining absent from a meeting.

If all the members of the board of audit were present and voting and two voted in favor of a motion or resolution and one voted against it, the motion or resolution proposed would carry. The member voting against the resolution cannot have greater power by remaining absent from the meeting than though he attended and voted against the action proposed.

CHARLES E. HOUSTON,
Assistant Attorney General.

Blue Earth County Attorney.

December 9, 1947. 541

123

County—Commissioners—Expenses—Not entitled to reimbursement of expenses in attending meeting called by commissioner of taxation under authority of MSA, Sec. 273.071, L. 1947, C. 531.

Facts

M. S. A., Sec. 273.071 (Laws 1947, Chapter 531) created the office of county supervisor of assessments. The duties of the office are defined. Expenses allowable to the incumbent are stated. Subd. 7 provides that "expenses for reasonable and necessary travel in the performance of their duties, including **necessary travel**, lodging and meal expense incurred by them while attending meetings of instruction or official hearings called by the commissioner of taxation."

In your letter of the 16th, you state that the commissioner of taxation plans to call regional meetings in the state to discuss this act. A region will embrace two or more counties. County auditors and county board members will be invited to attend. If such officers attend such meetings outside their resident county, travel and expense will be involved. M. S., Sec. 384.06, makes provision for the auditor's expense.

Question

Does the law provide that reimbursement may be made to county commissioners for their travel expense in attending meetings called by the commissioner of taxation?

Opinion

No provision is made therefor in M. S. A. Sec. 273.071. Nor does that act make it the duty of the county commissioners to attend such meeting. They are paid mileage for committee work. M. S., Sec. 375.06. But this is not committee work. The Attorney General rendered an opinion March 10, 1930 (File 124b) that they were not entitled to reimbursement for expenses paid in attending a convention, because there was no authority therefor. This appears to be a similar case and to require a like opinion. I conclude that authority for reimbursement is lacking.

CHARLES E. HOUSTON,
Assistant Attorney General.

Public Examiner.

June 17, 1947. 124-B

124

County—Register of Deeds—Books—Where numerical register and reception book is kept strictly in accord with authority and requirements of

MS1945, Sec. 386.04, the reception book required by Sec. 386.03 and the consecutive index required by Sec. 386.32 need not be kept.

Facts

Your register of deeds keeps the book provided in Sec. 386.04. He has also kept the books provided in Sec. 386.03 and also has kept two mortgage index books, called the mortgagors' and the mortgagees' index wherein all mortgages, liens and releases are indexed alphabetically. You do not say in your letter that in these books last mentioned are entered all deeds and other instruments left with the register of deeds as is required in Sec. 386.03.

Questions

1. Is the keeping of the books specified in Sec. 386.04 a substitute for the keeping of the books provided for in Secs. 386.03 and 386.32?
2. If the book provided in Sec. 386.04 is kept, may the mortgagors' and mortgagees' index books now kept be discontinued?

Opinion

You will note that the statute, Sec. 386.04, Mason's, Sec. 876, is authorized to be kept when the county board of any county **wherein the register's office keeps a deed index and mortgage index.** Therefore, if your register of deeds does not keep a deed index and mortgage index, the county board is not authorized by Sec. 386.04 to combine the reception books required by Sec. 386.03 and the consecutive index book required by Sec. 386.32.

But where the board in a county wherein the register's office keeps a deed index and mortgage index authorizes it, then the index prescribed by Sec. 386.04 may be kept. When the numerical registry and reception book is kept in accordance with Sec. 386.04, the register shall make the entries in this book in accordance with the requirements of Secs. 386.03 and 386.32. In order to keep this record in accordance with the provisions of Sec. 386.03, the pages shall be lettered in alphabetical order, a convenient number of consecutive pages being allotted to each letter of the alphabet, and every entry made therein shall be made under the initial of the grantor's surname, and in the grantees' index under the grantee's surname, and all such entries shall appear therein consecutively and in the order as to time in which the instruments were received. In this book shall be entered all deeds and other instruments left and all copies left as cautions or notices of lien, authorized by law to be recorded. In view of the last sentence in Sec. 386.04, "The register shall make the entries in this book in accordance with the requirements of sections 386.03 and 386.32," I am not at all sure that the work is either simplified or lessened. He must keep the records and indices specified in Sec. 386.19.

If the records are kept in accordance with the authority in Sec. 386.04 and if in the register's office there is a deed index and a mortgage index, and

if the entry is in the numerical register and reception book in accordance with the requirements of Secs. 386.03 and 386.32, then the records required by Sec. 386.03 and Sec. 386.32 need not also be kept.

CHARLES E. HOUSTON,
Assistant Attorney General.

Sibley County Attorney.

April 18, 1947. 373-B-18-A

125

County—Register of Deeds—Recording—Chattel mortgage—receipt for may be (1) contained in body of mortgage, or (2) be endorsed thereon, or (3) attached thereto—L. 1947, Ch. 258.

Opinion

The language of M. S. 1945, Sec. 511.03, as amended, is:

> "No register of deeds nor city clerk shall receive or file any chattel mortgage which does not contain in the body thereof or have endorsed thereon or attached thereto a receipt of the signer of the mortgage to the effect that a copy of such mortgage has been received by him."

Thus, the body of a chattel mortgage must contain a receipt of the signer that he has received a copy of the mortgage, or the mortgage must have endorsed thereon a receipt of the signer to the same effect, or the mortgage must have attached thereto a receipt of the signer to the same effect. He has his choice of any one of the three methods of compliance. Of course, if the compliance is by endorsement or by attaching a receipt, the endorsement must be signed separately from the mortgage and the attached receipt must be signed separately from the mortgage, but if the receipt is contained in the instrument before the signature of the mortgagor, it is my opinion that that is sufficient because the three conditions are stated in the alternative. If he complies with any one of them, it is sufficient.

CHARLES E. HOUSTON,
Assistant Attorney General.

Blue Earth County Attorney.

April 16, 1947. 373-B-5

126

County—Register of Deeds—Recording—Plats—How certified—MSA 505.03. **Proper acknowledgment required to entitle plat to record**—MSA 306.05.

Problem 1

Your letter of December 10 calls attention to M. S. A., Sec. 505.03. This is in the law relating to plats. On the plat, the surveyor is required to make a certificate in accordance with requirements of this section. The same section requires an instrument of dedication on the plat, which shall be signed and acknowledged by the owner of land. Except in certain cities specified, the plat shall be presented for approval to the council of the city or village in which the land is located. When the plat is approved by the council, it shall be certified to that effect by the clerk.

A plat has been offered to the register of deeds for record. Separate papers are attached to the plat on which are certificates of survey, dedication and approval. You say that "it is contemplated" (but you do not say by whom it is contemplated) that the register of deeds shall record the certificate in his miscellaneous record and that the plat will go into the plat book.

Question

Is this in compliance with M. S. A., Sec. 505.03?

Opinion

In my opinion, the dedication, the surveyor's certificate and the approval should appear on the same sheet of paper upon which the plat is drawn. That is the language of the statute. The plat, the dedication, the surveyor's certificate and the approval by the council constitute one entire instrument. This should all appear on the plat without reference to record in another place in the office of register of deeds. Under the terms of Sec. 505.04, it is only when the plat has been duly certified, signed and acknowledged, as provided in Sec. 505.03, that it shall be recorded in the office of the register of deeds and a duplicate filed with the county auditor. Not only the statute, but the common practice requires that the certificate appear on the plat and not on papers attached thereto or filed therewith.

Problem 2

A cemetery association was formed under authority of M. S. A., Sec. 306.02. Cemetery grounds adjoining a church were conveyed to the association. The trustees of the cemetery association submitted to the register of deeds a plat of the cemetery to be recorded in his office. On the plat, is a certificate, which describes the cemetery property by metes and bounds. The beginning of the description is a section corner but the description makes reference to no other monument. The size and description of the lots are shown on the plat. On this plat, also appears the following:

> "We the directors of ..... association hereby acknowledge the above plat with our hands and seals."

Then, also appears the following:

> "Subscribed and sworn to before me this 15th day of November 1948."

A notary signed the last certificate.

Question

Is such plat entitled to record in that form?

Opinion

M. S. A., Sec. 306.05, with reference to land acquired for cemetery purposes, provides:

> " * * * Such land, or such portion thereof as may from time to time be required for that purpose, shall be surveyed and divided into lots of such size as the trustees shall determine, with such avenues, alleys, and walks as they deem proper, and a map of such survey shall be filed for record with the register of deeds of the county of its location. * * * "

I am unable to say from the description contained in your letter whether it is definite. Of course, that is the ultimate purpose of the description that the land described may be identified therefrom.

The acknowledgment should be in the form prescribed by the statute for a corporate acknowledgment.

If the description is certain and when a proper acknowledgment appears on the plat, it would seem that it is entitled to record in the office of register of deeds, otherwise not.

CHARLES E. HOUSTON,
Assistant Attorney General.

Freeborn County Attorney.

December 14, 1948. 373-B-15

127

County—Registration of titles—Seal—May not be affixed upon certificates of title by printing—Minn. St. 1945, § 508.32.

Facts

"As statutory counsel for the Registrar of Titles of this county, I have been asked a question by him on which he wishes that I secure your opinion. Certificates of Title issued by him are required to bear his official seal. M. S. A. 386.40."

Question

Whether the seal may be affixed upon Certificates of Title by printing.

Opinion

The answer to your question is in the negative.

In your inquiry you refer to Minnesota Statutes 1945, Section 386.40. This reference is erroneous, as Section 386.40 refers to the register of deeds. The statute applicable to the registrar of titles is Minn. St. 1945, § 508.32, which provides in part as follows:

> " * * * Every registrar of titles shall have an official seal and affix the same to all documents requiring his official signature."

The language of Section 508.32, quoted above, is substantially the same as the corresponding provision in Section 386.40. The forerunner of Section 386.40 as it was found in Gen. St. 1878, C. VIII, § 186, is, as to the above quoted provision, substantially the same as Section 386.40. This provision of § 186 has been passed upon by the courts. The statute cannot be regarded as merely directory. It requires that he affix his seal and the directions of the statute must be followed. This means that he must make a legible impression of his seal upon all documents which require his official signature. **Colman v. Goodnow**, 36 Minn. 9, 11; **Hartkopf v. First State Bank**, 191 Minn. 595.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Attorney for Examiner of Titles.

March 9, 1948. 374

128

Sheriffs—Deputies—Appointment—Compensation in event of riot or impending violation of law caused by strikes—Compensation of deputies fixed by judge of district court—MSA, § 387.22.

Question

You inquire as to the power of a sheriff to appoint deputies to assist him in preserving law and order in the event of riots or impending violations of law.

Opinion

Your attention is called to a provision of law to be found in the second paragraph of Laws 1917, Chapter 312, Section 5, which now appears in M. S. A., Section 387.22, and reads as follows:

> "Whenever there is any riot or impending violation of law, and the sheriff shall be of opinion that other than the regular deputies are required, he shall apply to the judge of the district court to deter-

mine upon and fix the compensation of such special deputies as the sheriff may name and appoint, and such special deputies so named and appointed and the compensation of whom is fixed by the judge, shall have all the powers assigned to him by said sheriff in such appointment. The appointment by said sheriffs and the fixing of their compensation shall be immediately certified by the sheriff to the clerk of the district court of his county and such certificate filed by such clerk and such special deputies shall be paid in the same manner as deputies in attendance upon terms of court."

The above-quoted provision authorizes a sheriff, in the event of any riot or impending violation of the law, to appoint as many deputies as he may require and to apply to a judge of the district court to determine upon and fix the compensation of such special deputies who shall be paid the compensation so fixed by the judge in the same manner as deputies in attendance upon terms of court.

J. A. A. BURNQUIST,
Attorney General.

Hon. Luther W. Youngdahl,
Governor of Minnesota.

May 13, 1948. 390-B-1

129

Sheriffs—Deputy appointment—where compensation is fixed by order of court pursuant to MS 45, § 387.24, such determination is binding upon the county board. The order of the court might be reviewed by certiorari.

Facts

" * * * the sheriff of Scott County prior to the January, 1947 meeting of the board of county commissioners made application to the district court naming a certain individual as full time deputy sheriff of Scott Couny and requesting his appointment as such full time deputy. The district judge by written court order named the full time deputy requested and set his salary at $225.00 per month.

"It is the opinion of the county commissioners that no full time deputy sheriff is necessary and the question has now arisen as to whether or not the sheriff may discharge the deputy or whether it is necessary to receive a court order accordingly for it is the opinion of the county commissioners that the court will refuse to vacate the order."

Question

"What remedy is available in an instance of this kind, that is, where the sheriff has made application for the appointment of a full time deputy and the court has made its order appointing the deputy and fixing the salary, and then refuses to vacate the court order accordingly?"

Opinion

We assume that the salary of the deputy sheriff was fixed by the court pursuant to Minnesota Statutes 1945, Section 387.24. The law does not specifically provide for an appeal from a determination made by a court pursuant to this statute. We think that the order of the court fixing the salary of the deputy sheriff under this statute might be reviewed by certiorari.

If the county board refuses to pay the deputy sheriff in accordance with the order of the court fixing his salary, then we believe that the matter might be tested in a mandamus action brought by the deputy sheriff against the county officers for the issuance of a county warrant for salary payment in accordance with the court's order.

The legislature has conferred upon the judge of the district court authority to fix and determine the salary of the deputy sheriff in accordance with the statute above referred to. We believe that the determination so made by the court is binding upon the county board, and determines the salary of such deputy until the order has been modified, vacated, or set aside.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Scott County Attorney.

January 24, 1947. 390-B-1

130

Sheriff—Expenses—Attending law enforcement conference called by the Governor—MS1945, Sec. 387.20.

Question

Whether the sheriff may be reimbursed for his expenses in attending the law enforcement conference called by the Governor.

Opinion

Minnesota Statutes 1945, Section 387.20, reads in part as follows:

> "In addition to such salary each sheriff shall be reimbursed for all expenses incurred by him in the performance of his official duties for his county and his claim for such expenses shall be prepared, allowed, and paid in the same manner, as other claims against counties are prepared, allowed, and paid * * * ."

Because of the official duties of the sheriff and the relation existing under the law between him and the chief executive, it has heretofore been held by this office, in an opinion dated November 20, 1923, file No. 104-A-6, that in attending upon a law enforcement conference pursuant to call by the Governor the expenses of the sheriff are incurred "in the performance of his official duties" and are lawful charges against his county, to be paid in the same manner as other claims against the county.

We adhere to the above mentioned opinion.

J. A. A. BURNQUIST,
Attorney General.

Clearwater County Attorney.

July 11, 1947. 104-A-6

131

Sheriff — Expenses — Transportation of convicts from county where convicted to reception center of Youth Conservation Commission, created under L. 1947, C. 595.

Facts

The sheriff of "A" County delivered four boys to the reception center of the Youth Conservation Commission at the State Training School for Boys at Red Wing. Each boy was previously convicted in the District Court on the charge of grand larceny in the second degree. Previous to delivery of the boys at Red Wing, the sheriff received an order from the Commission to convey them and make such delivery.

Question

Should such expense, to be paid to the sheriff, be disbursed by the state or county?

Opinion

Upon reading M. S. A., Sec. 640.52, it is observed that the necessary expenses of the sheriff and other officers incurred in conveying convicts to the state prison and state reformatory, including per diem and expenses of guards, shall be approved by the state auditor and paid out of the state treasury. This section is very limited in its application. The state auditor is not authorized to go beyond its terms. It is not authority to do anything not there authorized.

The last legislature created a Youth Conservation Commission. L. 1947, C. 595, M. S. A., Sec. 260.125. Subd. 19 thereof grants authority to this commission over felons to it committed. Provision is not made therein for disbursement of state funds for conveyance of convicts from the county where convicted to the reception center of the Youth Conservation Commission. Accordingly it appears that this is a matter with which the state auditor is not concerned. The sheriff should be referred to the county officers.

CHARLES E. HOUSTON,
Assistant Attorney General.

State Auditor.

April 16, 1948. 390-C-12

132

Welfare board member—Contracts—Interested in—After officers resignation is accepted, the firm in which the board member was a stockholder may submit a bid—MSA Secs. 382.18 and 620.04.

Facts

L, a member and a stockholder of a contracting firm, was for several years a member of the county welfare board created under M. S. A. C. 264. L was elected chairman of that board for the year 1948 pursuant to section 264.01, subd. 4. On or about June 30 L mailed his resignation of office to the county board, to become effective as of July 1. The county board met on July 8 and did then accept his resignation effective as of July 1. On July 9 the welfare board met and likewise accepted his resignation.

Pursuant to advertisement for bids for the construction of a county infirmary at Virginia, bids were received and opened on July 6. The two lowest bids received were by the firm of which L was a member, in the sum of $438,580, and the firm of S Company in the sum of $471,100.

In addition to the facts presented by you, and the authorities cited, we have been favored with a memorandum from counsel representing the two

bidders above mentioned, wherein the uncontroverted facts were set forth at considerable detail and authorities bearing upon the legal question to be hereinafter stated are cited and analyzed as to the legal conclusions to be drawn therefrom.

From these memoranda, and in addition to the facts already stated, it is made to appear without controversy that while L was a member of the welfare board and on September 7, 1945, as chairman of the hospital committee, he signed a contract on behalf of the hospital board engaging the services of architects to prepare plans and specifications for the construction of the building which involves the two bids mentioned. These plans and specifications are dated May 1, 1948. On or about May 28, advertisements for bids were issued by the county board for bids to be opened on July 6. These memoranda both recite that L's resignation was mailed on July 1 to the proper officers, to become effective on that date.

In so far as it may be material, it further appears that on July 6 L's firm submitted its bid pursuant to the advertisement for bids. On July 6 the bids received were opened by the county purchasing agent. Thereafter the purchasing agent tabulated the bids received and the county board, without accepting any bids, adjourned until July 22, at which time further consideration of the bids will be given by the board.

On July 12 the county welfare board appointed a new chairman in place of L.

A tabulation of all the bids received was enclosed by counsel submitting one of the memoranda.

Question

Was L's firm eligible to bid upon the infirmary building and may the county board accept such bid if in the exercise of its judgment such bid constitutes the lowest responsible bidder?

Opinion

We shall assume, as has been frankly stated in each of the memoranda submitted, that the bid of L's firm was made in good faith and that L, as a member of the welfare board and his connection with the architects and their employment, was likewise acting in good faith and without attempt or intention to obtain for L or his firm any undue or unfair advantages therefrom. It must be conceded that certain knowledge comes from business experience or connections which may be gainfully used. To what extent L obtained or gained knowledge by being a member of the welfare board or the employment of the architects or by his official connection and association with the members of the board or the architects has not been made to appear. It is sufficient to assume what has been frankly stated, that these transactions and associations were all in good faith and no bad motives should therefore be presumed.

The decisive question is "when did L's resignation from the welfare board become effective?"

We are not aware of any statute or rule of law which forbids a person from contracting in good faith with a municipal body of which he had been previously a member.

There are two statutes which forbid county officers from being interested in a contract to which the county is a party, namely, section 382.18 as amended by Laws 1947, chapter 360, and section 620.04.

In giving effect to the provisions of these statutes the status of the contracting party as an officer or otherwise should be determined as of the effective time of the contract. These statutes contemplate conditions and circumstances existing at the time the contract is made. There is no prohibition against an ex-officer of the county being interested in a contract with the county.

The next point for consideration is the status of L at the time when the bids in question are to be considered by the county board and the bid of the successful bidder accepted and a contract awarded therefor.

We think that L, as chairman of the welfare board created under the provisions of M. S. A. ch. 264, was one of the classes of persons which the statute forbids from being interested in a county contract (1938 Attorney General Report, No. 137).

L was appointed chairman of the welfare board for the year 1948, under the provisions of section 264.01, subd. 4, which in part provides:

> "Annually on the first Monday in January, the board shall elect from its number a chairman, and vice-chairman to serve for one year, and until their successors qualify."

The term of office of the member of the board to be appointed by the board of county commissioners is for a fixed term, Section 264.01, subd. 2.

Section 351.02 (2) provides that a vacancy shall occur before the expiration of the term of such office by resignation. Section 351.01 relating to resignations reads as follows:

> "Resignations shall be made:
>
> "(1) By incumbents of elective offices, to the officer authorized by law to fill a vacancy in such office by appointment, or to order a special election to fill the vacancy;
>
> "(2) By appointive officers, to the body, board, or officer appointing them, unless otherwise specially provided."

From the facts presented and upon which we base our conclusions, it appears that on July 1 L mailed his resignation to the proper public officers which was received by such officers on July 2. The resignation by its own terms clearly manifests L's intention to resign from office. On July 8 the

county board accepted his resignation effective as of July 1, and on July 9 his resignation was accepted by the welfare board. On July 12 the county welfare board appointed another chairman in place of L.

There are two lines of decisions as to when a resignation becomes effective so as to cause a vacancy. The one line holds to the proposition that when an officer takes office for a fixed term and until his successor is elected or appointed and qualifies, in order to effect a vacancy three conditions must occur, namely,

A resignation by the incumbent,

An acceptance thereof by the proper board, and

The appointment of a successor who qualifies.

The leading case supporting this rule is **Badger v. U. S.**, 93 U. S. 599, 23 L. Ed. 991 (Illinois statutes and constitution involved). However, in connection with this case it should be noted that the resignation of the officer was for the purpose of attempting to prevent the collection of a judgment. Other courts which have followed the rule announced in the Badger case are **The People ex rel. The Illinois Midland Railway Company v. Barnett Township**, 100 Ill. 332; **Jones v. Jefferson**, 66 Texas, 576; 1 S. W. 903; **Keen v. Featherston**, 99 Tex. Ap. 563, 69 S. W. 983; **U. S. V. Green, et al** (Mo.), 53 Fed. Rep. 769.

The county board had not, on the 12th day of July when a successor to L as a member and chairman of the welfare board was appointed, accepted any other bids nor awarded a contract therefor.

The interest which is forbidden by the statutes mentioned must exist at the time when the contract is made. The inception of the contract could not begin until the bid was accepted. Hence, if we adopted the rule stated in the Badger case, then the three conditions which are therein stated as a prerequisite to causing a vacancy occurred in the instant case, as follows:

The resignation of L on July 1

The acceptance thereof on July 8 and July 9 by the county board and the welfare board

Filling the vacancy by appointment of a chairman on July 12.

Consequently, upon the rule stated in the Badger case, the office of L became vacant on July 12.

The action of the county board taken on July 6 to adjourn the meeting for the purpose of considering the bids submitted until July 22, postponed the time for the acceptance of the successful bids until at least July 22. L's resignation had been made and tendered, accepted, and the vacancy caused thereby filled prior to July 22.

It does not appear to us from a reading of our Supreme Court Decisions that our court has followed the rule stated in the Badger case.

In **State ex rel Ladeen,** 104 Minn. 252, on page 255 the court said:

> "A written resignation delivered to the board or officer authorized to receive it and to fill the vacancy created thereby would be prima facie evidence of an intention to relinquish the office, but it is not conclusive."

In an opinion given by this office on March 9, 1940, (File 437-A-18) it was held that the resignation of a town supervisor does not become effective until accepted by the town board. In the instant case the resignation was to become effective by its terms on July 1. L's intention to resign is clearly expressed. He caused the resignation to be mailed to the proper officers who by law had the power to appoint his successor. The resignation was received by the county board and the welfare board. L could have done no more. It is conceded that he acted in good faith. His resignation has been accepted and the vacancy filled.

The county board has not as yet accepted or rejected any bids submitted. It intends to do so on July 22.

As bearing upon the principle of the right of an officer to resign so as to become eligible to make contracts, see 44 Corpus Juris, page 95, section 2180.

Applying the language of our court in the Ladeen case we conclude that the termination of L's office by his resignation became effective as of July 1st in accord with L's manifest intentions, and the acceptance thereof by the county board and the welfare board, and that the county board may, on July 22, or at a subsequent adjourned date, consider the bid submitted by L's firm and accept the same if, in the judgment of the board, such bid constitutes the lowest responsible bidder as provided by statute.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

St. Louis County Attorney.

July 22, 1948. 90-B-3

133

Towns—Attorney—Town board has authority to hire an attorney on monthly basis to furnish services and advice in matters other than legal actions —MSA 365.10 (3) 366.01.

Facts

The town of Irondale has within its boundaries a considerable amount of platted property. The plats of Crosby Beach, Morningside Park, Julesburg, Riverton, and others, are within the town limits. The town has a

valuation of between six and seven hundred thousand dollars. It transacts a great deal of business, including the buying of equipment and making of contracts.

For the purpose of handling its business, the town is in need of legal advice on questions which arise from time to time and for the drawing of contracts and other papers. The town board is anxious to retain the regular services of an attorney for the purpose of furnishing legal advice and drawing contracts and other papers and generally acting as attorney for the town, except in cases involving litigation in the courts.

Question

"May a town through its town board employ an attorney to regularly represent the town with regard to all matters of a legal nature arising as a result of their governmental operations and pay him therefor on an annual basis?"

Opinion

The only statutory provision relating to the payment of attorneys fees by a town is found in M. S. A. § 365.10 (3). This provision is to the effect that electors of each town have power at their annual election:

"To direct the institution and defense of all actions in which the town is a party or interested; to employ necessary agents and attorneys for the prosecution or defense of the same, and to raise such sums of money for that purpose as they deem necessary."

From a consideration of this statute, it is apparent that the power to employ an attorney to direct the institution and defense of all actions in which the town is a party or interested is vested in the electors of the town at their annual town meeting. See, however, M. S. A. § 365.40.

There are many matters as to which a town board from time to time requires the assistance and advice of an attorney other than actions in the courts. In drawing contracts, in approving specifications for contracts, in drawing proceedings with reference to the establishment of town roads, in drawing advertisements for bids, in connection with proposed bond issues, in attending meetings of the board for the purpose of giving advice on legal questions, and in many other matters which arise from time to time, a town requires and should be entitled to have the assistance of a competent attorney.

The section of the law above quoted does not apply to the hiring of an attorney for the purposes last mentioned.

I direct your attention to M.S.A. § 366.01 relating to the duties of the town board. It is therein provided that "The supervisors shall have charge of all of the affairs of the town not by law committed to other officers."

It is my opinion that this authority vested in the town board gives that

board the power to retain and pay an attorney on a monthly basis for all services of a legal nature which it requires other than in connection with actions by or against the town.

If the business of any town is so extensive, complicated, and of such magnitude and importance that good business judgment would require the advice of an attorney from time to time, I think power to employ such an attorney rests in the town board.

In the case of Lindquist v. Abbett, 196 Minn. 233, the court had under consideration the matter of the employment of an attorney by a school board. The power "to prosecute and defend actions by or against the district" was expressly given to the board. Apparently there was no express authority to hire an attorney to give advice with respect to other matters. In that case on the subject now under discussion our court said:

> "The board of directors of any private corporation of the magnitude, importance, and pervasive contacts which characterize the Duluth school district would, as matter of business sense and safe administration, require the services of counsel. The usual thing would happen. The executive head would select some lawyer having the confidence of the management and retain him upon an annual basis. If a firm were chosen, probably the understanding would be that some one member of it would be assigned to be individually responsible for the prompt and satisfactory handling of all matters of the corporation submitted to him. Business men are averse to being shunted from one lawyer to another simply to suit the convenience of others. Their desire is for some one adviser to whom they can go when occasion arises and get prompt and dependable answers to their questions. They want advice backed not only by knowledge of the law but also by experience with the other 'nonlegal' factors so often present in the problems submitted by business men to their lawyers.
>
> "The evidence makes it appear that the hypothetical case of the private corporation indicates the precise status in which the members of the defendant board found themselves when they first retained Mr. Spear. It is beyond our competence to find in their attitude and action anything surprising, to say nothing of such elements of arbitary or capricious action as to indicate that they went beyond their lawful power. We cannot find anything illegal in the manner of Mr. Spear's employment and payment. We cannot agree in the distinction made below between what were supposed to be his 'legal' and 'nonlegal' services. Once a lawyer becomes familiar with the affairs of an important and continuing client, he is constantly advising on matters which may involve both questions of law and fact. Many courses of action which are legal are unwise. The lawyer who in vouching for their legality does not at the same time point out their lack of wisdom, if it be known to him, is an incompetent adviser. In so counseling, he does not by so much cease to be a legal counselor. His knowledge of the law is not the only thing wanted. Frequently more important is his knowledge, gained from experience, of how the law works in application to the affairs of

men. In some cases corporations desire their counsel to become specialists in their affairs. It is probable that the defendant board deliberately tried to make Mr. Spear a specialist in the affairs of the Duluth school district. If so, they were but following an approved practice of well-managed, private business. There is no law which condemns them for so doing simply because they happen to be managing a school district.

"Apparently it was considered to be Mr. Spear's duty, anyway it was his custom, to be present at every board meeting. The members wanted to be sure of the legality of their action as they went along and were attempting to avoid the delay which often ensues if a matter must wait until it can be referred to absent counsel and his opinion procured. Then there is often a choice, already mentioned, to be made between two or more routes of action, all of which may be legal, but one altogether the more desirable for some reason only an experienced lawyer may know. So, the criticism of Mr. Spear's presence at all board meetings is baseless. No one has yet condemned the municipal practice that requires the city or village attorney's presence at meetings of the council. That custom is no more to be condemned in the case of defendant board. It is charged with public affairs more weighty and complex than those of most cities of the state.

"It is of no significance that the conventional city or village charter expressly authorizes the employment of an attorney. Take away such express grant, the power would yet come by implication from the very necessity of the case. * * * "

I think that the argument of the supreme court in this case is equally applicable to the case of a town board where there is no express authority given the board to employ an attorney even though legal services and advice are necessary and advisable.

In an opinion dated October 16, 1945, No. 102, 1946 report, this office ruled:

"There are many occasions on which the town board needs the services of an attorney other than in the institution and defense of actions. I think there is implied power in the board to hire an attorney in such case."

In this opinion it was held that the town board had the right to retain and pay an attorney for legal services necessarily required by the town board in connection with drawing notices, conducting proceedings, drawing up the minutes and the order establishing a cartway and awarding damages.

Therefore, if in the judgment of the town board there is so much business requiring the continual services and advice of an attorney at law (other than the institution and defense of cases) that it would be advisable, businesslike and economical to hire an attorney for the purposes indicated on a regular basis, it is my opinion that the town board acting reasonably and

in good faith may employ an attorney from month to month to furnish such services. I think such employment should be on a monthly rather than on an annual basis.

RALPH A. STONE,
Assistant Attorney General.

Ironton Town Attorney.

April 19, 1948. 434-A-1

134

Constables—Town deputy—Authority of town constable to appoint deputy.

POWER OF TOWN CONSTABLES

The office of constable is one of great antiquity. In medieval law it was a name given to a very high functionary under the French and English kings, the dignity and importance of whose office was only second to that of the monarch. He was in general the leader of the royal armies and had cognizance of all matters pertaining to war and arms, exercising both civil and military jurisdiction. He was also charged with the **conservation of the peace of the nation.** Thus there was a "Constable of France" and a "Lord High Constable of England."

In English law the constable was a public civil officer, whose proper and general duty was to **keep the peace** within his district, though he was frequently charged with additional duties.

In American law the constable is an officer of a municipal corporation (usually elected) whose duties are similar to those of a sheriff, though his powers are less and his jurisdiction smaller. He is to preserve the public peace, execute the process of magistrates' courts, and of some other tribunals, serve writs, attend the sessions of the criminal courts (of justices of the peace), have the custody of juries, and discharge other functions sometimes assigned to him by local law or by statute; he is a conservator of the peace; he is an officer charged with a duty to the public of the gravest and most delicate nature, in which the whole commonwealth is vitally interested; he is the local peace officer of the vicinage; a constable stands on the same footing as a sheriff, and originally his duty was to keep the peace (as it still is), and he has no authority to serve process in civil actions, except such as is expressly conferred upon him by statute.

POWER TO APPOINT DEPUTIES

I find no statute authorizing a town constable to appoint deputies. Under date of May 18, 1925, file 847, this office issued an opinion as to the

appointment of deputy village constables. It was held that there is no authority for the village council or the constable himself to appoint a deputy constable, and that there was no such office.

RALPH A. STONE,
Assistant Attorney General.

Attorney for Town of Bloomington.

May 7, 1948. 847

135

Planning and zoning commission—Where no definite term is fixed by law, an officer holds at the pleasure of the appointing power—MSA 366.17.

Question

What is the term of office of a member of a zoning commission appointed pursuant to M. S. A. 366.17?

Opinion

M. S. A. 366.17, provides for the appointment by the board of supervisors of "a planning and zoning commission" in certain towns after certain requisites have been complied with.

The statute further provides that all members of the planning and zoning commission must be freeholders and that the number of such commissioners is to be determined by the board. There is no definite term of office provided for the commission or members of the commission.

> "Where the term of office is not fixed by law, the officer is regarded as holding at the will of the appointing power, even though the appointing power attempts to fix a definite term; and an officer removable at the pleasure of the appointing power has, in the strict meaning of the word, no 'term' of office." 46 C. J. title Officers, p. 964.

The above quotation from Corpus Juris is supported by ample authority. See Throop on Public Officers, § 304, from which I quote as follows:

> "Where an office is filled by appointment, and a definite term of office is not fixed by a constitutional or statutory provision, the office is held at the pleasure of the appointing power, and the incumbent may be removed at any time."

I also quote from § 354 of the same text:

> "The general rule is, that where a definite term of office is not fixed by law, the officer or officers, by whom a person was appointed to a

particular office, may remove him at pleasure, and without notice, charges, or reasons assigned."

Wright v. Gamble, 136 Ga. 376, 71 S. E. 795, Ann. Cas. 1912 C, p. 372.

A law provided for a board of commissioners of roads and revenue of a county. The law authorized the board of commissioners to elect their own clerk, but the act fixed no definite term of office for the clerk.

In November, 1909, the board passed a resolution fixing the term of the clerk of the board at two years beginning with the first Tuesday in January, 1910. Pursuant to the resolution, and on the first Tuesday in January, 1910, G was elected clerk of the board.

At the regular meeting of the board in May, 1910, the board declared the office of clerk vacant and rescinded their action appointing G as clerk, and thereafter appointed W as clerk of the Board. Litigation is between W and G as to who held title to the office of clerk. The court said:

"It seems now to be the universally accepted rule, that, where the tenure of the office is not prescribed by law, the power to remove is an incident to the power to appoint."

This case cites numerous authorities to the same effect. I direct attention to the case of Parsons v. Breed, 126 Ky. 759, 104 S. W. 766, which held that "where neither the constitution nor statute fixes the term of office, the appointee holds at the pleasure of the appointing power, although it was attempted by the appointing power to fix a definite term."

See Quernheim v. Asselmeier, 296 Ill. 494, 129 N. E. 828, in which the court held:

"Where an office is filled by appointment and a definite term is not fixed by constitutional or statutory provision, the office is held at the pleasure of the appointing power, and the incumbent may be removed at any time."

My opinion is in accord with the above cited authorities.

RALPH A. STONE,
Assistant Attorney General.

Attorney for Town of Eden Prairie.

December 20, 1948. 439-H

136

Village—Clerk—Records—Custody of village books—Should be kept at the place directed by the council if that place is safe—MS1945, Sec. 412.29 Sd. 6.

Question

Does the clerk have to keep the village books at the village hall, when directed to do so by the other members of the council, or may he keep them in his own home away from the inspection of the council?

Opinion

Wherever the clerk keeps the books they must be kept subject to inspection by the village council. The village clerk should keep the books at the place directed by the council, if that is a safe place for keeping the same; otherwise, being responsible for their safety, he may keep them where they will be safe in his judgment, subject, however, to inspection, as aforesaid. Minnesota Statutes 1945, Section 412.19, Subd. 6, provides that the village council "shall have power to control and protect the public buildings, property, and records and insure the same."

RALPH A. STONE,
Assistant Attorney General.

Attorney for Village of Rockford.

July 16, 1947. 470

137

Village—Clerk—Salary—After being fixed by the village council at the beginning of his term the council cannot increase the salary of the clerk during the term—MSA 412.12, MSA 412.11, MSA 412.21.

Facts

"The Village Council of the Village of Crystal deems it advisable to establish a village office in the village hall and wishes to employ one person on a full-time basis to work in that office and take care of the clerical and routine work of the village.

"The present village clerk's salary was established at the beginning of January, 1948 at $40.00 per month. This salary was of course fixed at that amount in that he was merely to do this on a part-time basis, fulfilling the usual functions of a village clerk. However, the Council would now like to employ him in a full-time capacity and pay him a salary commensurate with the amount of time which he would be devoting to the village work. He would then be the only full-time employee and in charge of the village office."

Questions

"Can the Village Council now change his salary so as to adequately compensate him for full-time employment? If not, can the Village

Council appoint him as a manager of the village office at a stated salary, this being separate and apart from his work as village clerk."

Opinion

M. S. A. § 412.12, provides in the last paragraph of that section as follows:

> "He shall act generally as the clerk, recorder, and bookkeeper of the village, be the custodian of its seal and records, countersign its official papers, post and publish notices, ordinances, and the like, and perform such other appropriate duties as may be imposed by ordinance or other direction of the council. For his services he shall receive such compensation as may be fixed at the beginning of his term by resolution of the council. For certified copies, and for filing and entering, when required, chattel mortgages and other papers not relating to village business, he shall receive the fees allowed by law to town clerks."

Under this section it has been the holding of this office that in villages operating under the 1905 law the compensation of the village clerk is to be fixed at the beginning of his term and may not be increased during such term. To that effect are the opinions of December 19, 1938, and April 8, 1947, 470-B, copy enclosed herewith.

Under the statute quoted the council could impose appropriate duties upon the village clerk, but even so the council could not increase the clerk's compensation during his term of office.

A further objection might be made to so increasing the salary of the village clerk in this: That the clerk is a member of the council, and that to so increase his salary he would be participating in a contract and interested in a contract of the village contrary to the provisions of the statute. See M. S. A. § 412.21.

I call your attention to the provisions of M. S. A. § 412.11. Under the provisions of this section the clerk, with the consent and approval of the council, could appoint a deputy who would have authority to discharge any and all of the duties of the clerk, and the council would have authority to fix the salary of such deputy. Such deputy could be required by the clerk to keep the office open at all times.

RALPH A. STONE,
Assistant Attorney General.

Attorney for Village of Crystal.

April 19, 1948. 470-B

138

Village council—Authority—Buildings—Removal from village—Council can-

not arbitrarily or unreasonably prevent removal of building where the village has no bonded debt and taxes are paid. Ordinance prescribing the moving of buildings along the streets.

Facts

A certain person has purchased a dwelling house located in Iona. He desires to move it to Slayton. The taxes on the property from which the house is to be removed have all been paid. Iona has no bonded debt.

Question

Whether the village council may legally refuse to permit the removal of the building.

Opinion

The village council has no right to arbitrarily or unreasonably refuse to permit the removal of a building under such circumstances. I take the following quotation from the case of Evans v. King (S. D.), 230 N. W. 848:

> "In a small city or town where the streets are not crowded by traffic to any great extent, the use of the streets for moving buildings may be properly exercised under reasonable regulations, and to totally forbid such use in such communities may well be deemed unreasonable, and in a proper case the city authorities may be compelled by mandamus to issue a permit for the moving of buildings across or along the streets in such places. But such use of the streets not being a matter of right, the governing body has some discretion in regard to when a permit shall be issued. The answer in the instant case alleges that the plaintiff's building cannot be moved across or over the streets without damaging sidewalks and cutting down trees planted by the city in the parking, and not only would it cause damage to the property of the city, but would destroy the electric light wires and equipment, and impair the service of light and power. The court refused to permit any evidence in support of these allegations, apparently on the theory that plaintiff had an absolute right to the use of the streets for the purpose of moving his buildings over and along them. In this we think the court erred. It may be that the refusal to issue a permit was arbitrary and not warranted in the exercise of a reasonable discretion, but that was a matter to be established by proof if it existed, and the refusal to admit any evidence in support of the answer prevents any finding as to whether the refusal was unreasonable and arbitrary or was justified in the exercise of a reasonable discretion. * * * "

I think the law is well expressed in the foregoing quotation.

The village council would have a right to require compliance with an ordinance prescribing reasonable conditions which the owner could comply

with. The circumstances would be very unusual in which the council could absolutely prohibit removal of the building. Also see Opinion 796, 1920 report and 237, 1936 report.

RALPH A. STONE,
Assistant Attorney General.

Attorney for Village of Iona.

October 13, 1947. 469-A

ORDINANCES

139

License—Bulk oil stations and trailer camps. Town may regulate by ordinance—MS1945, § 368.01.

Opinion

Bloomington township is entitled to exercise the powers of villages referred to in M. S. § 368.01, as it falls within the classification therein set out.

This section confers police power upon the town. It authorizes the town to "regulate the storage of gunpowder and other dangerous materials" (412.19, subd. 8). The town is also authorized to "provide for the government and good order of the village, the suppression of vice and immorality, the prevention of crime, the protection of public and private property, * * * and the promotion of health by such ordinances, rules, and by-laws not inconsistent with the constitution and laws of the United States or of this state as it shall deem expedient." (Subd. 24)

I think the power conferred is sufficient and broad enough to authorize the town to adopt an ordinance regulating the storage of oil and gasoline and also regulating the operation of trailer camps, and if deemed advisable by the town, a license for these occupations may be required.

As bearing upon and substantiating this opinion, I refer you to Dunnell's Digest, title Municipal Corporations, § 6794; also **Power v. Nordstrom**, 150 Minn. 228.

See **Standard Oil Co. v. Minneapolis**, 163 Minn. 418. An ordinance of the city provided that no building should be erected for the storage or sale of oil or gunpowder within the city limits unless the party desiring to erect such building had obtained permission from the city council. The purpose of the action was to compel the city council to issue a license for the erection and maintenance of a gasoline filling station. The license was refused upon

the ground that a station at that particular place would interfere with the traffic and increase the fire hazard. The court upheld the ordinance and the action of the city in refusing a license.

It was held in **State v. Morrow**, 175 Minn. 386, that under the general welfare clause of the city of Minneapolis the council had power to enact an ordinance for the licensing of an open air automobile parking place.

The general welfare clause of the city of Minneapolis is similar to that which applies to villages.

I refer you to the following quotation from **Sverkerson v. City of Minneapolis**, 204 Minn. 388, 391:

> " * * * The lawmaking body has a wide latitude in considering what is an evil and what is necessary for the good order of the community. 'It is largely a matter of discretion with the legislature to determine the subjects of police regulation, and the mode and extent of such regulation. It is not for the courts to determine the wisdom or expediency of police legislation.' "

As to the storage of oil, see **State v. Northwest Linseed Co.**, 209 Minn. 422. See the discussion on page 427 of this report and the following quotation:

> "The exercise of the police power is legislative. Its policy is not for the courts. Only when its exercise unconstitutionally affects personal or property rights do the courts take cognizance; and it is presumed that the legislative body investigated and found conditions such that the legislation which it enacted was appropriate."

RALPH A. STONE,
Assistant Attorney General.

Attorney for Bloomington Township.

August 26, 1947. 434-A-6

140

License—Real estate broker—Power to license real estate brokers—Under city charter such power is granted—Ordinance should be reasonable and define real estate broker.

Question

Has the city council of Austin authority to license and regulate local real estate agents?

Opinion

I find no state law conferring such authority upon third class cities.

Your charter provides in Chapter V, Section 6, that the common council shall have authority to license and regulate various activities, including "brokers and stockbrokers, insurance offices and insurance agencies * * * ."

I think this is sufficient authority for the council to pass an ordinance regulating brokers of real estate.

A broker is defined by Funk & Wagnalls New Standard Dictionary to be "a person who negotiates sales or contracts as agent, or makes sales and purchases for a commission."

I think the common understanding of the meaning of the term "broker" is that he is a person who acts as agent for others, and does not act as a principal for himself.

Black's Law Dictionary contains the following definition of a broker:

> "An agent employed to make bargains and contracts between other persons, in matters of trade, commerce, or navigation, for a compensation commonly called 'brokerage.' (citing authority) But the term 'broker' is no longer limited, but extends to almost every branch of business, to realty as well as personality."

Words and Phrases, Vol. 5, states that " 'Brokers' are persons whose business it is to bring buyer and seller together." The same book and volume on page 827 cites City of Texarkana v. James & Mayo Realty Co., 62 S. W. 2d 42, 187 Ark. 764, holding in effect that a person engaged in dealing in real estate is a broker.

Oregon Home Builders v. Montgomery Inv. Co., 94 Or. 349, 184 P. 487, 491, holds that a real estate broker is one employed in negotiating the sale, purchase or exchange of lands on a commission contingent on success.

In Morris v. O'Neill, 239 Mich. 663, 215 N. W. 8, it was held that to make one a real estate broker within the meaning of the law requiring a license to engage in such business, it is not sufficient that he make one or two sales, but it must be made to appear that he is engaged in the business to such an extent that it can be said to be his vocation or partial vocation.

I think that with the authority granted by the charter to license brokers, the city council would have the authority to license real estate brokers; that the word "broker" is to be given its ordinary meaning; that as so used, it means one who is engaged in the buying and selling of property on commission or as agent.

I think the council could pass an ordinance licensing and reasonably regulating the business of real estate brokers, but such ordinance should not apply to a person engaged in the business of buying and selling real estate on his own account. A person who buys and sells on his own account is not a broker.

Of course such an ordinance would have to be general in its application and reasonable in its provisions. It could be so drawn as to exclude spasmodic or unusual sales not made in the regular course of business. The ordinance should define who is a real estate broker within the meaning of that term as used in the ordinance.

As supporting this opinion, I refer you to the case of Buckley v. Humason, 50 Minn. 195.

RALPH A. STONE,
Assistant Attorney General.

Austin City Attorney.

November 17, 1948. 62-C

141

Rent control—Regulations governing landlord and tenant—Governing body may pass ordinance relating to housing situation not adequately covered by State and Federal acts—Laws 1947, Ch. 632, MS1945, § § 566.02, 566.03.

Question 1

"Does the Minneapolis City Council have the power to adopt and enforce an ordinance containing provisions more drastic in their effect on the right of a landlord to evict a tenant than those contained in and permitted by Public Law No. 129, adopted by Congress on June 30, 1947, amending the existing Federal Rent Control Law permitting landlords to evict tenants under the circumstances specified in Section 209, Subdivisions 1 to 5, inclusive thereof?"

Answer

Section 209 of the Federal Housing and Rent Act of 1947, to which you refer, applies only to controlled housing accommodations. It does not include an establishment known as a hotel as therein defined or any of the other housing accommodations mentioned in (c), paragraphs 1, 2, and 3, of Section 202, Title II, of that act. As stated in my opinion of August 9, 1947, the status of the law in the matter under consideration is of a somewhat doubtful nature, but, if the city council determines the existence of a local rent emergency endangering life, health, and safety of the community, it is warranted in passing a rent ordinance intended to prevent results detrimental to public interests during such an emergency. Such action, if a sufficiently serious emergency exists, would appear justified, not only with respect to such housing accommodations as are not covered by the federal act, but also with respect to those not excepted from the federal law. The

Price Control Extension Act of 1946 contained the provision that housing accommodations should not be subject to rent control by any state or local government. That act expired on June 30, 1947. The Housing and Rent Act of 1947 contains no such provision.

Under Section 209 above cited, no eviction action may be brought to get possession of any "controlled housing accommodations" as therein provided so long as the tenant continues to pay rent, except in the circumstances specified in Section 209 (a), paragraphs 1 to 5. It is my understanding that one exception causing hardship is paragraph 4, which permits an eviction action if:

> "(4) the landlord seeks in good faith to recover possession of such housing accommodations for the immediate purpose of substantially altering, remodeling, or demolishing them and replacing them with new construction, and the altering or remodeling is reasonably necessary to protect and conserve the housing accommodations and cannot practically be done with the tenant in occupancy, and the landlord has obtained such approval as may be required by Federal, State, or local law for the alterations, remodeling or any construction planned."

You will note that the landlord must obtain the approval specified in the above quoted paragraph as may be required by federal, state, or local law before an action of eviction can be brought. It would, therefore, appear that in a rent ordinance enacted by the City of Minneapolis provision may be made for the refusal of such approval until the emergency endangering the life, health, and safety of the public, if found by the city council to exist, is terminated.

Question 2

"Calling your attention to the provisions of Article 4, Section 36, of the constitution of the State of Minnesota:

> 'Any city or village in this state may frame a charter for its own government as a city consistent with and subject to the laws of this state. * * *
>
> 'Such charter shall always be in harmony with and subject to the constitution and laws of the State of Minnesota. * * *
>
> 'The legislature may provide general laws relating to affairs of cities * * * which shall be paramount while in force to the provisions relating to the same matter included in the local charter herein provided for,'

has the legislature, by the enactment of Chapter 632, Laws of 1947, shown an intention to adopt as exclusive for the State of Minnesota, including its political subdivisions, the rent regulations provided in said Public Law No. 129, and any amendments thereof, until such time as the Congress shall abandon the field of rent control?"

Answer

The city council, of course, in ordinary times has no power to pass an ordinance which is repugnant to the general laws of the state. What position the courts will take in the event of a city emergency which requires the passage of an ordinance to protect the life, health, and safety of a community may be entirely different from that taken in the absence of the emergency now alleged to exist in the City of Minneapolis. However, as to housing and rent regulations, there is now in force no state law, as the operation of the 1947 act has been postponed until the federal act is terminated. Even if the state law is considered in effect, it does not contain any rent provisions with reference to hotels and other housing accommodations excepted from the operation of the act. There is nothing in our constitution forbidding a municipality from passing local ordinances in conflict with a state act which is not in force or with a federal act which is in force. As stated in answer to question 1, there is nothing expressed in the Federal Housing and Rent Act of 1947 which forbids the city council, in the event of a local emergency requiring local action, from passing an ordinance to take care of the local situation. The 1946 federal act forbidding rent control by state or local governments is no longer in effect.

There are many ordinances enacted by a city covering the same subject matter with respect to which the state has also enacted laws. Local laws are valid unless repugnant to state or federal law. **State v. Lee,** 29 Minn. 445. Any relaxation of restrictions imposed upon landlords by state or federal acts would, I assume, be repugnant, but the imposition by a city of further restrictions on the landlord, when not expressly prohibited by state or federal law, might be held permissible by the courts. The existence of an emergency would, of course, make such holding more probable.

In the absence of court decisions holding otherwise, I would not assume that the city is powerless to act in the matter under consideration. As heretofore stated, it is my opinion that the city council, if it finds the existence of an emergency, is justified in passing a regulatory rent ordinance and leaving the validity of such ordinance for judicial determination. The modern tendency of the courts is to extend, rather than to restrict, the police power. At the time of the moratorium on mortgage foreclosures and the emergency which then existed, serious constitutional objections were raised, but the courts, including the United States Supreme Court, found reasons for holding the moratorium law valid.

Question 3

"Does the City Council of the City of Minneapolis have the right to adopt and enforce local legislation more drastic than Chapter 566, Minnesota Statutes 1945, regulating evictions under forcible entry and unlawful detainer, so as to modify or suspend the effect of that statute, or any of the provisions thereof, within the corporate limits of the City of Minneapolis?"

Answer

The only provisions in Chapter 566 which entitle a landlord to possession are Sections 566.02 and 566.03, which permit an unlawful detainer action in the event the tenant, who has peacefully entered, unlawfully detains the premises or holds over after termination or contrary to the conditions of his lease or after any rent becomes due, or when a tenant at will holds over after notice to quit. If, by reason of an emergency such as above referred to, the city council should pass an ordinance to be in effect only during the emergency, making it lawful for the tenant for such period to continue in possession by paying a lawful rent, in effect extending the lease, there, of course, would be no right to bring an unlawful detainer action on the ground of termination of the lease unless the courts should hold such an ordinance invalid. I am not in a position to state definitely whether the courts would, under the rent conditions existing in Minneapolis, hold such an ordinance valid or invalid, but, as herein and heretofore stated, the passage of such temporary legislation, with a proper preamble showing the existence of a serious emergency and leaving the determination of its validity, if attacked, to the courts, would, in my opinion, be justified on the assumption that the emergency as determined by the city council to exist creates a situation for the exercise of the police power of the city within its own limits. That authority has frequently been recognized by the courts as the basis for valid statutes and ordinances notwithstanding allegations that legislation thereunder would be in conflict with state and national statutory and constitutional provisions.

I realize that by the views herein expressed the question, among others, of whether state and federal housing and rent control acts can be held to have so preempted the field as to exclude a city from handling a local emergency endangering life, health, and safety of its inhabitants is not categorically answered. The lack of court precedents on recent state and federal rent acts and the fact that no specific ordinance has been presented for consideration make it, I believe, inadvisable on the part of the Attorney General to render a more definite opinion than hereinabove given. It is my understanding that other cities, including New York and Chicago, have enacted ordinances of a similar nature. Discretion as to the wisdom of enacting proposed ordinances to remedy the present rent situation in the City of Minneapolis, in the absence of complete assurance of their validity, may, of course, be exercised by the city council. If it desires to enact rent legislation, it would, I believe, strengthen the possibility of the holding of such legislation valid if it is based on facts evidencing the existence of an acute exigency. As hereinabove stated, the courts have been very liberal in the upholding of legislation necessitated by the existence of such an emergency.

Note—August 9, 1947 opinion hereto attached.

J. A. A. BURNQUIST,
Attorney General.

Minneapolis City Attorney.

August 13, 1947. 431

Question

"Has the City of Minneapolis, through its chief governing body, the Board of Public Welfare, or the Mayor, the power to pass any ordinances or make any rules or regulations governing the relationship of landlord and tenant in the City of Minneapolis?"

The power of a city council to enact an ordinance regulating rental charges and the rental situation with reference to housing accommodations which are excluded from the operation of both the state and federal housing and rent acts and other phases not covered thereby, depends largely upon the interpretation that will be given to such laws by the courts.

If the federal and state housing and rent acts are to be construed as preempting the entire field of legislation pertaining to rent control, municipalities would have no authority to pass an ordinance relative thereto. However, if such acts, through excluding certain housing accommodations from their operation and failing to cover certain phases of the problem, should be construed as not preempting the entire housing and rental field, a different conclusion would follow. Then municipalities would appear, especially in the event conditions within a city create such an emergency as to endanger life, health and safety of the community, to have the right, under their police and other public welfare powers conferred by the city charter, to pass for the protection of the public, ordinances which pertain to such phases of housing and rent control as are not adequately covered by state and federal acts to meet an existing local emergency.

Minnesota courts have not as yet passed upon the power of the city to enact such an ordinance but it is, I believe, the duty of a city council to determine whether such an emergency exists in the city which it serves. If it finds that the rental conditions are of such a nature as to endanger life, health, and safety of the inhabitants for whom it is the chief governing body, the council would, in my opinion, in such circumstances, be justified to pass an ordinance relating to such phases of the housing and rental situation as are not adequately covered by the state and federal acts to meet such a local emergency, notwithstanding doubts as to the validity of an ordinance of that nature.

J. A. A. BURNQUIST,
Attorney General.

Minneapolis City Attorney.

August 9, 1947. 431

142

Streets—Benches—Placing of for convenience of persons waiting for bus or car—MS1945, § § 160.01, 160.34, subd. 3.

Question

Whether Minnesota Statutes 1945, Section 160.34, Subdivision 3 and Subdivision 1 of the same section should be construed to apply to the public streets of the city of Minneapolis.

Opinion

Subdivision 3 of the above cited section was construed by our Supreme Court in the case of **Automatic Signal Advertising Company v. Babcock,** 166 Minn. 416. In that case the question before the court was whether automatic signal devices carrying advertising could be placed on trunk highways within the limits of a city under permits given by the governing body thereof. The court held that cities and villages may regulate traffic upon trunk highways by ordinances not in conflict with the state law, but that power cannot be extended so as to encroach upon the authority given the commissioner of highways who is given, by statute, the regulation and general supervision of the state trunk highways as well within as without the limits of the cities and villages through which they extend.

It is my opinion that the authority of the commissioner of highways in the matter under consideration is limited in the city of Minneapolis to the state trunk highways established therein.

That section 160.34 does not apply to any other streets or highways in that city is apparent from reading M. S. A. Section 160.01, subdivision 1, which provides in part as follows:

> "The provisions of Chapters 160, 161, 162, 163, and 164 shall be construed as relating **solely to roads not included within the limits of any city, village or borough, except when highways within cities, villages, or boroughs are specifically mentioned.** * * * " (Boldface type supplied)

J. A. A. BURNQUIST,
Attorney General.

Minneapolis City Attorney.

September 27, 1947. 59-A-53

143

Zoning—Building permits—Provision exempting United States, state, and political subdivisions thereof from payment of building permit fee, and exempting buildings under construction by these agencies from payment of fee, considered.

Question

"1. Would an amendment to the fee section of the building ordinance in the following language be valid:

> Provided, however, that in the case of public buildings, constructed or to be constructed by the United States, State of Minnesota, or any political or governmental subdivision thereof, including school districts, the entire cost of which construction is payable out of public monies, the Building Inspector shall issue a permit without charge or fee. Nothing herein is to be interpreted as exempting any such public building from the operation of any other provision of this ordinance or of any other ordinance of the Village of Golden Valley."

Answer

The power of a municipal corporation to enact ordinances and adopt by-laws is derivative. Ordinances should be reasonable and uniform in operation, and not discriminatory. We do not believe that the exemption of the United States, the state and governmental or political subdivisions thereof from the payment of a building permit fee would render the proposed amendment invalid.

Question

"2. If the above amendment is valid, may it be made retroactive so as to exempt a School District from the requirement of a fee in the case of a school building now under construction and about 10% completed?"

Answer

Ordinarily ordinances are enacted so as to operate prospectively and not retroactively, and should be so construed whenever possible. Ordinances containing provisions so as to leave no doubt as to the intent of the governing body to have the same operate retroactively have been sustained. So has also the validity of a zoning ordinance been sustained, which, by its terms, permitted the completion of a building which did not conform to the requirements of the building ordinance. **Norton v. Hutson,** 142 Kan. 305, 47 P. (2d) 630.

We believe that the retroactive aspect of the proposed amendment is valid. It seems to us to be a matter resting within the discretionary powers of the council, and it cannot be said that the same is so unreasonable and discriminatory so as to render it invalid.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Village of Golden Valley Attorney.

April 12, 1948. 477-B-34

144

Zoning—Owner—Change of zoning—Where state owns a fee title, it is an owner within the meaning of the zoning ordinance requiring consent of two-thirds of the owners of real estate within 100 feet—The owner of an easement is not an owner within the meaning of this provision.

Facts

It is proposed to rezone certain land in the village. The zoning ordinance providing for rezoning is as follows:

> "Such an amendment, however, shall not be passed where it will alter the use regulations or plans herein contained unless the owners of two-thirds of the several descriptions of real estate situated within one hundred feet of the real estate proposed to be changed shall have acquiesced therein."

Question

Where a zoning ordinance provides for a change of zoning as above set forth and where a state highway to which the state has absolute fee title runs along a piece of land to be rezoned, is the state an owner so that its acquiescence could be used to make up the two-thirds of the several descriptions of real estate required by the ordinance?

Opinion

It was held in opinions dated August 25, 1938, April 14, 1938, and May 10, 1940, file 59-A-32, that lands which had forfeited to the state for nonpayment of taxes were owned by the state within the meaning of the rezoning ordinances.

In line with these opinions, I hold that the state, as a fee owner of real estate which is used for a road, should be considered in determining whether two-thirds of the real estate situated within 100 feet of the real estate proposed to be rezoned, has acquiesced therein.

Question

Would the answer be the same if the state has merely an easement for road purposes?

Opinion

The answer would not be the same. Where the state has merely an easement, it is not an owner within the meaning of your zoning ordinance.

I think the ordinance should be construed as requiring ownership rather than a mere easement.

RALPH A. STONE,
Assistant Attorney General.

Attorney for Village of Golden Valley.

March 15, 1948. 59-A-32

PUBLIC BUILDINGS

145

Doors—To swing outward—Act—Does not apply to banks, restaurants or retail stores—Whether act applies to any place is a question of fact— L. 1947, Ch. 23.

Question

Whether restaurants, retail stores and banks are required to have the doors of their places of business open outward?

Opinion

Prior to the 1947 session of the legislature, this office had rendered two opinions to the effect that M. S. 1945, Section 616.23 did not apply to the ordinary 3.2 beer taverns; also this office had expressed doubt as to whether that section applied to public or private clubs. It may be that because of such opinions the legislature was moved to enact Laws 1947, Chapter 23, amending said Section 616.23 so as to read as follows:

> "The doors of all theaters, **amphitheaters**, opera houses, public halls, **dance halls, saloons, taverns, public and private clubs, churches, schools**, or places used for public entertainments, exhibitions, or meetings, which are used exclusively or in part for admission to, or egress from, the same, shall be so hung and arranged as to open outwardly and, during any exhibition, entertainment or meeting held therein, shall be kept unlocked and unfastened, and in such condition that, in case of danger or necessity, immediate escape from such building shall not be prevented or delayed. Every owner, agent, or lessee of any such building who shall rent the same or allow it to be used for any of the aforesaid purposes, without having the doors thereof hung and arranged as hereinbefore provided, shall, for each violation of any provision of this section, be guilty of a misdemeanor, and be punished by a fine of not less than $25.00 nor more than $100, and, in default of payment of fine and costs, shall be confined in the county jail for not less than 15, nor more than 60, days."

The words boldfaced above were added by the amendatory act of 1947. The addition of such words is the only change made in the law by the 1947 amendment.

The law as amended of course applies to places of the character specifically enumerated. Whether such places come within the scope of the law depends upon the character of the activities carried on in the place. The law would not apply to an ordinary restaurant where no other activity was carried on. It would not apply to the ordinary bank, retail store or grocery store. Whether a place is one used for public entertainments, exhibitions or meetings is a question of fact which this office cannot determine.

You will, of course, be cognizant of the character of the places as to which the question may arise, and will be in a much better position than this office to advise the officers of the fire department with respect to this question.

RALPH A. STONE,
Assistant Attorney General.

Austin City Attorney.

October 2, 1947. 59-A-9

146

Library—Power of county library board to control use of room in library building which power includes the right to permit or deny the use thereof to civic or other organizations—MS Sec. 134.03.

Facts

The village of Grand Rapids owns a library building supported jointly by a village and county tax levy. Therein is a meeting room sometimes used for library purposes and at other times could be used and has been available for meetings of various civic and miscellaneous organizations. The board is in doubt whether it has the right to discriminate between groups so as to permit certain groups to use the room and to withhold use from other groups.

Question

Does the library board have discretion to permit or to withhold permission to use the room in the library building by various of such organizations?

Opinion

I assume that this is a free county library for which a tax is levied for maintenance by authority of M. S., Sec. 375.33, since you say that it is

supported jointly by a village and county tax levy. If it is a free county library controlled by a board existing by authority of Sec. 375.33, Subd. 4, that board has the powers and duties of a board of directors of a free public library in a city or village and is governed by Secs. 134.03 to 134.15.

Such board has the duty to adopt by-laws and regulations for the government of the library and reading rooms and for the conduct of its business as may be expedient and conformable to law. It has exclusive control of the rooms and buildings provided for library purposes. M. S., Sec. 134.03, paragraph 4. Therein seems to lie the answer to your question. Exclusive control of the rooms and building contemplates a determination by the board as to what use shall be made of such rooms. Its action must be reasonable, not arbitrary. If in conformity with such standards, the board may say who may use the room and when it may be used and who may not use the room.

CHARLES E. HOUSTON,
Assistant Attorney General.

Itasca County Attorney.

December 5, 1947. 285-B

PUBLIC SAFETY

147

Firemen's Relief Associations—Pension—By-laws should provide for payment of pensions to widows and orphans of a deceased fireman and not to his legal heirs—MSA § 424.31.

Question

You inquire whether benefits should be paid to the legal heirs of a deceased member, or to his widow and orphans.

Answer

Section 424.31 (2) reads as follows:

"For the payment of pensions to disabled firemen and the widows and orphans of firemen."

The term "widow" is defined in the second paragraph of subparagraph (6). A widow might be a legal heir of a deceased member but would not be entitled to receive benefits as such unless she qualified within the meaning of the term "widow" as defined in the above paragraph. Consequently, the term "widows and orphans" should be used instead of the term "legal heirs or to the person accepting the financial responsibility for the funeral expenses of the deceased member" as stated in Section 1 of Article XIII, and where the term "legal heirs" occurs in the first and fourth lines of Section 4 of Article XIII.

The association in providing for the payment of benefits in its by-laws is restricted to the persons and classes specified in § 424.31.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Baudette Village Attorney.

December 17, 1948. 688-M

148

Firemen Service pensions—Question of modification of service pension which has been modified and paid monthly for five years discussed— MSA 69.06.

Facts

"The By-Laws of a volunteer Firemen's Relief Association provide for the payment of a monthly pension in an amount not exceeding $25.00 per month. 'A' was granted such a pension approximately five years ago and has drawn that pension since placed on the pension rolls. Because of a limited amount of money available for the payment of pensions, the members of the Relief Association now plan on amending their By-Laws to provide for a lump sum pension of approximately $50.00 per year of service and also intend to limit the amount that any pensioner can receive, to $1,000.00, which of course would also be the minimum amount, since the provision of Section 69.06—Laws of Minnesota—1945, provide for a minimum of twenty years of service."

You have not provided me with the form which the amendment to the by-laws will take, and it is difficult to consider your questions without knowing the exact language of the new by-law. Neither am I furnished with the form of the old by-laws. As I understand it, however, the amended by-laws will provide only for a lump sum payment at the rate of $50 for each year of service, limited by a maximum of $1,000. I understand the new by-laws will not contain any provision for the payment of a monthly pension; that the members of the fire department relief association do not make any contributions to the pension fund and have never done so; and that the individual identified as "A," to whom you refer, never made any such contributions.

Questions

"1. May the By-Laws of a Volunteer Firemen's Relief Association provide a maximum pension in such an amount that it would also be the equivalent of the minimum pension which would be payable under the By-Laws?

"2. In the light of the decision of the Supreme Court in the case of Gibbs vs. The Minneapolis Fire Department Relief Association, 125 Minn. 174, what options would the Relief Association have in its treatment of 'A'? Would 'A' be entitled to the full lump sum pension provided in the By-Laws? Could the Association make any provision to settle with 'A' at a lower sum?

"3. Is it legal for such a Firemen's Relief Association to provide in its By-laws for a sliding scale of funeral benefits based upon years of service?"

Opinion

The questions above quoted will be answered in the order in which they are numbered. Unless otherwise noted, the sections hereinafter referred to are those of Minnesota Statutes Annotated.

1.

As to pensions not accrued up to the time of the adoption of an amendment which should be made applicable to future payments and to all members, the association may provide that the maximum pension shall not exceed the minimum.

2.

Your second inquiry raises the question whether a pensioner who has fulfilled all the requirements for a pension under the old by-laws and has drawn such pension for five years can now be cut off from the pension roll.

M. S. A., § 69.06 is the statute relating to the payment of service pensions. In general, it authorizes payment of a pension not exceeding $40 per month to members of the fire department relief association who comply with certain qualifications and requirements. Under this statute and the present by-law, the pensioner has been paid at the rate of $25 per month for five years. The statute also contains the following provision:

"Any such fire department relief association where the majority of its members are volunteer firemen may provide in its certificate of incorporation or by-laws for a service pension in an amount not exceeding $100 per year of service to be paid in a lump sum where the retiring member qualifies for a service pension under the provisions hereinbefore set forth."

I assume, for the purposes of this opinion, that the fire department relief association is lawfully entitled to amend its by-laws, and, in the absence of a copy of the by-laws, that the pensioner in question is now entitled only to a monthly pension thereunder.

In the case of **Gibbs v. Minneapolis Fire Department Relief Association**, 125 Minn. 174, it appeared that the plaintiff was a widow of a deceased fireman. She sought to recover a pension of $25 a month from the date of her

husband's death and, further, an order directing that she be placed upon the pension rolls of the defendant while she remained a widow. The lower court directed payment of the pension at the rate of $25 a month from the time of her husband's death until the passage of Laws 1913, Chapter 318, approved April 16, 1913. That act amended the previous law by changing the definition of a widow who is entitled to a pension so as to exclude one who did not depend upon the deceased for support. The court, therefore, held that the pension was properly payable until that law was passed but not afterwards. The statute changed the definition of a widow qualified to receive a pension so that under the law as amended the widow would not be entitled to anything. In other words, the court held that, although the widow was qualified for a pension at the time of her husband's death, there was no reason why the state could not change the law and by such change deprive her of any pension. The court said:

> " * * * there is no vested right in the pension accruing in the future from month to month. It may be taken away. The whole pension system may be abrogated without a violation of the Constitution. A pension already accrued cannot be taken away."

In **Hessian v. Ervin,** 204 Minn. 287, it was held that a beneficiary under the state employees retirement association act had no vested right in a pension. Under that act the employee contributes to the pension fund, but the court said:

> "Plaintiff so far has no right of an irrevocable or irrepealable nature in or to the fund, or any part of it. * * * Nor will rights accrue for him until performance of the conditions precedent to payments from the fund, i.e., retirement after contributing for the statutory period. Even then it may be doubtful whether there will be a vested right to anything except payments already accrued." Citing **Gibbs v. Minneapolis Fire Department Relief Association,** supra.

Johnson v. State Employees' Retirement Association, 208 Minn. 111, was another case dealing with the provisions of the state employees retirement act. The plaintiff had retired under the provisions of the act, and his annuity at the time of such retirement was fixed by the statute at $110.05 per month. Laws 1939, Chapter 432 amended the retirement act and reduced the pensioner's payments to $100 per month. The plaintiff claimed that he was entitled to be paid the amount payable at the time of his retirement. The court cites **City of Dallas v. Trammell,** 129 Tex. 150, 112 A. L. R. 997, in which the court held that there was a reserved right in the legislature to amend or repeal the laws on which the pension system was founded, and that there was no vested interest in future installments or pensions which will prevent the legislature from repealing the law as to the amount of pensions. It is said in that case:

> "It is well settled that the mere circumstance that a part of a pension fund is made up by deductions from the agreed compensation

of employees does not in itself give the pensioner a vested right in the fund, and does not make it any less a public fund subject to the control of the legislature."

In 54 A. L. R., p. 943, is found an annotaion on the subject "Vested right of pensioner to pension," and the annotation is introduced by the following language:

> "The unquestioned rule is that a pension granted by the public authorities is not a contractual obligation, but a gratuitous allowance in the continuance of which the pensioner has no vested right; and that a pension is accordingly terminable at the will of the grantor."

A supplementary note in 98 A. L. R., p. 505, is to the same effect.

Thus under Minnesota decisions we are of the opinion that the by-laws of the association may be amended so as to increase or decrease service pensions or so as to grant to members a lump sum pension in lieu of any further monthly payments if such amendment is made to apply to all members. In other words, care should be taken in drafting the amendment so that there will not be any unlawful discrimination between pensioners.

3.

We do not find anything in the statute which would expressly authorize or prohibit basing the payment for funeral benefits upon the years which a deceased fireman has served. Section 69.04 (4) provides that such death and funeral benefits may be paid as the municipality may from time to time authorize. The basis for paying benefits and the amount thereof is, it appears, within the discretion of the governing body of the municipality. That body in determining the funeral benefits must, of course, be reasonable and not arbitrary in establishing the basis for such payments.

J. A. A. BURNQUIST,
Attorney General.

Nashwauk Village Attorney.

May 26, 1948. 688-M

149

Fire protection—Towns—Bond issue for equipment, lands and buildings—towns qualifying under § 368.01 limited to specific powers contained in enumerated subdivisions of said section, and also in § § 412.22 and 412.27.

Facts

In substance you state that at the annual meeting on March 11, 1947, the town of Rose voted $50,000 in bonds for the purchase of fire equipment,

lands and buildings for fire protection in Rosetown. You refer to Minnesota Statutes 1945, Sections 365.15 to 365.19 as authority to purchase fire equipment, lands and buildings. You further state that Rosetown could qualify under Minnesota Statutes 1945, Section 368.01, and would therefore be authorized to exercise the powers of villages as provided in said Section 368.01. Reference is made to Section 412.19, subd. 23, empowering villages to issue bonds for said purposes and to levy taxes, and also Section 475.14, subd. 1, which empowers villages and other municipalities to issue bonds for the purchase or erection of needful public buildings and to secure fire equipment. You also refer to Sections 88.42 and 88.44, relating to the powers of certain towns to prevent and abate forest fires.

Question

As to the authority of the town to issue $50,000 in bonds for the purchase of fire equipment, lands and buildings as authorized at the annual town meeting of March 11, 1947, and the applicability of the statutes hereinbefore mentioned to towns for the purpose of financing the purchase of fire equipment, lands and buildings for fire protection purposes.

Answer

The validity of the $50,000 bond issue depends upon the statutory authority therefor.

Section 365.15 empowers the electors to authorize the town board to provide for fire protection or fire apparatus therefor, and to determine by ballot the amount of money to be raised for either of such purposes.

Section 365.16 authorizes the town board to levy a tax for the amount authorized by the electors as provided in Section 365.15, or for a lesser amount.

Section 365.19 provides that the tax levy authorized under Sections 365.15 to 365.18 shall in no event exceed the amount of tax authorized in any one year pursuant to Section 88.04.

Section 88.04, as well as Chapter 88, relates to forestry and to forest and prairie fires. The town of Rose is not located within nor contiguous to a forest area and obviously may not avail itself of the provisions of Minnesota Statutes 1945, Chapter 88.

Sections 365.20 to 365.24, inclusive, relate to fire protection and are applicable to towns in which the assessed valuation of the platted lands thereon equals or exceeds 50% of the total assessed valuation of all lands of such town, exclusive of mineral valuations. Upon the facts submitted, it is not possible to determine whether these statutes are applicable to the Town of Rose.

However, it is our opinion that no authority exists under Sections 365.15 to 365.19, or Sections 365.20 to 365.24 to sustain the validity of the $50,000

bond issue by the Town of Rose. Neither do we find any authority in the statutes mentioned to issue bonds in any sum whatsoever.

Assuming that the Town of Rose can qualify under the provisions of Section 368.01, the question then arises as to the extent of the powers of which a town becomes possessed by virtue thereof. Are the powers of towns that qualify under Section 368.01 coextensive with the powers of villages under Section 412.19, or are they limited to the specific powers enumerated in subdivisions 2, 8, 9, 11, 13, 14, 18, 19, and 24 thereof?

This necessitates construction of that portion of Section 368.01 which reads as follows: " * * * shall have and possess the same power and the same authority now possessed by villages in this state under the laws of this state in so far as such powers are enumerated in section 412.19 and in subdivisions 2, 8, 9, 11, 13, 14, 18, 19, and 24 thereof * * * ." Section 368.01 contains no repeal provisions.

The fundamental aim of construing a statute is to ascertain and give effect to the intention of the legislature as expressed in the language used. Such intent should control though it seems contrary to the letter of the statute or even contrary to the rules of construction.

If the legislature intended to invest towns coming within the scope of Section 368.01 with the powers of villages under Section 412.19, then the addition of the specific subdivisions following become surplusage. Furthermore, a construction that such towns may exercise the powers of villages under Section 412.19 would result in confusion and conflict with statutes relative to towns. As an illustration, Section 412.19, subd. 4 grants to the village council the power to provide for the prosecution or defense of actions, and to employ counsel therefor, whereas Section 365.10 (3), relating to the powers of town electors at the annual meeting, provides that the electors shall direct the institution and defense of all actions in which the town is a party, and to employ necessary agents and attorneys therefor.

Another rule of construing statutes to be observed is that specific provisions in a statute control over general provisions. **Lovell v. The City of St. Paul**, 10 Minn. 290 (229) 233, **Olson v. D. M. Osborne & Co.**, 30 Minn. 444, 445, **City of St. Paul v. Johnson**, 69 Minn. 184, 186, **State v. Erickson**, 190 Minn. 216, 221, **Weiss v. City of St. Paul**, 211 Minn. 170, 174.

It is therefore our opinion that towns which qualify under Section 368.01 shall have and possess the same powers and authority now possessed in villages in so far as such powers are enumerated in Section 412.19, subdivisions 2, 8, 9, 11, 13, 14, 18, 19, and 24 thereof, and also the powers enumerated in Sections 412.22 and 412.27.

Having reached this conclusion, it necessarily follows that Section 475.14, subd. 1, is not applicable to towns.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Rosetown Attorney.

June 18, 1947. 43-B-1

150

Fire protection—Village may contract with a group of individuals for fire protection services in consideration of such group placing its fire truck in the possession of the village to be used by the village whenever needed within or without the village—MSA § § 438.08, 438.09.

Facts

"A corporation of individual farmers living in several townships wish to purchase a fire truck and incorporate, if necessary. They wish to then contract with a village to leave the truck in the village and the village agree to furnish the membership fire protection in return for the village being allowed to use the truck for village fires."

Question

" * * * whether or not the village could legally contract with such a corporation or club of individuals."

Opinion

M. S. A., Section 438.08, empowers the council or any other body of a municipality having control of its fire department, by resolution adopted by five-sevenths vote, to authorize its fire department, or any portion thereof, to attend and serve at fires outside of the limits of the municipality either within or without the state. Section 438.09 authorizes the body or person having control of a municipal fire department to contract with other municipalities or private groups for compensation for services rendered in fighting fires as provided in section 438.08.

Ample authority exists under these two sections to enter into the proper contract if "compensation" is to be construed so as to include the use of the fire truck owned by the group of individuals in exchange for fire services to be rendered by the village. We think that it should be so construed. Obviously the possession of the fire truck by the village with the right of use is something of value. Whether the rental value of the fire truck con-

stitutes compensation for the fire services to be furnished by the village to the group of individuals is a matter for the consideration of the council in its exercise of judgment and discretion.

"Compensation" as used in the Federal and State Constitutions, which provide that private property shall not be taken for a public use without just compensation, was construed by our court in **The Winona & St. Peter Railroad Company v. Denman,** 10 Minn. R. 267 (Gil. 208, 219) to mean:

> "According to approved lexicographers the primary signification of compensation is 'equivalence,' and the secondary and more common meaning is something given or obtained as an equivalent."

In **Tuttle v. Bisbee,** 144 Ia. 53, 120 N. W. 699, the syllabus reads:

> "Mutual debts are extinguishable at common law, but by the civil law, under the doctrine of compensation, relief is granted by the reciprocal acquittal of debts between two persons who are indebted to each other; 'compensation' being the extinction of debts for which two persons are reciprocally debtors to one another, by the credits for which they are reciprocally creditors to one another."

It is our opinion that the council has authority to enter into the proper contract if in its judgment the value of the use of the fire truck represents fair compensation to the village in exchange for the fire fighting services to be rendered to the group of individuals who are the owners of such fire truck.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Swift County Attorney.

April 29, 1948. 688-A

PUBLIC UTILITIES

151

Commissions—Joint—Adjoining villages exercising joint power under MSA 471.59. Two villages may not have a joint water, light, power, and building commission under MSA 453.01 but may agree under MSA 471.59 for the joint operation of a water utility.

Facts

"The villages of Triumph and Monterey in Martin County, Minnesota are contiguous. At the present time each village has its own water system. Inasmuch as the village of Monterey has a better standpipe

and inasmuch as the village of Triumph has a better quality of water they are desirous of getting together on a joint project so that both of the villages could use the Triumph water and the Monterey standpipe.

"Section 471.59 MSA provides for an agreement to be entered into between the governing bodies of municipalities for various propositions when a joint enterprise would be to the advantage of both. Section 453.01 MSA provides for the appointment of water, light, power and building commissions in villages under 10,000 population."

Question

Whether the Villages of Triumph and Monterey could have a joint water and light commission serving both villages.

Opinion

I find no authority in M. S. A. 453.01 which would authorize the formation of a joint water, light, power, and building commission to serve for both villages. I think the only way that the two villages may execute the joint power of maintaining a water supply system is by an agreement entered into pursuant to M. S. A. 471.59. Such an agreement should be in detail and should specify the manner in which the utility is to be operated and the expenses of operation divided, as well as the manner in which the funds are to be disbursed.

RALPH A. STONE,
Assistant Attorney General.

Martin County Attorney.

June 10, 1948. 624-E-5

152

Contracts—When municipality engages in the manufacture, sale, and distribution of electrical energy it acts in a proprietary capacity and has generally the same powers as natural persons—contracts made by the municipality for sale and distribution of electrical energy may be modified, amended, or abrogated by mutual consent.
Basic rate—Using part gas and part oil units.

Facts

In 1943 the city of Jackson entered into a written contract with the local REA cooperative to sell to it a limited amount of electrical energy for redistribution and sale to its patrons at rates and under conditions as therein

provided. The contract contained no provision as to the particular types of equipment to be used by the city in producing the energy to be furnished. The city was, at the time the contract was made, producing electrical energy by two Diesel units, and some by a gas burning steam unit, and has continued to do so until within the last few months when, by the addition of a steam turbine unit, the city has supplied electricity largely from the turbine, with the additional and auxiliary use of the Diesels. The turbine is operated by gas when the supply is sufficient, otherwise by oil, and at times by using part gas and part oil. At some time during every month of operation oil as fuel has been used in generating electricity used by and furnished to REA, either through the Diesel engines or by burning in the turbine.

You refer to a provision in the contract, as follows:

> "The above rate is based on a fuel cost of not more than 6c or less than 5½c per gallon. For each increase or decrease in the average cost of fuel above 6c or below 5½c (FOB Jackson, Minnesota) the above rate shall be increased or decreased in an amount equivalent to the difference in fuel cost above 6c and below 5½c per gallon, whichever the case may be, divided by 12 (the number of KWH generated per gallon of fuel oil)."

You further state that difficulty has arisen with respect to the meaning and the rights of the parties resulting from the quoted portion of the contract, and you propound three questions which will be restated, and our answer will follow.

> "First. If the amount of current furnished REA by oil burning units can be segregated from that produced for its use by gas burning units, is the REA entitled to the energy produced by gas at the basic rate (without consideration of the adjustment clause)?"

Answer

In our opinion the provisions of the adjustment clause above quoted are applicable to fuel oil only, and not the gas. This seems clear for the reason that the cost adjustment is to be made according to the cost of the fuel used on a gallonage basis. The unit for measuring gas is on a cubic foot basis, and not upon a gallonage basis, and, consequently, the provision of the adjustment clause for a decrease or increase from the basic rate does not apply to the cost of gas.

> "Second. The same question as stated under 'First' if the amount of current furnished by the two types of fuel **cannot** be segregated?"

If the cost of the two types of fuel used cannot be segregated, then no adjustment can be made. It seems to us that where the cost of each kind of fuel is known, the portion of the cost that each bears toward the total cost of operation will be determined and used as the ratio in computing the proportionate amount of the cost to be charged to fuel oil or to gas. This becomes the problem of an accountant or an engineer, and when determined affords the basis for cost adjustment.

"Third. Does the city have the power to amend its contract with the REA, prior to the expiration of the period covered thereby, and with agreement of course with them, so as to furnish energy to them, which is produced by gas, or by gas and oil fuel, at a rate less than that now provided in the contract after application thereto of the adjustment clause; in other words, does the city have the power to reduce the rate by an accepted amendment to the contract by the elimination of the adjustment clause in so far as it applies to energy produced by gas?"

Answer

In our opinion the city and REA may modify, amend, or abrogate the contract upon such reasonable terms and conditions as may be mutually agreed upon. When a municipality engages in the manufacture, sale, and distribution of electrical energy, it acts in a proprietary capacity. See **Williams v. Village of Kenyon,** 187 Minn. 161, and **Reed v. City of Anoka,** 85 Minn. 294.

In the Williams case the court, in considering the powers of a municipal corporation at common law, quotes from 1 McQuillin, Mun. Corp. (2 ed.) § 124, as follows:

"1. To have perpetual succession.

"2. To sue and be sued, implead and be impleaded, grant or receive by its corporate name and do all other acts as natural persons may," etc.

No request was made for our opinion as to the validity of the contract, and, for the purpose of this opinion, we have assumed it to be a valid contract.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Jackson City Attorney.

March 25, 1948. 624-C-2

153

Delinquent bills—Water pipes—Cost of repairs—No provision for filing a lien and certifying the same to the county auditor for delinquent water bills and cost of repairing water pipes between water main and water meter on consumers property—MSA 451.01 et seq.

Facts

"The Village Council has passed an ordinance permitting the water commission to shut off the water of any person who fails to pay his

water rent when billed. In addition to water rent, it may be necessary from time to time, for the Village to make repairs to pipes between Village mains and meters on the property of users of Village water, which repairs are properly chargeable to the individual."

Question

"Is there any method or procedure by which delinquent water rent and the cost of such repairs as those referred to above may be made a lien on the property involved, certified to the County auditor and included in the next annual tax statement?"

Answer

I am not aware of any statute which would authorize the filing of a lien for delinquent water bills and the cost of repairing water pipes connecting the water main with the consumers premises and having the same included in the annual tax statement.

Broad powers to regulate and control water plants are given to the commission, § 453.04. The commission is empowered to fix water rates to patrons, § 453.05.

Undoubtedly the commission could adopt reasonable rules and regulations to enforce payment of charges for water services rendered to consumers. See City of East Grand Forks v. Luck, 97 Minn. 373, and cases cited.

I do not believe that either the commission or the council has power, either express or implied, to file liens on property of a consumer for delinquent water bills and the cost of water pipe repairs, and if not paid to certify the same to the county auditor to be included in the annual tax statement, and would doubt the validity of any ordinance which authorized such a procedure.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Golden Valley Village Attorney.

December 17, 1948. 624-C-4

154

Liability—Damages—Break in service pipe leading from water main to adjacent property. Village not liable without proof of negligence.

Facts

The village has been asked to pay a claim for water damage caused by a leak in a water pipe leading into private property. The break occurred

in the pipe **installed and maintained by the village.** The water followed the pipe into the basement and ruined a motor and other property.

For the purposes of this opinion I shall assume that the pipe in question was a service pipe and that the duty rested upon the village to maintain it. Whether such duty rested upon the village is perhaps a debatable question.

Opinion

In the case of **Bridgeman-Russell Company v. City of Duluth,** 158 Minn. 509, the complaint alleged that the city had installed as a part of its water works system a large reservoir on a hilltop in the city, where more than 14,000,000 gallons of water are kept; that leading therefrom through a 20-inch main the water is conducted from the reservoir downhill and past the plaintiff's property; that said main broke near plaintiff's premises, and great quantities of water were discharged thereon, damaging the plaintiff. A demurrer to the complaint was overruled, and that order was affirmed on appeal, following the case of **Wiltse v. Red Wing,** 99 Minn. 255, which latter case adopted the rule in the old case of **Rylands v. Fletcher,** L. R. 3 H. L. 330, a leading **English case.**[1]

If the doctrine of the **Bridgeman-Russell** case and **Rylands v. Fletcher** is to be applied here, then the village would be liable without proof of negligence. However, I think this situation is distinguishable from those cases which have applied the rule of **Rylands v. Fletcher.**

The village has not in this instance collected a large quantity of water in one place and discharged it suddenly upon private property. The water in the service pipe belonged there. It was intended to be there and was there with the consent of the claimant. I do not believe that the harsh rule in **Rylands v. Fletcher** should be applied in such a case and the village held liable regardless of whether there were any negligence or not.

In 14 A. L. R. p. 552 is found an annotation dealing with the topic of the liability for damages by water escaping from pipes. The annotation indicates that a municipality can be held liable for negligence if its water pipes burst and cause injury, but most of the cases annotated do not apply the rule that the municipality can be held liable without proof of negligence. Many of the cases apply the Massachusetts rule expressed in **Goldman v. City of Boston,** 174 N. E. 686, where it was held that:

> "It was essential for the plaintiff to recover that some negligence on the part of the defendant should be shown in the laying of the water main or in its care and maintenance."

The case of **Interstate Sash & Door Co. v. City of Cleveland,** 74 N. E. 2d 239, had to do with the bursting of a four-inch water main, and the ques-

[1] In **Rylands v. Fletcher** the defendants had constructed a reservoir on their premises and filled it with water, which flowed by an underground communication, of which defendants were ignorant, into plaintiff's mine. Defendants were held liable without proof of negligence for the damages necessarily sustained by plaintiff by such flow of water. The House of Lords held that the question was not whether a defendant had acted with due care but whether his acts occasioned the damage.

tion discussed is whether the city should be held liable without proof of negligence. In holding that an allegation of negligence in the complaint was necessary the court said:

> "The plaintiff does not suggest that it was unlawful for the defendant city to lay the four-inch water main in West 24th street. On the contrary, the laying of mains in public streets for the purpose of furnishing water for protection against fire and for use of the inhabitants is universally recognized as proper, necessary and legal in modern cities. Nor is it contended that it was unlawful for the city to raise the level of that portion of West 24th street. Furthermore, under the circumstances alleged it is not apparent that the four-inch water main was inherently dangerous and likely to burst or that water was likely to escape therefrom and cause harm; and it would be equally difficult to conclude that the use of the dirt and stones to raise the street level was inherently dangerous or likely to cause harm either alone or by reason of the combined presence of the water main under the surface of the street.
>
> "This is in conformity with the general rule which is stated as follows in Ann. Cas. 1916C, 1050: 'Water in an underground pipe is not such a dangerous instrumentality as to require a person so conveying it to confine it at his peril, and no recovery can be had for an injury to property caused by the leakage or bursting of an underground water pipe unless negligence in the construction or maintenance of the pipe is shown.'
>
> "The following statement appears in the case of McCord Rubber Co. v. St. Joseph Water Co., 181 Mo. 678, 81 S. W. 189, 192: 'The plaintiff contends, however, that the defendants are liable regardless of whether they were guilty of any negligence directly causing the accident. * * * That contention rests for its authority on the decision in Rylands v. Fletcher, L. R. 3 H. L., 330. * * * There is a wide difference between a great volume of water collected in a reservoir in dangerous proximity to the premises of another, and water brought into a house through pipes, in the manner usual in all cities, for the ordinary use of the occupants of the house. Whilst water so brought into a house cannot literally be said to have come in in the course of what might be called * * * "natural user" * * * yet it is brought in by the method universally in use in cities, and is not to be treated as an unnatural gathering of a dangerous agent'."

My attention has not been directed to any case involving the breaking of a service pipe between the main in the street and the property serviced. There is less reason for applying the rule of **Rylands v. Fletcher** to such a case because there is no collection of large quantity of water in one place.

Where the water is brought to the property with the knowledge and consent and for the benefit of the owner of the property, a different rule should apply. The owner wants the water pipes there. It would seem to be

extending the doctrine of **Rylands v. Fletcher** beyond reasonable limits to hold the village liable because of a leak in the service pipe without proof of any negligence.

The question then involved in your inquiry is one of fact: whether the claimant can prove negligence on the part of the village. Of course, this office cannot determine a question of fact, but certain general observations may be made which may apply to the case.

Assuming that the village took the responsibility of furnishing and installing the service pipe, the duty would rest upon the village to exercise reasonable care in the installation thereof. It would be the duty of the village to exercise reasonable care in inspecting the pipe before installing it to see whether there were defects in it. If, upon such inspection made in the exercise of reasonable care, there were no visible or discoverable defects in the pipe, and if the pipe were purchased from a reputable dealer and manufactured by a reputable steel mill, I think that the fact that the service pipe after a time proved to be defective would not be sufficient to fasten liability upon the village.

In the matter of maintenance of the pipe (assuming, for the purpose of this opinion only, that the duty of maintaining the service pipe rested upon the village), I do not believe that the duty rests upon the village of digging up every service pipe in the village periodically to ascertain its condition. It might be that a case for the jury could be made out by proof that a pipe had been in use for many years without any examination of its condition, but it seems to me that, to maintain an action on the ground that a pipe had become defective because it had been too long in use, it would be necessary for the plaintiff to prove the ordinary service life of such pipe in this climate and under the conditions where it was installed and to prove that the ordinary service life of the pipe under such conditions had been exceeded.

RALPH A. STONE,
Assistant Attorney General.

Clarkfield Village Attorney.

November 16, 1948. 844-B

PUBLIC WORKS

155

Garbage collection—Cost be assessed against individuals but may not be assessed against property and spread on the general tax rolls.

Question

"Does the Village Council have the power to specially assess the real estate of the village for the payment of municipal garbage collection and disposal service even though this service was furnished to a tenant of the owner of the real estate without such owner's consent or knowledge?"

Opinion

This office has gone so far as to hold that a village may by ordinance take exclusive charge of the collection of garbage and may impose the cost of collecting it upon those from whom it is collected. Opinion of April 25, 1945 (file 477-B-14).

I find no statutory authority for the levying of assessments against real estate for the collection of garbage by which activity the real estate itself would not be specially benefited. Such an activity is not in the nature of a public improvement for which the village may be authorized to levy special assessments. In the case of **Trephagen v. City of South Omaha**, 69 Neb. 577, 96 N. W. 248, the court said:

" * * * Without a special legislative enactment no city or other municipal subdivision has any right to levy a tax or assessment upon the property of its citizens. Cooley on Taxation (2d Ed.) pp. 62-142. The statute not having conferred authority on the city authorizing it to assess and levy a special garbage tax and make it a specific charge on the lot in question, we conclude that such tax was void."

I think that some other means will have to be found for collecting the assessment not through the instrumentality of an assessment spread upon the tax rolls.

RALPH A. STONE,
Assistant Attorney General.

Attorney for Village of Deephaven.

September 22, 1947. 408-C

156

Sewers—Rentals—Water, light, power and building commission—Commission may pay and village may charge rentals for sewer connections with the electric plant and public buildings under the jurisdiction of the commission—MSA § 453.01 et seq.

Facts

The village of Kenyon is establishing a sewer system; those using the sewer system will pay rental charges fixed by the village council; the village has a water, light, power, and building commission which has charge of the water, light, and power utilities and the public buildings of the village.

Question

Can the council collect sewer rental charges from the municipally owned buildings operated by the water, light, power, and building commission?

Opinion

The water, light, power, and building commission operates the electric light and power plant and has charge of the public buildings. If the plant or village buildings require sewer connections and the commission deems it advisable or proper to have such connections for the plant and buildings under its jurisdiction it would have authority to pay the sewer rental charges fixed therefor, and the village council would have the right to demand payment from the commission of such charges so fixed. I see no difference between paying the expense of sewer rentals and paying other expenses incurred by the commission in performing its operations.

RALPH A. STONE,
Assistant Attorney General.

Kenyon Village Attorney.

June 14, 1948. 387-G-7

157

Water supply—Wells— Manner of financing cost—Where village has general obligations outstanding to its legal limit and does not intend to pay cost of additional water supply by assessment or revenue from users, it may issue warrants in anticipation of collection of taxes, subject to limitations contained in MSA, § 475.22.

Facts

The village of Chokio is having difficulty in obtaining a water supply for its users, and it will be necessary to secure new sources in order to furnish an adequate water supply for the village users. The village is now bonded up to its legal limits. The cost of any new source of water supply will not be paid by assessment for benefits or from revenues to be paid by the users.

Question

You inquire as to the method and manner of financing the cost of obtaining additional sources of water supply.

Opinion

You advise that the village has issued bonds up to its legal limits. We assume this to mean that the village has issued obligations to the extent authorized under section 475.06, as amended by Laws 1947, chapter 296.

There are certain obligations which are excepted from the provisions of chapter 296, covering the issuance thereof. Section 2 in part provides:

> "Subd. 3. 'Obligation' means any bond, certificate of indebtedness, warrant or order authorized by law issued by a municipality, provided that the following obligations are excepted from the provisions of this chapter covering the issuance thereof:
>
> " * * *
>
> "(3) Those issued for improvements which are payable wholly or partly from the proceeds of special assessments levied upon property especially benefited thereby including those which are the general obligations of the municipality issuing the same, if the municipality is entitled to reimbursement, in whole or in part, from the proceeds of special assessments levied upon property especially benefited by such improvements."

In determining "net debt" certain obligations are to be excluded. Section 2 in part provides as follows:

> "Subd. 5. 'Net debt' means the amount remaining after deducting from its gross debt the aggregate of the principal of the following items issued by any municipality:
>
> " * * *
>
> "(2) Obligations issued for the acquisition, construction, maintenance, repair, or improvement of public waterworks systems, and public lighting, heating or power systems, and of any combination thereof **or for any other public convenience from which a revenue is or may be derived.**" (Boldface 1947 amendment).

We believe that obligations issued for the acquisition of additional sources of water supply come within the class of obligations that are to be excluded in calculating the "net debt" as provided in the subparagraph last referred to. It seems clear to us that securing additional sources of water supply such as a new well constitutes an "improvement" of the public waterworks system within the meaning of this subparagraph.

The village may issue warrants in anticipation of the collection of taxes, subject to the limitations of section 475.22.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Chokio Village Attorney.

September 15, 1948. 476-C-1

REAL PROPERTY

158

Cemetery—Gravel pit—Upon separation of village from town, cemetery owned by township may be sold, reserving burial rights therein for towns. Minn. St. 1945, § 365.26. Property owned by town and upon village separation from town may be sold pursuant to Minn. St. 1945, § § 413.071, 413.072, and § 365.10, Subd. 8.

Facts

A certain township acquired title to and owns a gravel pit, a cemetery, and certain flowage rights on a millpond, which property is now within the corporate limits of the Village of "C," which village has been incorporated and separated from the town.

1. Has the township a right to sell the cemetery to the village, reserving the right for the residents of the township to thereafter be buried therein?

Answer

When authorized by a vote of the electors at a town meeting the town may sell or lease any part of such cemetery, but the part so sold or leased shall continue to be used for the burial of the dead of the town. Minnesota Statutes 1945, Section 365.26. You will note that, before any sale or lease of the cemetery may be made, authority must be given by the electors.

Question

2. Must the gravel pit and flowage rights be kept as joint property or, if the township be willing, could the Village of "C" purchase them?

Answer

Minn. St. 1945, § 413.06, provides that any real estate purchased or improved with taxes theretofore levied upon property both within and without

the village boundaries shall be and remain the joint property of the town and village. § § 413.071 and 413.072 provide the manner and method of sale or division of property which by reason of § 413.06, supra, has become the joint property of the town and village.

We think that there is authority under these sections for sale by the town of its interest in the property jointly owned to the village. If the village and the town are unable to agree as to the amount or value that each is entitled to receive, then § 413.072 provides for the appointment of a board of arbitration to determine the value or the amount that each is entitled to receive. However, these statutes contain no specific provision authorizing the town board to sell the interests of the town in such property and we believe that it would be necessary for the electors of the town to first authorize the sale of the town's interest in such joint property pursuant to Minn. St. 1945, § 365.10, Subdivision 8.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Village Attorney of Champlin.

February 13, 1947. 440-B

159

Joint ownership—Counties and villages—May not jointly acquire and own real estate for village use as fire hall and county use for housing road patrol and equipment—MS1945—412.075, 412.19, sd. 8.

Question

"May a County, having a need within a Village for a garage or building to house its road maintenance patrol, and the Village, having a need for a building to house its fire equipment, join in the acquisition of a tract of land and in the erection and maintenance of a building designed to serve the County in keeping its road equipment and the Village in keeping its fire equipment?"

Answer

Villages have power to take, purchase, lease, and hold such real and personal property within or without its corporate limits as the purposes of the corporation may require. Minnesota Statutes 1945, Section 412.075.

A village council has power to provide fire engines, engine houses, and generally to take such measures for the prevention or extinguishment of fires as may be necessary or proper. M. S. 1945, § 412.19, subd. 8.

Opinions have been rendered by this office to the effect that road and bridge fund moneys may be used to construct a garage building to house

road machinery when the county commissioners may deem it necessary to do so, and the expenditure is reasonable.

We are not aware of any statute empowering a village and a county to jointly acquire and jointly own real estate for the purposes stated in your letter. The legislature could grant such authority to villages and counties. Until such authority has been granted by the legislature we are of the opinion that a village and a county may not jointly acquire and jointly own real estate for the uses and purposes above stated.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Wadena County Attorney.

April 1, 1947. 125-A-41

Please annotate opinion # 159
See MSA 471.59, sd. 1

160

Lease—Water tower—Permitting use of city water tower for attachment of radio transmitter facilities—Such use may be permitted on best terms obtainable for not longer than city has no use for the property.

Facts

"A resident of the City of Gaylord has been granted a permit from the Federal Communications Commission to operate a two-way Mobile F.M. Radio System here, and has applied to the City Council for a twenty year lease or permit to use the water tower to attach a transmiting antenna and wiring for remote control."

Question

"Has the City Council any legal authority to enter into such a lease or issue a permit for the use of the water-tower for that purpose?"

Opinion

The leading authority on the question of leasing unneeded city property is Anderson v. City of Montevideo, 137 Minn. 179 (cf. Penn-O-Tex Oil Co. v. City of Minneapolis, 207 Minn. 307).

I hesitate to express an opinion upon the validity of leasing the required facilities for a period of 20 years, for the reason that it is impossible to determine whether the city water tower will be in use for that length of time or whether the facilities leased might become inconsistent with the use of the property by the city for its own purposes.

I think the city should consider the feasibility of granting a permit or license for the use of the facilities after consideration of the following questions:

(1) Would the radio transmitting apparatus in any way interfere with the use of the property for city purposes?

(2) Does the city need the property which would be subject to the permit for any city purpose which would be inconsistent with the use thereof for the purposes of the lessee?

(3) Is the proposed offer by the holder of the federal permit the best price that could be obtained for the use of the facilities?

If all of these questions are answered in the affirmative, I think the city would be authorized to grant to the holder of permit a license to use the water tower and maintain attachments thereon for such time as the city does not need the property for its own use and not longer than the city maintains the tower.

Long term leases by a municipality are not favored, in as much as it is difficult to determine how long a period the city may be without use for the facilities.

With respect to such a position as this, I feel that the best way to handle it would be to give the permittee under the federal permit a license which would contain a provision that the same could be terminated at any time by the city on short notice in the event the city should desire to dismantle the tower or have other inconsistent use for the property, and not exceeding 20 years in any event. The license should contain a provision for indemnifying the city against claims for damage on account of such use of the tower as well as a provision as to the amount and terms of the payment of the consideration to be paid by the licensee.

RALPH A. STONE,
Assistant Attorney General.

Gaylord City Attorney.

April 13, 1948. 59-A-40

161

Public square—Title to public square platted under townsite act—City of Wayzata owns an easement for use as a public square in land platted as such in the town of Wayzata under the townsite act—MSA 503.01.

Facts

A plat of Wayzata was filed in the office of the Register of Deeds of Hennepin County on May 2, 1855. One of the platted blocks is marked and

indicated on the plat as a "Public Square." Apparently the plat was made by the occupants of a portion of the public lands in what is now the city of Wayzata.

There may be some doubt as to the date when the plat was filed. A letter from Marion Clawson, Director of the Bureau of Land Management of the Department of the Interior, dated August 25, 1948, states that the plat was filed in the office of the Register of Deeds of Hennepin County on January 14, 1856.

The plat shows streets and alleys and also certain lands marked "Public Park" and the block marked "Public Square."

Two government lots and three forties were patented to Andrew G. Chatfield, Judge of the County Court of Hennepin County, Minnesota, upon his entry under the townsite act. The patent was issued to him April 2, 1857. The patent conveyed the lands in fee to the trustee "in trust, for the several use and benefit of the occupants thereof, according to their respective interests." I assume that this patent conveyed the lands included within the plat of Wayzata. I also infer that the plat of Wayzata was made by occupants of the plat.

Question

What interest has the city of Wayzata in the land marked "Public Square"?

Opinion

The land included in the plat of Wayzata was entered and patended under what is known as the townsite law, under the act of May 23, 1844. This law is printed in M. S. A. Vol. 28, in fine print on pages 510 and 511. It provides in brief that whenever any portion of the surveyed public lands has been settled upon and occupied as a townsite (which I assume to have been the case at Wayzata) and therefore not subject to entry under the existing pre-emption laws, it shall be lawful if the place is not incorporated for the Judge of the County Court to enter such land in trust for the use and benefit of the occupants thereof according to their respective interests.

As complimentary to this act, this state has what is known as the Townsite Act, Laws 1855, Chapter 7, Section 1, now appearing as M. S. A. § 503.01, et seq.

Also in territorial days there was in force in Minnesota R. S. Chap. 31, relating to the recording of "town plots," which provided that when any person wished to lay out a town or an addition or subdivision, the same should be surveyed, the blocks numbered and the streets and alleys and lots shown. This statute provided (R. S. 1851, Chap. 31, p. 150):

> " * * * 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, to and for the uses and purposes set forth and expressed or intended."

In reference to this statute, our court held in the case of **Betcher v. Chicago, Milwaukee & St. Paul Ry. Co.**, 110 Minn. 228, 234, as follows:

> " * * * This statute, without substantial change of language, has been in force in this state ever since the organization of the territory of Minnesota. It was originally a statute of the territory of Wisconsin, and became a part of the statutory law of the territory of Minnesota by virtue of section 12 of the organic act of Minnesota, approved March 3, 1849. It has been the uniform holding of this court that the dedication of land, pursuant to this statute, to the public for streets, alleys, and public grounds, does not pass the fee simple title thereto, but only such an estate as the purpose of the trust requires, and that the fee, subject to the public easement, remains in the dedicator and his grantees. (citations) It follows that the fee to the tract in question never was in the municipality, but remained in the owner of the lots abutting thereon, subject to the public easement."

It would seem to follow from this case that the city of Wayzata does not own the fee to the public square. It is unnecessary to inquire who does own the fee. The question to be analyzed is whether the city of Wayzata owns the easement of the right to use and occupy the ground marked "public square" for public purposes.

The County of Hennepin existed at the time the plat was filed. This is indicated by the fact that the townsite was entered by the Judge of the County Court of Hennepin County. I do not know whether there was any town organization at that time or not, and the Village of Wayzata was not organized until 1884. Therefore there may be some question as to whether the easement in the public square is owned by the County of Hennepin, by the town in which Wayzata is located, or by the city of Wayzata.

In the case of **Village of Mankato v. Willard**, 13 Minn. 1, it was held that there could be a dedication of the land for a "public levee," even though the plat were made before the issuance of the patent.

And it was held in the **City of Winona v. Huff**, 11 Minn. 119, Gil. 75, that:

> "It is now well settled that in dedications to the public for public use, it is not necessary that there exist at the time a grantee capable of taking thereunder. * * * "

The Winona case concerned land dedicated as a public square in the city of Winona. This land had been entered under the townsite act. In this case the land had been platted as a "public square" similar to the plat of Wayzata. The court held that the city could maintain ejectment for the public square, and used this language:

> " * * * The language of the statute is, '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, to and for the uses and purposes set forth and expressed or intended.' It is not the use that passes merely, but the land necessary for the use, and whatever interest is necessary, passes to the corporate body—in this instance, the plaintiff. In this case the property is placed under the regulation of the plantiff, to designate the public purposes to which it shall be applied not inconsistent with the dedication, and to take all proper steps to accomplish such purposes. The right to the possession thereof, so far as is necessary to accomplish these objects, is clearly implied. This right, by the terms of the statute, is incident to the interest of the corporation in the land, and is in trust for the purposes of the dedication. It does not arise out of the corporate powers of the plaintiff, although it might exist there also. It is therefore, a legal right to the possession, with an interest in the land for the purposes of the trust, that is, the use of the public * * * "

There can be no doubt but that the title to the easement in the public streets is in the city of Wayzata. The same conclusion must be reached as to the title to the easement in the land platted as "public park." It would seem logical to hold that the title to the land platted as "Public Square" should be in the same municipality as is entitled to exercise jurisdiction over the streets and public parks.

I therefore conclude that the city of Wayzata is entitled to the easement of the public square, and to exercise control thereof and occupy and use the same for the purpose of a public square. It is my opinion that that dominion is not vested either in the County of Hennepin or the town in which the city is located.

You may be interested in the following cases:

Village of Mankato v. Meagher, 17 Minn. 265;
City of Denver v. Kent, 1 Colo. 336;
In Re Schaller, 193 Minn. 604.

It would seem logical to hold that if title to the easement in the public streets vested in the County of Hennepin at the time the plat was filed, that easement would pass to the town at the time the town was organized, and when the Village of Wayzata was organized, would pass to the village. It would seem logical to hold that the title to the premises platted as "Public Park" would by the same token pass to the village and then to the city of Wayzata. I cannot make any distinction between the title to the easement of the streets and public parks and the easement in the public square.

I feel that the city of Wayzata is entitled to occupy and use the land marked and used as "Public Square" for public purposes.

Whether the right to use and occupy the public square for public purposes includes the right to place buildings upon it, such as a fire hall, city hall, and other public buildings, raises a different question. Before expending money for these improvements upon the public square, I would suggest that you try to get some judicial determination of the rights of the city not

only to the ownership of the public easement, but as to what rights as owner of such easement the city has to the use and occupancy of the public square.

RALPH A. STONE,
Assistant Attorney General.

Attorney for the City of Wayzata.

September 21, 1948. 59-A-40

P.S. See the decision of the supreme court entitled Headley v. City of Northfield 35 N. W. (2d) 606. It holds that: "The ordinary and usual signification of a public square dedicated by a private person, as here, for public use is an **open** tract of land for use for purposes of free passage or of ornamentation and improvement as grounds of pleasure, amusement, recreation, or health." It was held that the public square in Northfield could not be used for a high school athletic field and playground. It was further held that owners of public property abutting on a public square have the right to maintain an action to enjoin the diversion of its use from the purposes for which it was dedicated.

162

Purchase—Municipal liquor store—Village has power to purchase building on contract for deed—Payment to be made only out of the profits arising from the operation of the store.

Question

Whether the village of Clontarf may purchase a building under a contract for deed with the provisions that payment therefor is only to be made out of the profits of the municipal liquor store.

Opinion

On questions such as this, the authority usually pointed to is **Williams v. Village of Kenyon,** 187 Minn. 161, where it was held that a village could enter into a valid conditional sales contract for the purchase of generating equipment, Diesel engine and accessories for the electric light plant of the village, payable only out of the profits of the operation of the electric system. In commenting on this case in the case of **Davies v. Village of Medelia,** 205 Minn. 526, 533, our court said:

> "The controlling principle in cases of this nature is aptly stated in Williams v. Village of Kenyon, 187 Minn. 161, 165, 244 N. W. 558, 560, wherein it was said: 'Since the power to acquire such a plant is expressly conferred, the means of accomplishing that object is left to the

village as long as these are such as are customary and reasonable.' Again: 'Where municipal authorities are authorized to contract in relation to a particular matter, they have a discretion as to methods and terms, with the honest and reasonable exercise of which a court cannot interfere, though they may not have chosen the best method, or made the most advantageous contract.' 4 Dunnell, Minn. Dig. (2ed) § 6697."

I can see no difference between the purchase of the generating equipment and the purchase of a building to house the municipal liquor store upon a conditional contract. It is my opinion that it is not unlawful for the village of Clontarf to purchase a building for its municipal liquor store on conditional contract of sale, the purchase price to be paid only out of the profits of the municipal liquor store, if any. The contract should be carefully drawn so as to protect the village in case the profits do not materialize as anticipated.

RALPH A. STONE,
Assistant Attorney General.

Swift County Attorney.

December 8, 1947. 218-R

SOCIAL WELFARE

CHILDREN

163

Aid—Dependent child—Children of divorced parents whose father has an estate under guardianship in excess of $300 in cash are not eligible for assistance under MSA § 256.73 (3 (a)).

Facts

"A, a Veteran of World War I, has been receiving a disability pension from the Government since World War I. Sometime after the 1st World War a guardian was appointed over the estate of A. During a period of years since World War I an estate greately in excess of $300.00 has been accumulated. During World War II A married B and as a result of that marriage three children were born. In 1947 B divorced A and by the divorce decree received the sum of $60.00 each month for the support of the three children, which sum was based on the amount that A received each month from the Government. The Divorce Decree was subsequently amended increasing the support

money of the children to $75.00, which amount is now in effect. The support money of $75.00 is insufficient to take care of the three children."

Question

"Whether the children of A are eligible for aid under M. S. A. 256.73 or whether the fact that the father of the children, who is now divorced from their mother, by having an estate under guardianship in excess of $300.00 would deprive the children from aid under the Statute."

Answer

M. S. A. § 256.73 (1) and (2) contain the prerequisites for giving assistance to any dependent child. Paragraph (3) (a) contains a provision which constitutes a bar to the allowance of such assistance, and reads as follows:

"The ownership by a father or mother of property as follows shall be a bar to any allowance under sections 256.72 to 256.87:

"(a) Personal property of a reasonable market value in excess of $300, exclusive of appropriate clothing and necessary household furniture and equipment, and of such tools, implements, and domestic animals as in the opinion of the county agency it is expedient to retain for the purpose of reducing the expense or increasing the income of the family * * * ."

We think that the money held by a guardian of the divorced father must be, for the purposes of the statute under consideration, considered to be the property of the father. In a previous opinion of this office under date of July 29, 1937, No. 14, 1938 report, the opinion was expressed that where a father pays in full the amount of alimony ordered by the court, but which amount does not provide an adequate budget for the support of minor children, such children would be eligible for aid to dependent children in an amount to cover the deficiency between the amount paid by the father under the order of the court and the budget needed for the support of the dependent children. However, in that case it did not appear that the father or his estate under guardianship was possessed of the amount of property, either real or personal, which, under the provisions of the statute above referred to, would constitute a bar to an allowance.

The language used in this statute is clear. It provides that ownership by a father or mother of personal property of a reasonable market value in excess of $300, exclusive of appropriate clothing and necessary household furniture and equipment, shall constitute a bar to aid to dependent children. It is apparent that the amount accumulated by the guardian for the divorced father is in excess of $300 and therefore, in our opinion, this personal property would constitute a bar for aid to the children.

It might be suggested that in view of the property possessed by the father that an application might be made to the court for a modification of the divorce decree, so as to meet the present needs of the children, by an increase of the amount to be paid as support money for the children.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Dodge County Attorney.

June 11, 1948. 540-C

164

Aid—Dependent children—Continued absence from the home—Whether warrant for abandonment prerequisite in all cases—MS1945, § 256.12, subd. 15.

Facts

Applications for aid to dependent children have been received by mothers of illegitimate children in cases in which the mother is unable to identify the father of the child, and in cases in which the mother has identified the putative father, but the putative father denies the paternity.

Question

Whether aid to dependent children can be allowed in such cases under the "continued absence from the home" provisions of the law.

Opinion

Minnesota Statutes 1945, Section 256.12, subdivision 15, provides that continued absence from the home means, among other things: "absence from the home by the parent for a period of at least three months continuous duration together with failure on the part of the absent parent to support the child, provided that reasonable efforts have been made to secure support for such child from the defaulting parent." This provision is subject to the limitation that "if such child shall have been abandoned in this state, * * a warrant for arrest shall have been issued for such abandonment."

Unidentified putative father. In our opinion reasonable but unsuccessful efforts to identify the putative father would constitute "reasonable efforts to secure support for such child from the defaulting parent." The question remains whether in such a case a warrant for arrest for "abandonment" could properly issue, and, if not, whether an aid to dependent children grant could be allowed. There is no statute of this state defining the crime of

"abandonment." M. S. 1945, § 617.55 defines the crime of desertion of a child by a parent "including the duly adjudged father of an illegitimate child." Section 617.56 defines the crime of failure to support a child. The reference to a warrant for abandonment contained in section 256.12, subdivision 15, must be construed as referring to a warrant for arrest because of violation of section 617.55 or section 617.56.

In **State v. Lindskog**, 175 Minn. 533, 221 N. W. 911, a married woman cohabited with defendant and had two children by him. Defendant absconded and was prosecuted under section 617.56 for failure to support his children. The court held that in the absence of a bastardy determination charging the defendant with support (M. S. 1945, § 257.18 et seq.) no crime had been committed under section 617.56. It is therefore apparent that until the identity of the putative father has been determined there is no basis on which an "abandonment" warrant can be issued.

It is our opinion that the mere fact such a warrant could not properly issue does not ipso facto preclude an aid to dependent children grant providing the other provisions of the statute are satified. That such was the intention of the legislature is evident from a consideration of the aid to dependent children act prior to the 1939 amendment. Laws 1937, chapter 438, section 1 (d) defines continued absence from the home as follows:

> " 'Continued absence from the home' as used in this act shall relate and apply only to cases where the parent, whether or not entitled to custody of the child, is an inmate of a penal institution under a sentence which will not terminate within three months after the date of such finding, or a fugitive after escape therefrom, or where there is and has been for three months past an outstanding warrant for his arrest on a charge, or after conviction, for the crime of abandoning in this state such child or abandoning in this state his wife while pregnant and the mother has in good faith assisted the proper authorities in all reasonable efforts to apprehend him pursuant to such warrant."

Under this provision there are many instances in which aid to dependent children was denied because no complaint could be issued. Laws 1939, chapter 195, amended this section by substituting therefor the language of the present law. See opinion of the attorney general dated April 21, 1939, copy of which is enclosed.

It is therefore our opinion that whenever a warrant for arrest could properly issue, such warrant must issue, but that if no warrant can properly issue aid to dependent children may be paid if the applicant is otherwise entitled thereto.

Identified putative father who refuses to admit paternity. The granting of aid to dependent children in such a case will depend upon whether, under all the facts and circumstances of the case, the reasonable efforts contemplated by section 265.12, subdivision 15, have been made. It would seem that normally reasonable efforts in such a case would include the institution of a proceeding under section 257.18 to adjudicate the question of paternity.

Your inquiry states that some of these applicants are living on Indian reservations. If it should appear that the parties involved are not subject to the jurisdiction of the district court of this state but are subject only to the jurisdiction of the Indian tribal court, or the Federal court, then a proceeding should be instituted before the court having jurisdiction for the purpose of adjudicating paternity.

The question of whether or not an Indian who is a member of a tribe and lives on an Indian reservation may participate in the aid to dependent children program is not raised by your inquiry and no opinion thereon is expressed. As to this point see **State ex rel. Williams v. Kemp,** 106 Mont. 444, 78 Pa. (2d) 585.

KENT C. VAN DEN BERG,
Assistant Attorney General.

Beltrami County Attorney.

April 2, 1947. 540-B

165

Aid—Dependent child—Grants to dependent children who are living with relatives—Effect of Federal Social Security Act—MS1945, § 256.12, Subd. 14, 42 U.S.C.A. § 406.

Facts

The Federal Social Security Administration has informed the Division of Social Welfare that "a child may be said to meet the requirement of living with a specified relative if his home is with a person included in one of the following groups:

> "1. Any blood relative, including those of half-blood, except cousins, nephews, or nieces. **Note:** Relationships to persons of preceding generations as denoted by prefixes of grand, great, or great-great are within this definition. * * * ."

Minnesota Statutes 1945, Section 256.12, in defining "dependent child" provides in part:

> " * * * a child under the age of 18 years * * * who is living with his father, mother, grandfather, grandmother, * * * uncle, or aunt in a place of residence maintained by one or more of such relatives as his or their home."

Question

"May the Director of Social Welfare in the administration of the Aid to Dependent Children Act interpret the term 'uncle' and 'aunt' as

used in said Act, Section 256.12, Subdivision 14, Minnesota Statutes 1945, as including greatuncle and greataunt?"

Opinion

Laws 1943, Chapter 6, amended prior statutes relating to aid to dependent children to include among the relatives with whom a dependent child might be living so as to entitle the child to aid under that act, the father, grandfather, brother, stepfather, stepbrother and uncle. The term "aunt" had theretofore been used in the statute. These named male relatives were added to the previously named female relatives by the 1943 act. The amendment, I assume, was adopted for the purpose of conforming the provision in question to the federal law and qualifying for federal aid to dependent children.

The Federal Social Security Act which names the same persons as those designated in the state statute has, I understand, been construed by the Federal Social Security Commission to include "persons of preceding generations as denoted by prefixes grand, great, or great-great." If this construction had been given to the federal provision before it was enacted by the state legislature, it would appear that under a general rule of law the legislature could have been considered to have adopted the federal construction. If the federal construction was given subsequent to the enactment of the state provision, it would not necessarily control, but a law of the nature here involved should, I believe, be liberally construed for the benefit of dependent children. The Director of Social Welfare is empowered by our statutes to administer and supervise all child welfare activities. Upon him is imposed by M. S. A. 256.01, Subd. 4 (5), the duty of cooperating with the federal government and its public welfare agency in any reasonable manner as may be necessary to qualify for federal aid to dependent children. He therefore, in the exercise of his discretion, may give weight to the federal construction and apply the same to a similar state provision in order to carry out the purpose of the state act, unless he deems the federal construction arbitrary and unreasonable.

J. A. A. BURNQUIST,
Attorney General.

Division of Social Welfare.

August 19, 1947. 540-J

166

Illegitimate—Funds paid by father for support and maintenance of child belongs to child even after adoption—MSA 257.23.

Facts

An illegitimate child was born. Suit was instituted under M. S. A., § 257.23 and paternity established. The father was ordered by the court to make a lump-sum payment for the care and maintenance of the child, which payment was made by the father to the county welfare board or the director of social welfare or the duly appointed guardian. Subsequently the child was adopted.

Based upon the foregoing facts, you ask the opinion of this office on the following

Question

Who is entitled to the funds paid by the father for the support and maintenance of the child before adoption in compliance with the order of the court?

Opinion

It is the opinion of this office that the money paid by the father in compliance with the judgment of the court for the care, maintenance and education of the child belongs to the child even after adoption.

EARL H. A. ISENSEE,
Assistant Attorney General.

Brown County Attorney.

August 30, 1948. 840-C-13

OLD AGE ASSISTANCE

167

Applicant—Birth certificate—State does not require an applicant to attach to his application a certified copy of his birth record. County welfare worker has right to inspect birth records in the office of the clerk of district court without the payment of any fee by the county except in those cases were an order of the court is necessary—MSA 256.19, subd. 2; 256.20; 144.175, subd. 1; 144.151 to 144.204; L. 1947, c. 517.

Facts

"The Clerk of District Court in this County pursuant to the Statutes is paid by the County a sum of money according to the class in which Dodge County falls, to-wit: that of Class C. In addition there

is a guarantee of salary as stated in M. S. A. 485.016, subd. 3 as amended. At various times people apply to the Welfare Board for Old Age Assistance. Often the applicants were born in this County and the Welfare Office seeks information from the birth records of the Clerk of Court to determine whether the applicant is at least 65 years of age."

Question 1

Whether an applicant for old age assistance is required to file with his application a certified copy of his birth record.

Answer

M. S. A. 256.19, subd. 2 provides in part as follows:

"An applicant for old age assistance shall file his application in writing with the county agency of the county in which he has a legal settlement, in such manner and form as shall be prescribed by the state agency."

The manner and form prescribed by the state agency do not require the applicant to accompany his application with a certified copy of his birth record. However, the county agency may make such a requirement to expedite its duties to investigate prescribed by M. S. A. 256.20.

Question 2

Are the birth records in the office of the clerk of district court open for inspection to county welfare workers without the payment of any fee by the county?

Answer

Under the provisions of M. S. A. 144.175, subd. 1, the birth records in the office of the clerk of district court are open to inspection, subject to the provisions of § § 144.151 to 144.204 and regulations of the state board of health. The board has not made any regulation which would prevent the inspection of the birth records in the office of the clerk of district court by a county welfare worker. There may be facts and circumstances which would bring the case within the provisions of § § 144.151 to 144.204 and prevent the social worker from inspecting the birth record of the old age assistance applicant. However, you have not set forth any such facts, and consequently there will be no effort to deal with anything but the ordinary case in this opinion, and in that instance the social worker would have the right to inspect the birth records in the office of the clerk of district court without the payment of any fee. M. S. A. 144.175, subd. 3, dealing with the rule as to right of inspection, was repealed by Laws 1947, c. 517.

EARL H. A. ISENSEE,
Assistant Attorney General.

Dodge County Attorney.

August 25, 1948. 521-D

168

Lien—Certificate of assistance must be filed prior to death of old age assistance recipient—MS1945, 525.44, 256.26, sd. 5 & 6.

Facts

At the time of his death X lived in Traverse County; he was at that time receiving old age assistance from Grant County; a certificate of assistance had been filed with the register of deeds of Grant County. X owned real estate in Traverse County which, at the time of his death, constituted his homestead; administration of his estate was commenced in Traverse County; Grant County filed a claim in probate court for old age assistance; the United States Department of Agriculture also filed a claim for seed furnished X during his lifetime; thereafter, a certificate of assistance was filed with the register of deeds in Traverse County.

Should Grant County disregard the probate proceedings and foreclose the old age assistance lien? It appears that the Department of Agriculture contends that in such a case they will have a prior lien because of the priority in time of filing their claim.

Question

Would the United States Government have any lien on the property by reason of the claim filed in probate court, and because the old age assistance lien was not filed prior to the time of the filing of the United States Government claim?

Opinion

You state and we assume that the Federal Government acquires no lien by virtue of the federal statute giving rise to their claim. Claims which have been filed within the time limited are to be paid in the order set forth in Minnesota Statutes 1945, Section 525.44. Priority in time of filing is irrelevant, assuming the claim was filed within the time limited. It is also well settled that a creditor of the deceased person acquires no lien to the exclusion of other creditors by virtue of the allowance of his claim. **Nelson v. Rogers,** 65 Minn. 246, 68 N. W. 18. Consequently, it is our opinion that the Department of Agriculture acquired no lien on the property in question.

It does not follow, however, that the state has a valid lien on the property in question which may now be foreclosed. Section 256.26, subdivision 5, provides for the execution of a certificate of assistance, and requires the filing of the certificate in each county in the state where there is real property belonging to the recipient. Subdivision 6, ibid, provides:

> "Thereupon the lien hereby imposed shall arise. It shall attach to all real property then owned by the recipient * * *, have effect in all counties in which such certificate shall have been filed. * * * "

It seems clear that the filing of the certificate is a condition precedent to the creation of the lien itself. Consequently, until the certificate was filed in Traverse County there was no lien on the property in question.

X died prior to the filing of the certificate in Traverse County. The question arises whether under such circumstances the state has any lien on the land in question. At the time of his death, there was no lien on the property. Upon his death title to the real property immediately passed to his heirs, subject to the claims of administration. Dunnell's Minnesota Probate Law, Section 77. It would seem to necessarily follow that at the time of the filing of the certificate in Traverse County there was no property belonging to X to which the old age assistance lien could attach. A closely analogous problem arose in **Byrnes v. Sexton,** 62 Minn. 135, 64 N. W. 155. In this case an action was brought for partition by the heirs of X. The defendants claimed title to a portion of the land by virtue of an execution sale. Defendants' grantors obtained a judgment against X in Rice County. Thereafter X died. There was no administration of his estate. The judgment subsequently was filed and docketed in Hennepin County where X had owned real estate. Execution was issued and the land was sold to the grantors of defendants; the court held that the docketing of the judgment after the decease of X gave rise to no lien; that immediately upon the death of X title to the real property vested in his widow and children, subject to payment of debts. The court states:

> "A judgment creditor without a lien could not thereafter secure a superior right, not only as to them (the heirs) but as to other creditors, by docketing his judgment * * *. A judgment creditor who acquired no lien prior to the decease of a judgment debtor must proceed to establish and collect his claim and demand as a general creditor, and in the course of proceedings in administration; * * *."

It is, therefore, our opinion that the state acquired no lien on the property in Traverse County.

KENT C. VAN DEN BERG,
Assistant Attorney General.

Grant County Attorney.

September 18, 1947. 521-P-4

169

Lien—Foreclosures—Redemption from—MSA 256.26, subd. 8; 514.15; 550.24; 550.25; 550.27; 580.26; 256.263.

Facts

On June 28, 1946 one ..... died leaving a homestead as the sole asset of her estate located at ....., Minnesota, on which

homestead the State of Minnesota acquired a lien for old age assistance theretofore granted to her. Appropriate foreclosure proceedings were taken by me to foreclose the lien given for assistance so granted and on January 5, 1948 said homestead was bid in for the State of Minnesota for the amount of the lien and expenses, so that the year of redemption expires on January 5, 1949.

The deceased ..... left surviving her eight children as her sole heirs at law. Now, a purchaser has been procured and the heirs have executed proper conveyances to the purchaser. They desire to redeem from the old age lien foreclosure sale.

Question

As to the procedure to be taken in the redemption from such foreclosure sale and who is to issue the certificate of redemption.

Opinion

M. S. A. 256.26, Subd. 8, provides, among other things, that old age assistance liens may be enforced in the manner provided for the enforcement of mechanic's liens upon real property. Section 514.15 (mechanic's liens) provides that the judgment shall direct a sale for the satisfaction of the liens and the manner of sale, and that the right of redemption shall be the same as upon execution sales, subject to exceptions not here pertinent. The statute relating to execution sales provides that the judgment debtor, his heirs or assigns, may, within one year from the date of the sale, redeem. (§ § 550.24, 550.25). Section 550.26 provides:

> "The person desiring to redeem shall pay to the person holding the right acquired under such sale, or for him to the sheriff or the clerk of the district court of the county in which the real property is situated, the amount required by law for such redemption, and shall produce to such person or officer the same documents required by law to be produced by a person desiring to redeem from a sale of real property under foreclosure of a mortgage by advertisement; and the person redeeming shall cause such documents to be filed with the register of deeds as required in the case of redemption from such foreclosure sale."

Section 550.27 provides that the person or officer from whom such redemption is made shall execute to the person redeeming a certificate of redemption which shall be in the same form as the certificate required to be executed on redemption from the sale of real property under foreclosure of a mortgage by advertisement. Section 580.26, relating to redemption from a mortgage foreclosure by advertisement, provides the form of redemption certificates to be used.

It is, therefore, our opinion that a certificate of redemption may be issued either by the person from whom such redemption is made, the sheriff, or the clerk of the district court of the county in which the real

property is located. The facts to be recited in the certificate of redemption are set forth in section 580.26.

KENT C. VAN DEN BERG,
Assistant Attorney General.

Pipestone County Attorney.

August 9, 1948. 521-P-4

170

Lien—Priority—Statute of limitations. Claims—Rights of volunteer in payment of taxes by children—MS, Sec. 256.26, Subd. 6, Sec. 541.05.

Question

Is a claim possessed by a child of an old age assistance recipient for money actually paid by the child in discharge of taxes upon real estate, owned by the recipient, subject to the statute of limitations so that it will be barred after the expiration of six years following payment?

Opinion

M. S., Sec. 256.26, deals with the priority of old age assistance liens with reference to the claim mentioned. Speaking of the old age assistance lien, the statute says in Subd. 6:

> "Such lien shall take priority over all other liens subsequently acquired, except that such lien shall not take priority over the claims of children of the recipient for money actually expended by them . . . in payment of the taxes * * * thereon."

Whether the child has any lien at all for the payment of taxes depends, of course, upon the facts and circumstances in the particular case. Such taxes might be paid as a pure gift.

If the taxes were paid pursuant to an arrangement between the parent and child and if this arrangement constituted a contract, the contract would determine when reimbursement from the parent to the child was due. In that event, the statute of limitations would necessarily operate from the time that such repayment was due. M. S. Sec. 541.05.

The statute, Sec. 256.26, Subd. 6, does not create a right in favor of the child for payment of taxes, but only relates to the priority of such claim over the old age assistance lien, in case the claim does exist.

Where the child is a mere volunteer in the payment of taxes, he will have only the rights of a volunteer.

CHARLES E. HOUSTON,
Assistant Attorney General.

Jackson County Attorney.

September 16, 1947. 521-P-4

171

Recipient—Is not entitled to assistance during period he is confined in county jail—MSA 256.18 (1).

Facts

X, an old age asistance recipient, has been obtaining board and room in a private home. Recently he was sentenced to the county jail for a period of 45 days, which sentence he is now serving. If he doesn't pay for his room in the private home, he will lose the same, and he may not be able to secure a room upon his release from the county jail.

Question

Does the law permit the county welfare board to grant X such an amount of old age assistance as will take care of his room rent and any other necessary expenses during X's confinement in jail?

Opinion

M. S. A. 256.18 (1) prohibits the payment of old age assistance to a person "While or during the time he is an inmate of, and receives gratuitously all the necessities of life from any * * * custodial, or correctional institution maintained by * * * any state or any of the political subdivisions of the state." The foregoing statute is applicable to your case and prevents any payment to X for old age assistance during the time he is in jail.

EARL H. A. ISENSEE,
Assistant Attorney General.

Pipestone County Attorney.

December 7, 1948. 521

172

Recipient—Real estate purchased on contract subjects his land to lien. Facts stated insufficient to deprive wife of purchaser of her right to old age assistance when in need—MSA 256.26.

Facts

"In March, 1939, an old age recipient took an Assignment of a vendee's interest in a Contract for Deed on which there was a balance of $2135.00. This balance was payable at the rate of $25.00 per month. The old age recipient was on old age assistance at that time and has been on ever since.

"The payments were made by the old age recipient and upon the balance being paid in full in June of this year, the vendor in the Contract conveyed the premises to the recipient's son. No consideration passed between the recipient and his son except that the son claims that he has contributed approximately $1800.00 by way of contribution for support and improvements on the premises. It appears that the old age recipient has now disqualified himself from receiving old age assistance until the value of the home is used up on a budgetary basis."

Questions

1. "The old age recipient's wife has also been receiving assistance and the question is, does this also disqualify her?

2. "Further, if old age assistance is stopped for the time necessary to use up the value of the home, may the State now before the premises are conveyed to a bona fide purchaser, bring action for a declaratory judgment that the conveyance is fraudulent so that on the death of the old age recipient, the State can still enforce its lien?"

Opinion

The facts stated do not show whether the purchaser of the property, the old age assistance recipient, was and is in possession of the land purchased. It is not shown whether it is income property or nonincome producing property. It is not shown whether the property purchased is the home of the old couple. The value of the property is not stated. It is not stated where the money came from which the old age recipient used to make the payments on his purchase. It is not stated whether the claim is true that the son contributed $1,800, a part of which was used to improve the premises. It is not stated how much of that sum was so used. It is not stated whether the wife had any control over the transaction, either by way of purchase of the property, by way of the contributions made by the son, or in any other manner. Surely, on the facts stated, it can hardly be claimed that anything has been done to prejudice the rights of the wife.

The qualifications of a person who is entitled to receive old age assistance are stated in M. S. A., Sec. 256.15, Subd. 1. Laws Special Session 1935, Chapter 95, Sec. 1, declares:

> "The care and relief of aged persons who are in need and whose physical or other conditions or disabilities seem to render permanent their inability to provide properly for themselves is hereby declared to be a special matter of state concern and a necessity in promoting public health and welfare. To provide such care and assistance a state wide system of old age assistance is hereby established."

Thus, the legislature declared the policy of the law. In the past, the county welfare board evidently considered that the wife was in need. Isn't the test whether she should continue to receive assistance whether she is still in need? Did the conveyance of the property to her son lessen her need? Is the state less concerned now about her need than it was before her son became the owner of this property? The root of the old age assistance law is need. So, it appears to me that in answering the question whether her assistance shall be cut off, the county welfare board will first consider her need. If she needs it and if she has not clearly disqualified herself, she should have it. The decision is for the board, not for lawyers. If the income from their property is sufficient so that she is not in need, we have the answer. But if the old couple reside on the property and it does not produce income, the need is not affected. The value of the property is material in determining need.

If the husband owned an equity in this property, the old age assistance lien which the law furnishes (M. S. A., Sec. 256.26) attached thereto and still continues. The fact that the conveyance was made to the son could not affect the validity of the lien. If the conveyance was made to the son with the approval of the father and if the father no longer asserts any rights therein, an action to foreclose the lien would bring the question before the court and it would be determined whether the state has a lien and the amount thereof. The lien would be in force under the provisions of M. S. A., Sec. 256.26, Subd. 8. It would appear that the amount and validity of the lien may be adjudged in an action to be brought by authority of M. S. A., Sec. 555.02, which action I consider advisable.

In the statement of facts furnished, I do not read fraud. In order to say that the conveyance is fraudulent, we would have to assume things, not stated. But it appears to me to be clear that the state has a lien on whatever property interest the old age assistance recipient who purchased the land under the contract for deed at any time had after he received the first installment of old age assistance.

CHARLES E. HOUSTON,
Assistant Attorney General.

Mower County Attorney.

Ocober 6, 1948. 521-P-4

SANATORIUM

173

Admission—Eligibility requirements of patient—To be eligible patient must have resided in county or counties maintaining sanatorium throughout the year immediately preceding application exclusive of time spent in hospital or sanatorium—MSA, Sec. 376.34. This section amends MSA, Sec. 376.16, which also states qualification under former law. Person ineligible under Sec. 376.34 may be received on application of director of social welfare under Sec. 251.03. Opinion No. 104, 1928 report reversed.

Facts

A person suffers from tuberculosis and has resided in Wadena County since December 6, 1947. Previous to that time, the patient was not a resident or inhabitant of that county. In August, 1948 the patient was admitted to the county sanatorium for tuberculosis. Due to the fact that the patient has not resided in Wadena County for a full year previous to her admission to the sanatorium and due to the fact that she is indigent, the county from which she came to Wadena County has been asked to assume responsibility for her care in the sanatorium. The county from which she came declined responsibility and points to M. S. A., Secs. 376.14, 376.16, and the opinion of the Attorney General, published in the 1928 Report as No. 104, in support of its position.

You call attention to L. 1945, C. 345, which amended M. S. A., Secs. 251.02, 251.03 and 376.34.

Question

Is Wadena County charged with responsibility for the sanatorium care of this patient?

Opinion

M. S. A., Sec. 376.16, relates to county sanatoriums. The only requirements for admission as stated in this section are that the patient be: (1) an inhabitant of the county, and (2) afflicted with tuberculosis. Attention is called to the fact this section comes from a law enacted in 1909.

M. S. A., Sec. 376.34, comes from L. 1945, C. 345, which was effective April 17, 1945. This section also defines eligibility for admission to a county tuberculosis sanatorium. A person is eligible under the terms of this section who (1) has been a resident of the county or counties maintaining a tuberculosis sanatorium throughout the year immediately preceding application, exclusive of the time spent in a hospital or sanatorium, and (2) is afflicted with tuberculosis. Under this section, the patient would not be eligible for admission at the time she was admitted under the facts stated.

M. S. A., Sec. 251.03, also comes from L. 1945, C. 345. This section makes provision for admission of persons ineligible under Sec. 376.34 to a county sanatorium. Such persons may be admitted to the state sanatorium or to a county sanatorium under the provisions there made. When a person lacks the residence qualifications necessary under Sec. 376.34 and lacks the financial means to pay for his sanatorium care, the director of social welfare has the obligation to apply for admission of such person to a proper sanatorium. The director has authority under Sec. 251.03 to pay for the maintenance of such patient out of his appropriation for the maintenance of county sanatoria funds to the sanatorium where such person may be received. It would, therefore, appear that Sec. 251.03 might be invoked under the facts stated.

The provision found in Sec. 376.34, requiring a year's residence in the county as requisite to eligibility for admission to a county sanatorium came into the law by L. 1929, C. 255. That requirement for eligibility was in addition to the requirement stated in Sec. 376.16 and had the effect of amending Sec. 376.16. Opinions rendered previous to the enactment of the 1929 law, which did not consider that factor of eligibility, cannot be considered as a statement of the law as it exists today. Accordingly, in this problem the opinion of the Attorney General, dated October 25, 1928, published in the 1928 Report as opinion No. 104, is not applicable to the law as it exists today.

CHARLES E. HOUSTON,
Assistant Attorney General.

Wadena County Attorney.

November 1, 1948. 556-A-1

174

Tubercular patient—County's liability for care of resident—MS1945, § § 251.02, 376.15, and 376.33.

Facts

An individual, a resident of Crow Wing County, was a patient at the Deerwood Sanatorium, a county sanatorium maintained by the Counties of Crow Wing and Aitkin for the care of tubercular patients. The individual is unable to pay the charges and has no kindred liable therefor and is maintained at the Deerwood Sanatorium by Crow Wing County. Relatives of the individual insist that she be transferred to the state sanatorium at Walker.

Question

Can a tubercular patient who is a resident of Crow Wing County and a patient in the county sanatorium for tuberculars require that she be trans-

ferred to any sanatorium of her choosing, including the state sanatorium, and Crow Wing County be required to pay the expense for such care and treatment at the sanatorium of her choosing?

Opinion

It is the opinion of this office that Crow Wing County, having a sanatorium of its own for the care of tubercular patients where a patient is being taken care of at the county expense, cannot be required to pay the expense of such patient at another tuberculosis sanatorium of the patient's own choosing.

Minn. Stat. 1945, § 376.15 has a provision for the treatment of patients outside of a county, or counties, maintaining a tuberculosis sanatorium, in which case a municipality, by agreement, pays for the care of such patient who is unable to pay.

Minn. Stat. 1945, § 376.33 also provides for the admission of a so-called "free patient," one unable to pay, in any sanatorium established under § § 376.28 to 376.42; but there again the patient must be a resident of the state residing outside of a county, or counties, maintaining a tuberculosis sanatorium.

Minn. Stat. 1945, § 251.02 deals with the care of consumptives in state and county sanatoria. Therein it is provided:

> "A person unable to pay such charges and without kindred legally liable therefor and able to pay may be admitted on request of his county board, and the charges shall be paid by the county."

It will be noted that the admission of the patient is **on request of his county board.** The above cited provisions are the only ones dealing with the admission of free patients where the patient has a county residence.

EARL H. A. ISENSEE,
Assistant Attorney General.

Crow Wing County Attorney.

April 5, 1948. 556-A-1

YOUTH CONSERVATION

175

Recreational activities—MSA, Sec. 260.125. MS, Secs. 471.15, 471.17.

Questions

"1. Does a **village or city council** or a **county board of commissioners** have the power to create a legal youth commission for the

purpose of the prevention and control of juvenile delinquency and the extension of youth resources to that end?

"2. What procedure should be followed—
Ordinance? Resolution? Other?

"3. Does a village or city council or county board of commissioners have the power to grant public funds to a youth commission for the prevention and control of juvenile delinquency? If a legal commission? If an advisory commission?

"4. Under the Minnesota Recreation Law (Laws 1937, Ch. 233 Minn. Stats. 1941, Secs. 471.15 to 471.19) Mason's 1940 Suppl., Secs. 1933-92—1933-9e) does the county board of commissioners have legal right to operate a program of public recreation and playgrounds, acquire and maintain lands, buildings, or other recreational facilities and expend funds for the operation of such programs, and generally come under the provisions in the Act?

"5. Does the county board of commissioners have the legal right to enter into cooperative agreement with other boards?

"6. Does the county board of commissioners have the right to form a legal recreation board, with full power to act? To create a joint board?

"7. Does the county board of commissioners in operating a county recreation program have the right to conduct its activities on

(1) Property under its own management

(2) Other public property under the custody of any other public corporation, body or board with its consent

(3) Private property, with consent of owner

(4) Accept gifts and bequests for the benefit of Recreation Service

(5) Employ recreational directors and instructors

"8. Is there any limit to the amount of land that county boards of commissioners can acquire for recreational programs?

"9. Is there a limit on amounts that may be expended by county boards of commissioners for such acquisition, or for any recreational facility, or for the operation of the recreational program?

"10. Do the county boards of commissioners have the right to levy a special tax for recreation?

"11. Does the county board of commissioners in the operation of a county recreational system have the right to acquire, construct, equip, and operate independently, cooperatively, or through joint boards, public recreation facilities such as swimming pools, golf courses, recreation buildings, tennis courts, athletic fields, bowling alleys, and youth centers?

"12. When a local ordinance is in conflict with a statute of the State, which has precedence? What advice should be given?

"13. Are school boards enabled to provide motion picture programs for the adults of a community? Without charge? If a charge is made and profits accrue, do such monies revert back to the general school fund?"

Opinion

1. In L. 1947, C. 595, M. S. A., Sec. 260.125, which is an act relating to the prevention of delinquency and crime relating to juveniles, creating a youth conservation commission, and kindred subjects, no such power as is involved in the first question is granted to village or city councils or county boards.

Various special acts of the legislature have created villages and cities and define the powers of the councils thereof. The Constitution enables cities and villages to frame charters for their government, and a city or village governed by a special charter, whether authorized by general or special law, the charter will be examined to learn the powers of the council. The general powers of village councils organized under the general laws are defined in M. S., Sec. 412.19, among which the powers you mention are not found. Neither are such powers found in the general powers vested in county boards, defined in Sec. 375.18.

2. If any such powers are granted by a special charter, that charter must be consulted for the determination of procedure.

3. Unless such power is granted in a special charter, a city or village is without power to make the grant mentioned. The county board is without such power.

4. M. S., Secs. 471.15 and 471.16, expressly state that a county may operate recreational facilities, acting independently or in cooperation with other named bodies. A county has the power to spend money for the purpose, when such money is available.

5. Sec. 471.16 is the authority for a county to cooperate with another body in that section named in the operation of such a program.

6. The county may agree with another body named in Sec. 471.16 to form a recreation board. The board has the powers that the law states.

7. (1) Yes. Secs. 471.15, 471.17.

(2) Yes. Secs. 471.16, 471.17.

(3) Yes. Sec. 471.17.

(4) Yes. Sec. 471.17.

(5) Yes. Sec. 471.17.

(It appears that the questions above, (1) to (5), are taken from Sec. 471.17.)

8. Yes. The county board will limit its expenditures according to its judgment of the need.

9. The answer to the 8th question applies.

10. There is no need for a special tax. When the board makes its budget, it may take under consideration the public need for this purpose and include in its budget such items therefor as its judgment dictates.

11. The law does not say what form of recreation shall be employed. That may safely be left to the good judgment of the county board.

12. This question is so general that I think of no answer that would be helpful. It would be better to consider a specific ordinance than to attempt a generalization. Ordinances are adopted by city councils and village councils. They usually have the benefit of advice of the attorney for the municipal corporation.

13. Since this question concerns the administration of schools, I consider that it should be channeled through the Commissioner of Education if he considers himself in need of an opinion on the subject.

CHARLES E. HOUSTON,
Assistant Attorney General.

Youth Conservation Commission.

March 9, 1948. 145

STATE

APPROPRIATION

176

Livestock Sanitary Board—Amount appropriated for paying indemnities may not be used for any other purpose—L. 1947, C. 634, § 36, Item 3. MSA § 10.17.

Question

"Can any portion of the appropriation for the Livestock Sanitary Board, as provided in Laws 1947, Chapter 634, Section 36, Item 3, Indemnities, $300,000 for the fiscal year ending June 30, 1948, be used for supplies and expenses in connection with carrying out the Bang's Disease Control and TB-testing program of said Board?"

Opinion

M. S. A. § 10.17, reads as follows:

"When there has been an appropriation for any purpose it shall be unlawful for any state board or official to incur indebtedness on behalf of the board, the official, or the state in excess of the appropriation made for such purpose. It is hereby made unlawful for any state board or official to incur any indebtedness in behalf of the board, the official, or the state of any nature until after an appropriation therefor has been made by the legislature. Any official violating these provisions shall be guilty of a misdemeanor and the governor is hereby authorized and empowered to remove any such official from office."

It is my opinion that, when an appropriation is made for the specific purpose of paying indemnities, the sum so appropriated may not legally be used for any other purpose.

J. A. A. BURNQUIST,
Attorney General.

Commissioner of Administration.

December 15, 1947. 9-A-24

COMMISSIONS

177

Notary public—Residence—change of—L. 1947, C. 372.

Question 1

"Does Laws 1947, Chapter 372, affect commissions already issued or does it apply only to commissions issued after the effective date of the Statute?"

Answer

"Generally a statute cannot be construed to operate restrospectively unless the legislative intent to that effect unequivocally appears." There is in the act in question no expressed intention that it shall operate retrospectively, but, for reasons hereinafter stated, it is doubtful that the chapter here considered has made any substantial change in the prior law.

Question 2

"Does a change of residence from one county to another invalidate the commission?

"a. If the commission was issued prior to the above Act."

Answer

If a notarial commission was issued prior to the passage of Chapter 372 and the appointee therein named had before enactment of the chapter changed his residence from the county in which he resided at the time of his appointment, his removal from such county resulted in the expiration of his commission. If the change of residence from one county to another of a notary public appointed prior to the enactment of the new law occurs, or has occurred, after the passage of Chapter 372, the effect of such removal under the new act is not so clear; but, in view of the fact that transfers of title to property and other important transactions generally require the services of a notary public, it is my opinion that, in order to eliminate any doubt as to his authority, a notary public whose commission was issued prior to the taking effect of the new act or thereafter and who has moved from the county in which he resided at the time of the issuance of the commission should be required to apply for a new commission whether his removal from the county for which he was appointed took place before or after the passage of the act under consideration.

"b. If the commission was executed subsequent to the above Act."

Answer

It might have been the intention of the legislature under the new law to permit the holder of a notarial commission issued pursuant thereto to change his residence without affecting his status as a notary public. However, to accomplish that intention, Minnesota Statutes 1945, Sections 359.01 and 351.02 (4), should also have been expressly or impliedly amended.

Neither of these sections was expressly amended. Section 359.01 reads in part as follows:

> "The governor may appoint and commission as notaries public, by and with the advice and consent of the senate, as may citizens of this state, over the age of 21 years, **resident in the county for which appointed,** as he deems necessary." (Boldface supplied.)

It is clear that under Section 359.01 the governor may appoint for a county as notaries public only such applicants as reside therein.

Minnesota Statutes 1945, Section 351.02, provides that every office shall become vacant on the happening of either of the following events:

> "(1) The death of the incumbent;
>
> " * * *
>
> "(4) His ceasing to be an inhabitant of the state, or, if the office is local, of the * * * county * * * for which he was * * * appointed * * * ."

In previous opinions of this office it has been held that when a notary public ceases to be an inhabitant of the county for which he was appointed his office becomes vacant.

The fact that Section 359.03 was amended by Chapter 372 by striking out the words "in which he resides" and inserting in lieu thereof the words "for which he was appointed" and Sections 359.04 and 359.05 were amended by striking out the words "while residing in the county for which he was appointed" would not justify the Attorney General in holding that above quoted Sections 359.01 and 351.02 (4) were thereby impliedly amended or repealed. Sections 359.03, 359.04, and 359.05 as amended are not so inconsistent with the unamended Sections 359.01 and 351.02 (4) as to require a holding that the former repeal the latter.

Question 3

"What considerations would determine the county for which he was appointed?"

Answer

The sections amended by Chapter 372 do not now contain any provision which requires the applicant for a notarial commission to be a resident of the county for which he may be appointed, but Section 359.01, which was not amended by Chapter 372, expressly provides that a commission may be issued only to a resident of the county for which the applicant is appointed.

Question 4

"Would the above act require a change in the notarial commission?"

Answer

By reason of what is hereinabove stated, there does not appear to me to be any need of changing the phraseology of the form of the commission heretofore used. Even under the provisions of the new act it would not be advisable for a notary public to act if he has moved from the county for which he was appointed without a judicial decision holding that under Chapter 372 a change of residence from such county does not terminate his commission.

J. A. A. BURNQUIST,
Attorney General.

Hon. Luther W. Youngdahl, Governor.

June 5, 1947. 320-I

178

Youth conservation—Members—Appointment—Qualifications—Laws 1947, Ch. 595, Sec. 1, Subd. 6.

Facts

The last clause of the first sentence of Laws 1947, Chapter 595, Section 1, Subdivision 6, reads:

"and one shall be a juvenile court judge who is also a judge of probate."

Question

"Assuming an appointment is duly made under this clause but thereafter the appointee resigns as probate judge, does said appointee thereby disqualify himself for further participation on said commission and automatically create a vacancy, or do the stated qualifications refer to the time of appointment only."

Opinion

In the enactment of the clause in question, the legislature obviously intended to make it mandatory that one member of the commission authorized by above cited Chapter 595 should be "a juvenile judge who is also a judge of probate."

Therefore, if a person who is both a juvenile judge and a probate judge, appointed as a member of the commission in order to comply with the legislative mandate requiring the appointment of one having such qualifications, should resign as probate judge, it is my opinion that such resignation would result in noncompliance with the legislative provision and that after his resignation such appointee would not be entitled to hold his office or perform the duties thereof.

The position herein taken is in accordance with the view expressed in Section 41 of 42 American Jurisprudence, p. 912, in which will be found the following language:

"Eligibility to public office is of a continuing nature and must exist at the commencement of the term and during the occupancy of the office. The fact that the candidate may have been qualified at the time of his election is not sufficient to entitle him to hold the office, if at the time of the commencement of the term or during the continuance of the incumbency he ceases to be qualified."

J. A. A. BURNQUIST,
Attorney General.

Luther W. Youngdahl, Governor.

June 9, 1947. 145-A

CONSTITUTION

179

Amendment—Convention to revise—Laws 1947, Ch. 641.

Opinion

Laws 1947, Chapter 641, proposes an amendment to the Constitution of Minnesota, Article XIV, Section 2.

Said Article XIV, Section 2, now reads as follows:

> "Whenever two-thirds of the members elected to each branch of the legislature shall think it necessary to call a convention to revise this Constitution, they shall recommend to the electors to vote at the next general election for members of the legislature, for or against a convention; and if a majority of all the electors voting at said election shall have voted for a convention, the legislature shall, at their next session, provide by law for calling the same. The convention shall consist of as many members as the House of Representatives, who shall be chosen in the same manner, and shall meet within three months after their election for the purpose aforesaid."

If the amendment is adopted, said Article XIV, Section 2, would read as follows:

> "Two-thirds of the members elected to each branch of the legislature may provide by law for calling a convention to revise this Constitution. The convention shall consist of as many members as the House of Representatives, who shall be chosen in the same manner and shall meet within three months after their election for the purpose aforesaid."

Under the present provisions of the Constitution, the calling of a convention to revise it requires that the legislature, by a vote of two-thirds of the members of each House shall submit to the voters of the state at the next general election the question as to whether such convention shall be called by the legislature at its next session.

The purpose of the proposed amendment is to eliminate the requirement of a vote on the question by the voters of the state and to authorize, without such vote, two-thirds of the members of each House to provide by law for calling such a convention.

The effect of the proposed amendment to Article XIV, Section 2, of the State Constitution, is to transfer the power to call a convention to revise the State Constitution from the electors expressing their will by a majority of all the electors voting at said election to two-thirds of the members elected to each branch of the legislature.

J. A. A. BURNQUIST,
Attorney General.

Secretary of State.

January 14, 1948. 86-A-34

180

Works of internal improvement—For the promotion of public health, public safety and general welfare are not prohibited—Minn. Const., Art. 9, § 5.

Opinion

Relative to Article IX, Section 5 of the Minnesota State Constitution, an opinion of this office dated December 21, 1933 (No. 733, 1934 Report, file No. 82) construes Article IX, Section 5 and gives a resume of judicial decisions relative to the kind and character of improvements permitted and prohibited by the provision in question.

Since that opinion was written, the state supreme court, in **Moses v. Olson,** 192 Minn. 173, has held that there would be no violation of Article IX, Section 5 prohibiting the "carrying on works of internal improvement so long as those works remain incidental only to the main public purpose of relief to the poor."

One of the most recent cases involving the provision under consideration is that of **Erickson v. King,** 218 Minn. 98. It was there claimed that the state legislature in creating the Metropolitan Airports Commission and in appropriating money for acquisition of airports and other purposes by the enactment of Laws 1943, Chapter 500, violated Article IX, Section 5 of the state constitution. However, the court construing the purposes of the act as public and governmental applied the "well-established implied exception to art. 9, § 5, in favor of improvements made in furtherance of governmental, as distinguished from proprietary, functions." On page 102 of the opinion, the court said:

> " * * * This provision of the constitution has been consistently held by this court not to apply to works which are used by the state as a sovereign in the performance of its governmental functions. * * * "

From what has been said in the opinions of this office and the decisions of our supreme court, it would appear that a determination of what is permissible or prohibited under Article IX, Section 5, must depend largely upon the facts in each case. As a general statement of the law, it can be said that under the section in question internal improvements incidental to the exercise of the police power of the state for the promotion of public health, public safety and general welfare are not prohibited, but internal improvements which are not carried on by the state in its sovereign capacity in furtherance of a governmental as distinguished from a proprietary function are forbidden.

J. A. A. BURNQUIST,
Attorney General.

Director of Research.

April 29, 1948. 82

LANDS

181

Indian — Allotments — Infants — Chippewa Indian — Date of attaining majority.

Facts

"B" is a Minnesota Chippewa Indian allottee upon the White Earth Reservation in Minnesota. The status roll shows that he was born on June 9, 1899. He attempted to convey his allotment by a deed executed and delivered on June 8, 1920.

Question

Was "B" an adult on June 8, 1920, when he conveyed his allotment?

Opinion

Inasmuch as the facts involve the status of a Chippewa Indian allottee, I think the answer should be returned in accordance with the Federal law.

43 C.J.S. title Infants, page 30, section 3, reads:

> "At common law, one becomes of age on the day preceding the twenty-first anniversary of his birth and on the first moment of that day."

To sustain this law C.J.S. cites the case of U. S. v. Wright, 197 Fed. 297, 116 C.C.A. 659. That case involved the question of when an Indian, a member of the Quapaw Tribe, reached his majority. J. W. Hunt, a member of that tribe, was born on September 6, 1882. Judge Smith, writing for the Circuit Court of Appeals of the Eighth Circuit, said:

> "The law ordinarily taking no cognizance of fractions of days, one becomes of full age the first moment of the day before his twenty-first anniversary. * * * Hunt therefore became of age the first moment of September 5, 1903. * * * "

That being the Federal rule which is applied in this Federal Circuit with respect to Indians, I think it should be followed in the case of "B" to whom your letter refers.

RALPH A. STONE,
Assistant Attorney General.

Mahnomen County Attorney.

September 17, 1948. 240-H

OFFICERS

182

Governor—Proclamation—Constitutional amendment announcing the passage of Bonus amendment—Full and complete text of the amendment to be included in proclamation and to be filed with Secretary of State—Need not be published by paid legal advertisement—MSA 3.20.

Question

The proclamation announcing the passage of the so-called bonus amendment is being prepared, and in connection therewith you submit the following questions:

"1. Is it necessary to publish the proclamation by means of a paid legal advertisement? If so, when must this be done?

"2. Is it necessary to include the full and complete text of the amendment in the proclamation?"

Opinion

In answer to your first question, you are advised that M. S. A., § 3.20 only provides that if a proposed constitutional amendment is adopted "the governor shall announce the fact by proclamation." There appears to be no legal requirement that such proclamation shall be published by means of a paid legal advertisement. The filing of the proclamation with the secretary of state should, therefore, be sufficient. Although no statutory provision requires it, the custom has been to insert the governor's proclamation in the first session laws of the state published after the adoption of an amendment.

In answer to your second question, I wish to state that in my opinion it is advisable to include in the proclamation of the governor the full and complete text of the amendment whose adoption is announced in the proclamation.

J. A. A. BURNQUIST,
Attorney General.

Governor of Minnesota.

November 18, 1948. 213-H

183

Secretary of State—Registrar of motor vehicles—Registration and notarial fees—MSA 168.33; 357.17.

Facts and Question

You state that in the registration of a motor vehicle the person seeking

to register the motor vehicle, and in some instances both the buyer and the seller of the motor vehicle, must have his signature acknowledged. Many of your deputy registrars are notaries public and have been performing this service as an incident to the registration of the motor vehicle. You inquire whether or not the registration fee provided by M. S. A. 168.33 includes the taking of acknowledgments or whether an additional fee may be charged for acknowledgments.

Opinion

M. S. A. 168.33 provides, among other things:

> "He (the deputy registrar) shall keep such records and make such reports to the registrar as that officer, from time to time, may require. He shall charge and receive for each application presented a filing fee of 25 cents, and shall report daily to the registrar all registrations made and taxes and fees collected by him, together with remittance of the amount so collected. * * * The amounts received by the registrar under the provisions hereof shall be paid by him into the state treasury daily, weekly, or at such other intervals as may be determined by the order of the executive council."

I refer you to opinion of this office dated January 12, 1932, file 385-B-2 addressed to you, in which it was held that the registration fee of 25 cents applies to applications for transfer of registration, applications for duplicate certificates, applications for nonresident permits, and other similar applications required by the statute. These fees must be accounted for, reported, and remitted.

Many of the documents to be filed in the registration of a motor vehicle require signatures to be acknowledged. The acknowledgment of the signatures is a part of the registration and is not included within the registration fee. There is no requirement in the statutes that the registrar as a part of the duties of his office shall take acknowledgments. There is no reason why these acknowledgments could not be taken by somebody other than the registrar or his employees. If, for the convenience of the public, the deputy registrar or one of his employees has been appointed a notary public and, as notary public, takes acknowledgments, the regular notarial fee as provided for by M. S. A. 357.17 may be charged by the notary. Such fee would not be reported as a registration fee but would be retained by the notary as a fee for his services as notary. The fee provided by M. S. A. 357.17 for the administration of oaths is 25 cents.

KENT C. VAN DEN BERG,
Assistant Attorney General.

Secretary of State.

September 24, 1948. 385-B-2

PUBLIC INSTITUTIONS

184

Liability—State employee is not liable for injuries resulting from acts within scope of his employment, but he is liable for injuries resulting from negligent acts outside scope of his employment. Volunteer workers can execute release from common law liability for damages but not Workmen's Comp. liability—Volunteer workers at state hospitals—MSA § 176.02, § 176.69.

Facts

"Recently certain organizations have offered to do volunteer work at the state hospital. Among these are the Gray Ladies of the American Red Cross and the Unitarian Church Society. The state hospitals would very much appreciate the services of these volunteer workers. However, the state hospital superintendents have now inquired as to liability in the case of injury to a volunteer worker."

Questions

"a. Please advise this office as to the liability on the part of (1) the State, (2) the superintendent, (3) any employee of the state hospital under whom or with whom a volunteer worker may be working at the state hospital.

"b. Can a voluntary worker waive any and all rights concerning liability as to injury? If so, will you please prepare a form for each volunteer worker to sign wherein he or she admits the possibility of injury and releases all parties from liability therefor."

In addition to the questions set forth in your letter, I have been asked to answer the question relative to the liability on the part of the state, employees of the state, and volunteer workers to the patient and the possibility of securing a waiver of any and all rights covering liability for injury to the patient.

Opinion

In rendering this opinion the liability of the state will be treated separately because it differs from that of individuals. The opinion will deal with the liability of all state employees under one heading, since their liability is the same. State employees will include the Director of Public Institutions, the superintendent, as well as other state employees. The liability to and releases from the volunteer worker and the patient will be treated separately.

The public institutions in the State of Minnesota are operated as a state agency. The state in its sovereign capacity is immune from suit unless the legislature waives such immunity by consenting to suit. Dunnell's Minne-

sota Digest, § 8831; **Berman v. Minnesota Agricultural Society,** 93 Minn. 125. The state has not waived its immunity in this instance except as to liability under the Workmen's Compensation Act, if the same is applicable.

Whether or not the volunteer workers come within the terms of the Workmen's Compensation Act is not discernible from the facts submitted to show the relationship that will exist between the state and the volunteer workers. The Compensation Act, by its own terms, is to be liberally construed, and our courts have been very liberal in their construction to include workers within the act. Our courts have held that volunteer firemen are entitled to the benefits of the act. **Stevens v. Village of Nashwauk,** 161 Minn. 20. An opinion by this office dated April 16, 1942 (our file 523-E-4) is to the effect that boy scouts serving as volunteer firemen are covered by the Workmen's Compensation Act. The line of demarcation which determines whether or not a worker comes within the terms of the act is very obscure, rendering it inadvisable to make a determination relative to the same unless all facts constituting the relationship are submitted in detail. I am not able to arrive at a conclusion covering this point from the meagre facts concerning the relationship which have been submitted in the aforementioned letter. It is the opinion of this office that there is no liability on the part of the state for injuries to volunteer workers unless the volunteer comes under the terms of the Workmen's Compensation Act.

The liability of a state employee depends entirely upon the facts and circumstances surrounding the incident which leads to the particular injury.

In those instances where the employee is acting within the scope of his authority to carry out the duties imposed upon him by law he is not liable unless the acts complained of were not only unnecessary but were done corruptly or maliciously. In the case of **Wilbrecht v. Babcock,** 179 Minn. 263, our Supreme Court set down the following rule of law at page 264:

> "It is well settled that an officer charged with the performance of such duties is not personally liable for errors of judgment or for acts done within the scope of his authority, unless it appears that the particular acts complained of were not only unnecessary but were done corruptly or maliciously."

In those instances where the state employee acts without the scope of his authority he is liable for the damages resulting from his negligence. In other words, he loses the protection afforded him under the rule set down in the preceding quotation. This liability would extend not only to the employee directly responsible for the injury to the volunteer but would extend to his superiors who cooperated in the act complained of or directed or encouraged it. In the case of **Nelson v. Babcock,** 188 Minn. 584, at page 590, our Supreme Court has laid down the rule in the following language:

> " * * * public officers are not liable for the negligence of their subordinates unless they cooperate in the act complained of, or direct or encourage it."

What has been said in the preceding paragraph concerning liability of state employees to the volunteer worker applies with equal force to the liability of state employees to the patient.

It is more than likely that the volunteer worker can waive any and all common law rights concerning liability for injury, but he cannot waive his rights, if he has any, under the Workmen's Compensation Act. M. S. A. § 176.02, which is a part of the Workmen's Compensation Act, provides in part as follows:

> "No agreement by any employee or dependent, whether made before or after the injury or death, to take as compensation an amount less than that prescribed by law, shall be valid."

Thus it can be seen by the preceding quotation that one cannot enter into a valid agreement to waive his rights under the Workmen's Compensation Act. Furthermore, any stipulation or agreement settling a claim for compensation must be approved by the Industrial Commission. This provision is found in M. S. A. § 176.69, which reads in parts as follows:

> "An employee or dependent may by a stipulation or agreement settle a claim for compensation with the employer or his insurer, but no such settlement shall be of any force or validity whatsoever until such settlement has been reduced to writing, signed by the parties, approved by the industrial commission, and an award has been made thereon by the commission."

A patient is committed to a state hospital because of a mental deficiency, which, in most instances, renders him incapable of entering into any contract. In order for the patient to enter into a contract releasing his rights to damages, it would be necessary to go to court and have a guardian of his estate appointed. Then it would be necessary for the guardian of the estate to petition the court for an order authorizing him to enter into a contract releasing the patient's rights to damages for any injury resulting from the negligence of a state employee and a volunteer worker. It appears to the undersigned that the court would not be justified in making an order permitting the guardian to release the rights of his ward unless a strong showing were made that the ward would benefit materially by such a release and that the possibility of a negligent act on the part of a volunteer worker or state employee was extremely remote. This procedure would have to be followed for each patient.

EARL H. A. ISENSEE,
Assistant Attorney General.

Division of Public Institutions.

July 13, 1948. 844-G

185

Wards—Discharged—State is not liable for injuries to patient provisionally

discharged—State employees may be liable if patient provisionally discharged is injured if the state employee was negligent in performing his duties under MSA, § 525.761, permitting release after commitment.

Facts

From time to time private employment becomes available to patients at the state hospital. If a patient is not fully recovered, he is released on provisional discharge and then enters the employment.

Questions

1. Is the state liable if the patient is injured while in the employment of a private party during the period he is provisionally discharged?

2. Is the hospital superintendent, wherein the patient was committed, liable if the patient is injured while in the employment of a private party during the period he is provisionally discharged?

3. Would a consent for employment executed by relatives of the patient relieve the state and hospital superintendent from any and all liability for injury to the patient occurring during the course of his employment?

Opinion

The questions presented will be answered in the sequence set forth above.

There would be no liability on the part of the state for any injury which might result to a patient provisionally discharged during the course of his employment while so discharged. The state is immune from suit unless the legislature gives consent to suit. The legislature has not given such consent but could do so if it so desires.

The superintendent of the hospital wherein the patient was confined would not be liable for damages for injury to the patient while employed during the period of his provisional discharge provided the hospital superintendent released the patient in accordance with the authority contained in M. S. A., § 525.761, and such release was not negligent on the part of the superintendent but wholly within the course of his employment and in the performance of his duties. If the superintendent's acts of placing the patient on provisional discharge were negligent, the superintendent might be liable for the injuries sustained by the patient, depending upon the facts and circumstances in the particular case. An example of a negligent act on the part of the superintendent which might lead to his liability would be the release of a patient who should not have been released because of his condition, and an ordinary prudent person possessed with the special qualifications requisite to be a superintendent would not have released the patient under the same circumstances. If such releases were negligent and the same contributed to or caused the injury, the superintendent might be held liable.

It is the opinion of this office that the state needs no release or consent of employment; that the superintendent of the institution needs no release or consent of employment if he acts within the scope of his authority as outlined by M. S. A., § 525.761; and that the release or consent for employment is superfluous in an overwhelming majority of the cases, and that its use may prove to be more detrimental to the superintendent than beneficial to him.

EARL H. A. ISENSEE,
Assistant Attorney General.

Division of Public Institutions.

October 7, 1948. 844-G

186

Wards—Mentally ill—Maintenance—Home School for Boys—Inmate transferred to mental hospital—County which actually makes the commitment must pay the state $10.00 per month—L. 1947, Ch. 534, § 4.

Facts

"A boy, whose regular residence is in the State of Indiana, was committed to the State Training School for Boys at Red Wing from St. Louis County. While in the state school it becomes necessary to commit the boy to a mental hospital."

Question

"As the state school is located in Goodhue County, does that county become liable to pay to the State of Minnesota, the sum of $10.00 per month for each month during which the boy is a patient at the state mental hospital to which he is committed?"

Opinion

In answering your inquiry it will be assumed that when you speak of mental hospital you mean one of the state hospitals mentioned in Laws 1947, Chapter 534, Section 1, and that the Probate Court of Goodhue County is conducting a hearing relative to the sanity of the boy. The result will be a commitment to a state hospital.

Laws 1947, Chapter 534, Section 4, provides:

"For the purpose of partially defraying expenses and cost of maintenance of each person hereafter committed to any one of the public institutions referred to in Section 1, the county from which any such person is hereafter committed to any such public institution shall pay to

the State of Minnesota the sum of $10.00 per month for each month or portion of a month during which that person is an inmate of that institution."

It is the opinion of this office that the provisions of section 4 quoted above, requiring the payment of $10.00 to the state by the committing county (Goodhue County) are applicable to the situation you relate, together with the assumed facts. The cited law is silent concerning residence, and, therefore, the fact that the boy was a resident of the State of Indiana would make no difference. Goodhue County would have a valid claim for reimbursement for the money so paid against the property or estate of the boy and certain of his relatives enumerated in the law.

EARL H. A. ISENSEE,
Assistant Attorney General.

Division of Public Institutions.

May 4, 1948. 248-B-3

187

Wards—Mentally ill—Maintenance—State's claim for reimbursement from estate—Exemptions—Minn. Const., Art. I, § 12; MS1945, C. 510; § § 525.56, 526.01, 550.37.

Facts

"X is an insane person duly committed to a state institution. The probate court committing him appointed a guardian of his estate.

"X's estate consists of a life interest in 80 acres of agricultural land, and an undivided one-third interest in 60 acres of agricultural land. Both parcels are rented on a cash basis. X receives $700 per year as his share of the cash rent.

"The state, through its director of public institutions, has submitted a claim on behalf of the state to the guardian of X for maintenance of X in the state institution, pursuant to Minnesota Statutes 1945, Sec. 526.01. The guardian has paid the claim of the state for the period ended December 31, 1947.

"The guardian refuses to pay any additional amount for the maintenance of X and demands a refund for the amounts paid. He claims the funds are exempt by law, Minnesota Statutes 1945, Sec. 526.01, Subd. 3.

Questions

"1. Can the State collect from X's guardian?

"2. Can the guardian force the state to make a refund?"

In addition to the facts submitted above, a representative of your office has stated that the payments made by the guardian of X were from cash receipts representing rental income. In February, 1948, the estate had accumulated over $1,700 cash after paying the state to December, 1947, and expenses of administration. These additional facts will be considered in rendering this opinion.

Opinion

All statutory references in this opinion are to Minnesota Statutes 1945 unless the contrary clearly appears.

The duties of a guardian in caring for the estate of his ward are provided for in part under § 525.56, which reads as follows:

> "A guardian shall be subject to the control and direction of the court at all times and in all things. * * * A general guardian of the estate shall
>
> "(1) Pay the reasonable charges for the support, maintenance, and education of the ward in a manner suitable to his station in life and the value of his estate; * * * ."

Under the above section it is the duty of the guardian to pay the reasonable charges for the support and maintenance of X from funds in his hands, including funds derived from exempt property if other funds are not available, under the proper circumstance.

Section 526.01 establishes a claim in behalf of the state for care and maintenance by the following provision:

> "Subdivision 1. For the purpose of defraying expenses and costs of maintenance of any inmate in a state * * * hospital for the insane, the State of Minnesota shall have a valid claim for reimbursement to the extent of $10.00 per month for each such inmate, for all money paid and expenses incurred by the state for such maintenance; (1) against the property or estate of such person so maintained, * * *.
>
> "Subdivision 2. * * * If an inmate has no dependents, the director of public institutions may fix a charge in excess of $10.00 per month but not to exceed the per capita cost for the previous fiscal year of the institution of which he is an inmate and the state shall have a valid claim against the property or estate of such inmate for the amount so fixed."

The validity of the state's claim against X's estate arising under the cited section has not been attacked.

The authority of the state to enforce its claim is placed in doubt by reason of § 526.01, subd. 3, which provides as follows:

> "In all cases under the provisions of sections 526.01 to 526.07, the property which, under the laws of this state, is exempt from attach-

ment or sale on any final process issued from any court, shall be exempt also as to the estates and persons charged with or upon whom any liability is imposed under the provisions of those sections."

The last cited subdivision makes it clear that an inmate in a state hospital is entitled to certain exemptions. It is the duty of the guardian to preserve the estate of his ward. It necessarily follows that the guardian should take advantage of the exemption provisions in the law in preserving the estate.

The question is then presented: Is X's property exempt by reason of the last cited section?

"The right to claim exemption is purely personal to the one in whose favor it exists, and the duty of making such claim rests primarily on the debtor." 22 Am. Jur., Exemptions § 119.

The guardian now claims the exemption for his ward. It will be assumed that the guardian has complied, or will comply, with the statutory provisions necessary to claim the exemptions.

Minnesota Constitution, Article I, § 12, provides in part as follows:

" * * * A reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law. * * * "

The reasonable amount of property exempt by law is set forth specifically in Chapter 510 and § 550.37.

Under Chapter 510 X would be entitled to the house used as a dwelling and the land upon which it is situated, not to exceed 80 acres. Since the facts submitted do not disclose what X, through his guardian, has selected as a homestead, it will be assumed that the 80 acres in which he has a life estate have been so selected. Under the facts submitted and assumed, the homestead would be exempt from the claim of the state.

In addition to the homestead described in the preceding paragraph, X has an undivided one-third interest in 60 acres of agricultural land, which, under the definition of a homestead, would not comprise a part thereof. This undivided interest is not exempt from the claim of the state.

Next we must consider if the funds accumulated from the cash rental of $700 per annum are exempt. The $700 annual rental is for the homestead and the undivided interest in the 60 acres.

Chapter 510 defines the homestead. It is completely silent on the question of income from the homestead. Section 550.37 sets forth in detail the various items of personal property exempt to the debtor, including moneys derived from various sources. It makes no mention of moneys received from the rental of the homestead. Under those circumstances, it can only be assumed that the legislature did not intend to exempt the cash income from the homestead. In the case of **Poznanovic v. Maki, 209 Minn.** 379, at page 383, the court said:

> " * * * The provision for the several definitely described subjects of exemption shows that the intention was to include only those mentioned and to exclude all others. The manifestation of legislative intent by enumeration of the specific subjects which were to be included in the list of exemptions makes applicable the maxim that the expression of one thing is the exclusion of another."

The Supreme Court of Minnesota has never passed upon the exemption of cash rent derived from the homestead. The federal court, in the absence of a state supreme court decision, has passed upon the question of exemption of crops grown on a homestead and held the crops are not exempt. **Vought v. Kanne** (Minn. 1926), 10 F. 2d 747. If the crop is not exempt, it would necessarily follow that the cash rent would not be exempt, since they both represent income from the homestead. Our supreme court, in passing on an analogous situation prior to the amendment making the proceeds of a sale of the homestead exempt for one year, had this to say:

> "None of these sections provide in terms or contemplate the exemption of the proceeds of a sale of a homestead. To sustain the exemption claim in this case this court would not only have to read into the statute that moneys owing from the sale of a homestead were exempt, but that they remained exempt for the period of one year from the time of sale whenever the original owners of such homestead intend to use the money in the purchase of a homestead within that year. We are of the opinion that it would be judicial legislation to do in this respect what the legislature had failed to do. It is well settled that 'the general rule is that all the property of a debtor is applicable to the payment of his debts. The effect of the exemption laws is to create exceptions to this general rule, so that a debtor claiming an exemption on any portion of his property must bring himself strictly within the terms of the law allowing exemptions; otherwise, the general rule must take its course. * * * The homestead law should be fairly, perhaps liberally, interpreted, but must not be strained.' Berry, J., in Ward v. Huhn, 16 Minn. 142 (159)." **Fred v. Bramen**, 97 Minn. 484.

The cash rent for the undivided one-third interest in the 60 acres is not exempt either.

The guardian of X may endeavor to establish the cash rent as exempt under subd. 7 of § 550.37, which provides:

> "Provisions for the debtor and his family necessary for one year's support, either provided or growing, or both, and fuel necessary for one year; * * * ."

Such an argument must fail because cash can hardly be construed as "provisions" "provided or growing." Furthermore, the facts submitted do not indicate the debtor has any family. X is being cared for by the state, so he has no need for "provisions" "necessary for one year's support." The state is providing the needs, and it seems just and equitable that payment therefor should be made to the state in keeping with the purpose of the statute.

It is the opinion of this office, based upon the facts submitted and assumed, that the cash rental and the undivided one-third interest in the 60 acres of agricultural land belonging to X are not exempt from the claim of the state made under § 526.01. The homestead is exempt.

In answer to the second question, the guardian has no right to a refund for payments made to the state, because the funds used in making such payments were not exempt.

EARL H. A. ISENSEE,
Assistant Attorney General.

Division of Public Institutions.

May 12, 1948. 248-A-1

REWARDS AND BOUNTIES

188

Wolf bounties—Wolf need not be killed in county of payment—MS 1945 § 348.071, 348.081, 348.111.

Facts

"The State Auditor has viewed a properly introduced claim for reimbursement to Meeker County, attested by the County Auditor, for the payment of $15.00 wolf bounty by Meeker County to 'A' for a wolf killed by 'A' in Itasca County."

Question

Whether the state can reimburse a county for wolf bounties actually paid on wolves killed in some other county.

Opinion

The act providing bounties for killing wolves was enacted as Laws 1945, Chapter 262. Section 1 thereof is Minnesota Statutes 1945, Section 348.071; Section 2 is Section 348.081; and Section 3 is Section 348.111. Section 348.071, Subdivision 1, provides:

> "Every person who shall kill a wild wolf in this state, not having at the time spared the life of any other such wolf which he could have killed, shall, upon compliance herewith, be rewarded in the sum of $15.00 for each adult wolf and $6.00 for each cub."

Section 348.071, Subd. 2, provides:

> "Every person who shall kill a wild fox in this state, not having at the time spared the life of any other such fox which he could have

killed, shall, upon compliance herewith, be rewarded in such sum as **the board of county commissioners of the county in which the fox is killed may have determined and established for each adult and cub fox."**

If the legislature had intended that the wolf bounty should be payable only in the county in which it was killed, it would have used language similar to that which it used in Subd. 2. The specification of the limitation in Subd. 2 and the failure to do so in Subdivision 1, compels the conclusion that the limitation does not apply to the payment of bounties for the killing of wolves. Your question is answered in the affirmative.

GEO. B. SJOSELIUS,
Deputy Attorney General.

State Auditor.

February 11, 1948. 47-F

TAXATION

ASSESSMENT

189

Cemetery lot—City is without power through ordinance to assess unused part of cemetery lot for lot maintenance and to tax machinery for collection of assessment through sale—Const. Art. IX, Sec. 1, MSA, Secs. 272.02 (1), 306.14, 307.09, 501.11 (7), 525.14.

Facts

The city of Tracy owns a cemetery, more than one-half acre in area. It is operated by a park and cemetery commission, authorized by the city charter. Many of the lots in the cemetery were sold many years ago. On many such lots the bodies of one or more members of a family have been buried. On many lots space for graves is unused while other space has been used for burial. The purchase price of the lots was paid when the lots were sold. The deeds, following the description of the land conveyed, contained this language:

"TO HAVE AND TO HOLD THE SAME, Subject to all laws of this State, now or hereafter enacted for the management and regulation of Cemeteries owned and held by said City of Tracy and also subject to all Ordinances, Resolutions, Rules and By-laws of said City now or hereafter made."

City Ordinance No. 80 provides that upon the failure of any owner of a parcel of ground in the cemetery to pay an assessment against such parcel,

such unpaid assessment shall be certified to the county auditor, and added to the general tax list of the county. Thereafter it shall be collected in the manner provided by law for the collection of real estate taxes.

Many owners of lots, the purchase price of which was paid at the time of purchase, have failed to pay assessments thereafter made for either annual or perpetual care.

The commission seeks a method to recover title to such portions of those lots heretofore conveyed to purchasers as have not been used for burial and have not been maintained, the purpose being to enable the commission to resell the same.

Questions

"1. Can the recorder now certify these unpaid assessments to the County Auditor in the same manner that unpaid assessments for public improvements are certified, and could the necessary tax proceedings then be conducted as on any other delinquent taxes?

"2. If such delinquent tax proceedings were had upon failure of the owner of the lot to pay the delinquent taxes, would title to these lots then vest in the city or in the state?

"3. Has the City Council at this time the power to amend Ordinance No. 80 by an ordinance providing in substance that the owners of these lots be given some reasonable notice—say 90 days—that unless these assessments are paid within that time, title to such lots shall revert to the city?"

Opinion

It appears that a question of public policy is involved. By Article IX, Sec. 1 of the Constitution of this state, public burying grounds are exempt from taxation. M. S. A., Sec. 272.02 (1) specifies a like exemption. The lots are exempt from execution. Sec. 306.14. The same exemptions apply to private cemeteries. Sec. 307.09. A city may receive property in trust for the benefit of a public cemetery. Sec. 501.11 (7). If it is the policy of the law that burial lots are exempt from taxation and assessments, such policy binds the city and is to be considered in construction of the effect of the quoted language in the deed. An agreement against public policy will not be enforced. An ordinance against public policy is void and will not be enforced.

If effect is to be given to the quoted language in the deed and to the ordinance, it may be illustrated as follows: Assume that A purchased a cemetery lot with space for several burials. He made the purchase at the time of the death of his wife. Thereafter A died and both were buried on this lot. Space unoccupied remained for one or more graves. The lot was paid for at the time of purchase. When A died, title to the lot passed by the law of succession to his eldest surviving son. Sec. 525.14. The son resides in a distant state and is without means to pay any assessment which may

be imposed under the ordinance. Is it the policy of the law that the remaining unused space in the lot shall be forfeited to the city to be again sold? Is it the policy of the law that the forfeiture shall be accomplished through the machinery of the tax laws in view of the Constitution and the statutes cited?

Brown v. Maplewood Cemetery Association, 85 Minn. 498, is not in point on the precise question which we have for consideration; but I consider the opinion worth careful consideration. The court there quite freely expressed itself on the subject of cemeteries and the reverence which is universally attached thereto. I consider that decision declaratory of the public policy in respect to cemeteries.

Sec. 306.41 is authority to the governing body of the city if the cemetery is not less than one-half acre in area and the plat is on file in the office of register of deeds, by unanimous vote of the council or governing body, to provide for the establishment of a perpetual fund the income whereof shall be devoted to maintenance and improvement of the cemetery and which fund shall be known as the permanent care and improvement fund of the cemetery of Tracy. The policy of the law is indicated as the legislature has declared in this section. Sec. 306.43 authorizes acceptance of donations for this fund. Careful safeguards for the fund are provided in subsequent sections. There is no suggestion that the tax machinery of the state applying to nonexempt property shall be used to augment such fund.

There is a way provided that a perpetual fund may be established for the maintenance of cemeteries. It is not for councils to say that they will choose their own means to beautify and keep respectable and suitable cemeteries. They are bound first by the policy of the state and original machinery conceived in the minds of the council in contravention with that policy should not be recognized—should not be given force.

My conclusion is that the method of providing for a perpetual fund for the maintenance of cemetery lots is provided by statute. That method is exclusive. The council is not at liberty to assess lots for maintenance and enforce its assessment by the tax machinery which applies to nonexempt real estate.

CHARLES E. HOUSTON,
Assistant Attorney General.

Tracy City Attorney.

August 6, 1947. 870-B

190

Equalization—Authority of county board of equalization to order changes in classification of real property—MS 1945, Sec. 274.13.

Facts

"M. S. A. Section 274.13 sets out certain powers of the county board of equalization regarding tax matters. It does not appear to specifically give them authority to change the assessor's classification as to urban or rural property either with or without notice."

Question

"Does the county board of equalization have the authority to reclassify property from rural to urban where it appears that the assessor made a mistake and where the facts would appear to show that the property in question was without doubt urban property?"

Opinion

M. S. A., Section 274.13 provides in part as follows:

" * * * The board * * * shall examine and compare the returns of the assessment of property of the several towns or districts, and equalize the same so that each tract or lot of real property * * * shall be entered on the assessment list at its full and true value, subject to the following rules:

(1) Real property, when to be raised. The board shall raise the valuation of each tract or lot of real property which in its opinion is returned below its full and true value to such sum as is believed to be the full and true value thereof; first, giving notice of intention so to do to the person in whose name it is assessed, if a resident of the county, which notice shall fix a time and place when and where a hearing will be had;

(2) When to be reduced. The board shall reduce the valuation of each tract or lot which in its opinion is returned above its full and true value to such sum as is believed to be the full and true value thereof;

* * * * * * * * * "

While a strict reading of this section of the statutes might not seem to confer upon the county board, sitting as the county board of equalization, authority to order changes in classification, since a change in classification does not result in a change in "full and true value," our predecessors in this office, in an opinion dated February 10, 1934, addressed to the former Minnesota Tax Commission, (Opinion 796, 1934 Report of Attorney General) specifically ruled that the county board of equalization does have that power. We quote the following pertinent language from that opinion:

"But, as heretofore, his (the assessor's) action in making such classification is subject to review by the various town, village, borough or city boards of review. These boards of review, among other powers, have the power to see that all real property is duly valued and to correct incorrect valuations. As property in one class is to be valued and assessed at a certain percentage of full value and property in another

class at a different percentage, such boards cannot completely perform their functions without having the power to investigate the question whether the assessor's classifications are correct.

* * * * * * * * *

'Next in order in the process of assessment we have the county boards of equalization, with duties as set forth in Mason's Statutes, Section 2049. Among other duties they are required to raise or lower the valuation of each tract or lot of real property which, in their opinion, is returned below or above its true value. Mason's Statutes, Section 2049. This, in our opinion, in proper cases, gives them the power to reclassify and thereby raise or lower the assessment.

* * * * * * * * *

"Accordingly we answer your first question in this way: The assessor makes the first classification. His action is subject to review by the board of review of his municipal subdivision, which may be either town, village, borough or city. The assessment lists, as corrected by the assessors under the direction of these boards of review are then presented to the respective county auditors, corrected by them, equalized by the county boards of equalization and corrected and equalized by the Minnesota tax commission, each of which, in proper cases, may change the classification of real property therein included."

Following this ruling, the Department of Taxation, ever since 1934, consistently has advised local assessment officials that both the local boards of review and the county boards of equalization have authority to order changes in classification.

We adhere to the ruling of our predecessors in office, and answer your question specifically by stating that in our opinion the county board of equalization does have authority to order a change in classification of real property from rural to urban where it appears that the assessor made a mistake in his classification of the property.

It should be pointed out that if the county board of equalization orders a change in classification from rural to urban or from homestead to non-homestead, notice of the proposed increase should be given to the owner of the property in question, as provided in Section 274.13 (1), since the higher assessed valuation proposed will result in the assumption by the owner of a greater share of the burden of taxation.

CHARLES P. STONE,
Special Assistant Attorney General.

Martin County Attorney.

August 2, 1948. 406-B

191

Equalization—County board of equalization—Reduction of aggregate assessment—Laws 1947, Chapter 531, Section 14, MSA, Sec. 274.13.

Facts

Laws 1947, Chapter 531, (which creates the offices of county supervisor of assessments or county assessor for each county), in Section 14 provides as follows:

> "The duties of the county assessor shall be as follows:
>
> * * * * * * * * *
>
> "(c) To make all changes ordered by the local boards of review, relative to the assessed value of the property of any individual, firm or corporation after notice has been given and hearings held as provided by law. No local board of review shall have the power to reduce the aggregate assessment returned by the county assessor, for such township, city, village or borough;
>
> * * * * * * * * *."

Question

> "Is the County Board of Equalization, which consists of the Board of County Commissioners, such a 'local board of review' that has no power to reduce the aggregate assessment returned by the County Assessor, 'for such township, city, village or borough' "?

Opinion

It is our opinion that the prohibition contained in Laws 1947, Chapter 531, Section 14 (c) that no local board of review shall have the power to reduce the aggregate assessment returned by the county assessor, for such township, city, village or borough, does not apply to the county board of equalization. In other words, the county board of equalization is not a local board of review as that term is used in Section 14.

However, the county board of equalization itself is subject to substantially the same limitation, more broadly applied, by virtue of the provisions of Minnesota Statutes Annotated, Section 274.13, which provides in part as follows:

> " . . . The board shall meet annually, on the third Monday in July, at the office of the auditor and, each member having taken an oath fairly and impartially to perform his duties as such, shall examine and compare the returns of the assessment of property of the several towns or districts, and equalize the same so that each tract or lot of real property and each article or class of personal property shall be entered on the assessment list at its full and true value, subject to the following rules:

"(5) Aggregate not to be reduced. The board shall not reduce the aggregate value of the real property, or the aggregate value of the personal property, of its county below the aggregate value thereof, as returned by the assessors, with the additions made thereto by the auditor as in this chapter required; but the board may raise the aggregate valuation of such real property, and of each class of personal property, to such aggregate amount as it believes to be the full and true value thereof."

In effect, this means that the county board of equalization cannot reduce the aggregate assessment of any local taxing district, as returned by the county assessor, unless it also increases the aggregate assessment of one or more of the other districts so that the aggregate value of the real property, and the aggregate value of the personal property, of the county is not reduced below the values of such property as returned by the county assessor.

CHARLES P. STONE,
Special Assistant Attorney General.

Bemidji Township Attorney.

December 21, 1948. 406-B

ASSESSOR

192

Assessment book—Delivery of books by auditor—City charter inconsistent with state law on subject of assessment inoperative in so far as inconsistent—Minn. Const. Art. 4, Sec. 36, L. 1947, C. 531.

Facts

The city of Chaska is governed by its home rule charter. Under it, the mayor and the city council govern the city. You state in your letter of February 8 that the governing body has authority to appoint a city assessor and to sit as a board of equalization of assessments. The county board of equalization of assessments is without authority to equalize the returns of the assessor as they relate to the city of Chaska.

A county assessor for Carver County has been appointed by authority of L. 1947, C. 531. His powers are defined in the law among which you call attention to Sec. 14, Subd. 14 (a):

"To make all assessments, based upon the appraised values reported to him by the local assessors or his assistants and his own knowledge of the value of the property assessed;"

It appears to be the position of the governing body of Chaska that its powers under the charter are unchanged by the 1947 law. It appears to be

of the opinion that the city charter exempts the city from the operation of the 1947 act and that it is the duty of the county auditor to deliver the assessment books and blank forms relating to assessments to the city assessor, not to the county assessor.

Question

Is it the duty of the county auditor to deliver the assessment books and blank forms pertaining thereto to the city assessor of Chaska or to the county assessor for Carver County?

Opinion

The power to tax is an attribute of sovereignty. Dunnell's Digest, Sec. 9114. All property in the city of Chaska not exempt from taxation is taxable. It is taxable not only for city purposes but also for school district, county and state purposes. The legislature has the power to devise rules and means by which assessments for the purposes of taxation are made. The legislature cannot be deprived of the power to make rules governing assessment of property for purposes of taxation because of the fact that the city charter provides means for assessment for city purposes. It would seem that the power to tax involves a state wide policy which should be uniform. Rules relating to assessment in Chaska for the purpose of raising money for all purposes except the government of Chaska should be uniform with such rules which apply in other parts of the state. There can only be one assessment. There cannot be an assessment for a city purpose and another assessment for school district, county and state purposes. This law contemplates one assessment for all tax purposes. The constitution requires that taxes be uniform upon the same class of subjects. Const. Art. IX, Sec. 1, Dunnell's Digest, Sec. 9140.

The Minnesota Constitution, Art. IV, Sec. 36, enables a city or village in this state to frame a charter for its own government as a city consistent with and subject to the laws of this state. The Constitution does not enable a city or village to frame a charter for its own government as a city **inconsistent** with and exempt from the laws of this state.

Accordingly, it is my opinion that in so far as the charter provisions of the city of Chaska relating to assessments are inconsistent with the laws of Minnesota on the same subject, such charter provisions are inoperative. Accordingly, it follows that the auditor will be governed by the state laws relating to assessment of property.

CHARLES E. HOUSTON,
Assistant Attorney General.

Carver County Attorney.

February 11, 1948. 12-D

You refer to the above opinion and state that this office was advised erroneously that Chaska was a city governed by a home rule charter, when,

in fact, it is governed by Special Laws 1891, Chapter II. You request a re-examination of the question ruled upon in the light of the provision of the special act of 1891, providing for a city assessor and the following:

> "No law of the State concerning provisions of this act shall be considered as repealing, amendatory, or modifying the same, **unless said purpose be expressly set forth in said law.**" (Special Laws 1891, Chapter II, Subchapter XI, Section 5.)

In our opinion, it is not necessary to determine whether Laws 1947, Chapter 531, hereinafter referred to as "Chapter 531," relating to assessments, superseded or amended the provisions of Special Laws of 1891, Chapter II, Subchapter V, Section 1, which provides in part:

> "The city assessor and his deputy or deputies * * *, as to all territory within the limits of the city, shall perform all the duties now or hereafter required by assessors by the General Laws of the state, and shall have all the authority, rights and powers now or hereafter conferred upon assessors by such laws, * * * ."

Laws 1947, Chapter 531, is a general law relating to the powers and duties of county assessors, supervisors of assessors, and local assessors, including city assessors except in counties containing a city of the first class. An examination of Section 14 thereof discloses changes in the duties of local assessors. No conflict arises between the 1947 act and the 1891 special law if, within the above quoted language of Section 1 of the 1891 law, effect is given to the 1947 act as such general law. It then follows that the 1947 law governs the powers and duties of the city assessor of Chaska. The opinion of February 11, 1948, is correct in the conclusion reached therein that it is the duty of the county auditor to deliver the assessment books and blank forms pertaining thereto to the county assessor for Carver County.

GEO. B. SJOSELIUS,
Deputy Attorney General.

May 3, 1948. 12-D

193

Clerical work—Authority of village to furnish—MSA, § 412.19. Taxation—Assessments—Reassessments—Authority of village board of review in connection therewith—MSA, § 270.17.

1. **Authority of village board of review in connection with reassessment ordered by Commissioner of Taxation.**

Facts

Under date of February 26, 1948, the Commissioner of Taxation of the State of Minnesota, ordered that certain real property in the village of St. Louis Park, specified in a list attached to the order, be reassessed as of May 1, 1947 for the purpose of the 1947 tax payable in 1948, and appointed a special assessor to make the reassessment and to make a return thereof to the Commissioner.

Question

Does the village council have the authority to act as a board of review prior to the return of the reassessment to the Commissioner of Taxation, as in the case of an original assessment?

Opinion

It is the opinion of this office that the village council does not have authority to act as a board of review in such case.

M. S. A., Section 270.17 provides that the special assessor appointed by the Commissioner of Taxation to make a reassessment shall proceed to reassess the property and prepare duplicate lists of such reassessment, showing the property reassessed, the amount of the original assessment, and the amount of the reassessment. Section 270.17 provides that the special assessor shall file both copies of the list with the Commissioner of Taxation, and that the Commissioner shall thereupon examine, equalize and correct the reassessment, and transmit one copy thereof, as corrected and equalized, to the county auditor. Section 270.17 provides that the list so transmitted to the county auditor shall supersede and be in place of the original assessment, and that the county auditor, upon receipt thereof shall extend and levy against the property so reassessed the taxes for the year involved according to the reassessment in the same manner as though such list was the original assessment list of such property.

No provision is made for review of the reassessment figures by anyone other than the Commissioner of Taxation. Although Section 270.17 does not require that notice be given to the taxpayer affected, I am informed by the Department of Taxation that as a matter of practice the Commissioner by published and posted notice, does give such taxpayers an opportunity to appear before him and protest the proposed reassessment figures, before he equalizes and corrects the list and transmits it to the county auditor. And, of course, Section 270.17 gives any taxpayer feeling aggrieved by the reassessment a right to appeal therefrom to the district court.

Even in the absence of the explicit provisions of Section 270.17 limiting review of the reassessment figures to the Commissioner of Taxation, there would seem to be no reason for a review of those figures by the village council sitting as a local board of review. The council reviewed the 1947 assessment when it sat as a local board of review in June and July of 1947.

Presumably at that time it made whatever corrections it thought were necessary. A subsequent review by the same board would serve little purpose.

It should also be pointed out that M. S. A., Section 274.01 which provides for review of current assessments by local boards of review, specifically provides that that board shall meet on the fourth Monday of June and proceed to perform the duties with which it is charged. No provision is made for meeting at any other time.

2. **Authority of village to furnish clerical assistance to village assessor.**

Facts

In the village of St. Louis Park the records of the village assessor are kept in the village hall and regarded as village property. Because of the rapid growth of the village there has been a substantial amount of clerical work required in order to make up permanent cards covering each parcel of land and to prepare the assessment book which is sent to the county auditor. It has been the practice of the village council to furnish the assessor with clerical assistance for this purpose. Chapter 388, Laws 1947 specified the compensation to be paid to village assessors in Hennepin County and provides for compensation to deputy assessors, but makes no provision for clerical assistance.

Question

Must all the work of the assessor, including the preparation of his permanent records and assessment books, be done by the assessor and his deputies for the compensation as specified and limited in Minnesota Statutes 1945, Section 273.04, as amended by Laws 1947, Chapter 388, or does the village council have authority to furnish the assessor with clerical assistance for the purposes outlined?

Opinion

M. S. A., Section 273.04, insofar as here applicable, provides as follows:

> "In all * * * villages * * * which are situated in counties having not less than 450,000 inhabitants and an assessed valuation, including money and credits, of more than $450,000,000, the assessor and each deputy assessor of each such * * * village * * * shall be entitled to compensation for each day's service necessarily rendered by him, the sum of $7.50, not exceeding 120 days in any one year, * * *
>
> "The duties of the assessor in such * * * villages * * * shall be as now prescribed by law, and shall be performed between the first Monday in April and the last Monday in July of each year."

Section 273.08, which sets forth the duties of the assessor, provides that he shall determine the values of all items of real and personal property, and enter those values in the assessment books.

It is our opinion that there is nothing in Section 273.04, as amended, or in Section 273.08, which would preclude the village council from furnishing clerical assistance to the assessor. We do not believe that the legislature, in enacting Section 273.08, intended that the assessor personally must make each entry in the assessment books. There is no statutory requirement for the making up by the assessor of permanent real estate cards. The installation and maintenance of such a permanent card system, while helpful to the assessor in his work, probably benefits the village itself more than it does the assessor.

We assume that the village of St. Louis Park was incorporated under the provisions of Chapter 9 of the Revised Laws of 1905. M. S. A., Section 412.19 provides that the village council of any village so incorporated shall have power to fix the compensation or its employees when not otherwise prescribed (Subd. 2) and to provide for the government and good order of the village (Subd. 24). If the village council, in the exercise of its discretion under the above provisions, believes that the work of the village assessor can be expedited and improved by furnishing him clerical assistance, it is the opinion of this office that the council has the authority so to do.

CHARLES P. STONE,
Special Assistant Attorney General.

St. Louis Park Village Attorney.

April 7, 1948. 406-E 12-E

194

Clerical work—Village assessor may not be hired to perform clerical work upon assessor's records—MSA 272.51; MSA 273.04, as amended by L. 1947, C. 388; MSA 288.01.

Facts

"The Village of St. Louis Park is situated in a county having not less than 450,000 inhabitants and an assessed valuation of more than $450,000,000 and, therefore, is subject to the provisions of Chapter 388, Laws of 1947, relating to compensation of assessors. The Village Assessor finds it impossible even with the assistance of his deputies to perform all the duties of his office between the first Monday in April and the last Monday in July of each year. In order that there may be adequate records showing the necessary data as to cubic content and other items taken into account in arriving at valuations of new houses constructed in the Village from time to time and in order to keep up to date Assessor's records showing divisions of property resulting from the recording of deeds from time to time, it is necessary that clerical work be done throughout the year. The Village Council is in full accord

with the Assessor in believing that this clerical work must be done, and we have been of the opinion that it was proper for the Village to use its clerical employees to do this work.

" * * * It appears that even if the County Auditor should direct the Assessor to perform this work, it would not be practical to do it within the 120-day period prescribed by the chapter nor would $100.00 be sufficient compensation."

Questions

Whether it would be improper for the Village to employ the Assessor himself to do this clerical work when he has already been paid the maximum amount for his services as Assessor authorized by Chapter 388, Laws of 1947?

" * * * whether the Village Assessor of a village of Hennepin County may be employed by the Village Council to do clerical work after the first Monday in April of any year and be paid for such services in addition to the compensation authorized by Chapter 388, Laws of 1947."

Opinion

This office previously has ruled that the village council of the Village of St. Louis Park has the authority to furnish clerical assistance to the village assessor, if, in the exercise of its discretion, it believes that the work of the village assessor can be expedited and improved by so doing.

Opinion No. 193 dated April 7, 1948. While that opinion was meant to apply only to the assessment period beginning on the first Monday in April and ending on the fourth Monday in July, we see no reason why the village council, in addition to furnishing the assessor with clerical assistance during that period, may not also hire a clerk or clerks to work on the record cards between assessment periods, if, in the exercise of its discretion, the council believes that the assessment work of the assessor can be expedited and improved thereby.

But we do not believe that the village assessor himself can be employed to do this work. The gathering of the necessary data as to the cubical contents of new buildings, etc. for entry on the record cards, and the supervision of the entry of that date on the cards, is assessor's work. It would not be proper for the clerk to go out and get the information. Nor would it be proper to permit him to work on the cards without supervision of the assessor. If the assessor were employed as the clerk, it would be difficult, if not impossible, to keep the duties of the two offices separate. And the assessor, in that capacity, would have to supervise the work which he himself was performing in a clerical capacity.

M. S. A., Sec. 273.04, as amended by Laws 1947, Chapter 388, expressly limits the compensation of village assessors in Hennepin County to $7.50 per day for each day's service necessarily rendered, not exceeding 120 days

in any one year. With the exception of an additional hourly compensation at the rate of 90 cents per hour, not to exceed $100, for work done by the assessor after the assessment period at the direction of the county auditor, the per diem compensation provided by Section 273.04, as amended, is intended to cover all of the services which the assessor is required to render, including certain all-year-round duties in connection with the assessment of stocks of merchandise of transient merchants (M. S. A., Sec. 288.01) and the assessment of personal property about to be sold in bulk or at auction sale or about to be removed from the county before payment of taxes (M. S. A., Sec. 272.51).

See Opinion, Attorney General, dated February 6, 1930, addressed to City Attorney of Virginia (File No. 12-B-1).

To compensate the assessor for work performed by him on the assessment record cards between the fourth Monday of July and the first Monday of April, under the guise of paying him for clerical work, in our opinion, would amount to a circumvention of the statute limiting the amount of compensation which he is entitled to receive.

We therefore rule that the village council of St. Louis Park may not employ the village assessor to do clerical work in connection with the assessment records, between the last Monday in July and the first Monday in April, and pay him for such services, when he already has received for his services as assessor the maximum amount permitted by law.

If the village assessors of Hennepin County do not have sufficient time within which to perform the duties of their offices properly, and are not being adequately compensated for their services, it seems to us that the proper course of action to pursue is to seek legislative relief.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Village Attorney, St. Louis Park.

November 22, 1948. 12-E

195

County—Office of county assessor may not be abolished and office of supervisor of assessments established until the county assessor has been employed for two years—L. 47, Ch. 531, Sec. 15.

Facts

"Pursuant to the authority contained in Laws of 1947, Chapter 531, the Board of County Commissioners of Beltrami County appointed a county assessor whose term will expire on December 31, 1948. At the

present time, there is considerable agitation to have a county supervisor of assessments instead of a county assessor. Two years have not elapsed since the office of county assessor was established in Beltrami County."

Question

"May the County Board abolish the office of county assessor at its January meeting and establish the office of county supervisor of assessments?"

Opinion

Laws 1947, Chapter 531, provides as follows in Section 15:

"If, after a county assessor has been employed for a period of not less than two years in any county, the board of county commissioners shall determine that the interests of the county may be equally well served by a supervisor of assessments, it may revoke the appointment of the county assessor and abolish the office. It shall then appoint a supervisor of assessments as provided by this act."

Under this section the County Board may not abolish the office of county assessor unless and until the county assessor has been employed for a period of two years.

RALPH A. STONE,
Assistant Attorney General.

Beltrami County Attorney.

December 31, 1948. 12-D

CANCELLATION

196

Auxiliary forests—County auditor has no authority to cancel taxes which have attached prior to filing of contract for record—MS 1945 88.47 to 88.53 as amended by L. 1947, C. 467.

Facts

"Minnesota Statutes, 1945, Section 88.49, Subdivision 4, states quote, 'Upon the filing of the contract for record the land therein described shall become and, during the life of the contract, remain and be, an auxiliary forest entitled to all the benefits and subject to all the restrictions of sections 88.47 to 88.53.'"

Questions

1. "Does the County Auditor have authority to remove said lands from the regular general tax rolls and place them on the Auxiliary Forest tax rolls prior to that date?

2. "If not, and if said filing date should occur on or after the 1st Monday of January, the date on which current taxes become due and payable, has the County Auditor authority to cancel the general taxes and then tax the property as Auxiliary Forest?

3. "If Auxiliary Forest contract is filed after May 1, 1947, but before the 1st Monday of January, 1948, the date when 1947 taxes become due and payable, may the County Auditor remove said lands listed in said contract from the general tax rolls and assess them as Auxiliary Forest for 1947 current taxes?"

Opinion

Question one is answered in the negative. The language quoted above is clear and unambiguous. It requires the filing of the contract for record before the real property becomes entitled to the benefits and subject to the restrictions of Sections 88.47 to 88.53, as amended by Laws 1947, Chapter 467.

Question two is answered in the negative. The taxes upon the real property became a lien thereon on May 1 of the year in which they were levied. The applicant is required to furnish certificates by the county auditor and county treasurer that there are no unpaid taxes upon the land. Section 88.48, Subdivision 5. It is difficult to see how this question can arise as the payment of all taxes is a condition precedent to the execution of the contract between the state and the applicant. There is no provision in Sections 88.47 to 88.53 authorizing the county auditor to cancel taxes which have attached to the real property.

Question three is answered in the negative for the reasons given above.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Itasca County Attorney.

December 26, 1947. 407-H

DELINQUENT

197

Assignment certificate—Notice of expiration of time for redemption—Failure to collect cost of publication—Auditor personally liable therefor

to certificate holder—Minnesota Statutes 1945, § § 281.01, 281.03, 281.13, 281.21, 281.34, and 281.38.

Facts

"A party bought a State Assignment Certificate on March 31st, 1947, and a Notice of Expiration of Time of Redemption was prepared and served by the sheriff. The sheriff returned the notice with his affidavit showing that the property was found vacant. This was returned by the sheriff on April 4th, 1947. Costs of this service amounted to $5.40 which was entered in the judgment book.

"On April 24th, redemption was made by one of the owners of the property. He paid the cost of the original certificate, interest on same and the sheriff's fees.

"On May 10th the office was presented with an affidavit of publication covering the notice of expiration of time of redemption. The costs for the publication amounted to approximately $12.00.

"On April 24th, the purchaser of the Certificate was notified by postcard that such redemption had been made."

Question

"Who is liable for costs of publication and collection of same?"

Opinion

The provisions of Minnesota Statutes 1945, Section 281.13[1], control the giving and service of the notice of expiration of time for redemption where the land was, as here, bid in by the state and thereafter assigned to an actual purchaser. Section 281.21. The county auditor is charged with the duty of preparing the notice of expiration of time for redemption and delivering it to the person applying for it who usually is the assignee of the state. Section 281.13. The printer's fees for publishing the notice of expiration of time for redemption is paid in the first instance by the holder of a tax assignment certificate and repaid by the party offering to redeem such land before a certificate of redemption may be issued. Section 281.34. Upon the payment by a person entitled, under Section 281.01, to redeem of the amount certified by the county auditor as due on such redemption, a certificate of redemption is issued. Section 281.03. The county auditor should then draw his warrant upon the county treasurer in favor of the assignee or person entitled thereto for the amount to which such person is entitled from the moneys paid for the redemption. Section 281.38. "If the amount certified by the auditor and received in payment for redemption be less than that required by law, it shall not invalidate the redemption, but the auditor shall be liable for the deficiency to the person entitled thereto." Section 281.03.

The issuance of the notice of expiration of time for redemption charged the auditor with notice that costs and fees would be incurred in the service

[1]All statutory references herein are to Minnesota Statutes 1945.

thereof. The return of the sheriff showing that the property was found vacant charged the auditor with notice that publication of the notice of expiration of time for redemption would be required. The statute last quoted from above makes the auditor liable for the deficiency to the person for whom the notice was issued. It is our conclusion that the county auditor is personally liable to the holder of the state assignment certificate for the costs of the publication.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Itasca County Attorney.

May 27, 1947. 419-F-1

EXEMPTION

198

Airports—Municipally owned and operated—Portions of field leased to private parties for agricultural purposes—Constitution, Art. IX, Sec. 1, MSA, Sec. 272.02.

Facts

The City of New Ulm purchased a tract of 200 acres outside the municipality for use as an airport. Several hangars and an administration building have been erected thereon. Two runways have been marked out. So much of the land as is necessary for runways, hangars, parking, etc., is in constant use for airport purposes.

Of course, a large part of the field in the vicinity of the runways is not needed for the airport. To avoid the expense of caring for it, the land has been leased to adjoining farmers. The leases are subject to the use of the land so far as it is necessary for the airport, and are terminable at the pleasure of the City. The leasing arrangement is temporary in character. As this leased land becomes necessary for use in connection with the airport, it will be withdrawn immediately from any lease. The land leased in 1947 has recently been entered on the tax rolls of the county as omitted property.

Question

Is the leased property exempt under Article IX, Section 1 of the Minnesota Constitution?

Opinion

We are advised by the Minnesota Department of Aeronautics that the 200-acre tract of land above referred to was officially approved as a municipal airport site by an order of the Commissioner of Aeronautics dated May 3, 1944, and that 40 acres of the site was purchased by the City of New Ulm on June 8, 1944 and the other 160 acres acquired by condemnation on

December 4, 1944, the total cost to the city being approximately $35,000. We are advised further that on August 17, 1945 the city was granted its first annual airport license, and that the field has been maintained as a licensed airport since that date.

A chart of the layout of the airport has been furnished us by the Department of Aeronautics. We attach it to this opinion. It shows a 300-ft. wide sodded runway extending north and south across the middle of the 200-acre tract for the full length thereof, and a 200-ft. wide sodded runway intersecting the north and south runway near the north end thereof, extending across the full width of the tract. The two runways form a T. It is our understanding that these two runways already have been constructed and are in use. The Department of Aeronautics also advises us that completed working plans and specifications very recently (March 4, 1948) have been submitted to the Department calling for further improvements, totalling approximately $100,000, to be begun as soon as the weather will permit, including the grading and construction of two additional 300-ft. wide runways, one to run from the Northwest corner of the 200-acre tract, to the Southeast corner, and the other to intersect the first, running in a generally Northeast to Southwest direction. The two proposed runways will form an X. These runways are shown on the chart in red.

M. S. A., Section 360.033, Subd. 1, declares that the acquisition of lands for the establishment of airports and the construction, maintenance and operation of airports and air navigation facilities and the exercise of other powers granted municipalities by Chapter 300, are public, governmental and municipal functions, exercised for a public service and matters of public necessity. Section 360.035 provides that any property acquired or used by a municipality pursuant to the provisions of Chapter 360 shall be exempt from taxation to the same extent as other property used for public purposes.

The tax exemption provided for in Section 360.035 is "to the same extent as other property used for public purposes." Article IX, Section 1 of the Minnesota Constitution and M. S. A., Section 272.02, exempt from ad valorem taxation public property used exclusively for any public purpose. This office previously has ruled that under these general provisions a 360-acre tract of land acquired by a city to be used as an airport is entitled to exemption from ad valorem taxation even if the entire field is rented out for agricultural purposes pending development of the airport, if the city is proceeding with proper dispatch under existing conditions to devote the land to the public use for which it was acquired.

Opinion 358, 1944 Report of Attorney General (file 414-D-4)

It seems clear from the information furnished us by the Department of Aeronautics, that the City of New Ulm is proceeding to develop the 200-acre tract for municipal airport purposes without unreasonable delay. It is our opinion that the temporary leasing in the interim of portions of the tract to adjoining farmers, consistent with proper use of the present airport facilities by the public, does not alter the tax exempt status of the tract. It is therefore our opinion that the entire 200-acre tract is entitled to exemption from the 1947 tax as public property used exclusively for a public purpose.

Even after the proposed new runways are constructed, it is our opinion that the continued renting of the triangular pieces between the runways for agricultural purposes would not affect the tax exempt status of the entire tract. While those portions of the tract will not actually be used in takeoffs and landings, they are a necessary part of the airport for clearance purposes and also for the purpose of preventing encroachments by privately owned structures and buildings. If they are left lying idle, the city will be required to keep them mowed and free from noxious weeds. This office previously has ruled that the renting of a part of a college building to a private party does not destroy the tax exempt status of the building as property of an exempt institution, if that renting is subordinate to the principal use of the building and does not interfere therewith.

See opinion dated April 13, 1933 (File No. 414-B-2)

Opinion dated December 5, 1944, (File No. 414-B-2),

The same reasoning applies here. The entire 200-acre tract will be devoted to the main purpose of the municipal airport, and the leasing of portions of the tract not actually being used as runways, for agricultural purposes, would, in our opinion, be merely incidental to that main purpose, and therefore would not deprive the tract of its tax exempt status.

Our Supreme Court has stated that the word "exclusively" as it appears in the phrase "used exclusively for any public purpose," means "substantially all" or "for the greater part."

County of Anoka v. City of St. Paul (1935) 194 Minn. 554, 261 N. W. 588. This office previously has ruled that the leasing of airport facilities such as hangar space for privately owned planes will not deprive a municipality owned and operated airport of exemption from general property taxation.

Opinion 215, 1946 Report of Attorney General (File 414-A-11).

The incidental leasing of portions of the field between the runways, for agricultural purposes, consistent with the proper use of those portions of the field in connection with the operation of the entire airport, in our opinion, falls in the same category.

CHARLES P. STONE,
Special Assistant Attorney General.

New Ulm City Attorney.

March 15, 1948. 414-A-11

199

Church property—Parsonage—Dwelling house formerly used as parsonage sold to private individual, to be removed from lot before May 1—Lot retained to be used as part of church grounds—Lot entitled to exemption—Dwelling house assessable as personal property—MS 1945, Sec. 272.03, Subd. 3, as amended.

Facts

"Prior to May 1, 1948, a church in Granite Falls, Minnesota owned a lot with a dwelling house on it used as a parsonage. Also prior to May 1, 1948, this church purchased a different lot and dwelling to be used as a parsonage and their pastor promptly moved to the new parsonage. The church trustees contemplating using the land on which the old parsonage was located as part of their church grounds, and having no use for the old dwelling sold the same and, they tell me, informed the buyer to remove the same before May 1, 1948. This the buyer failed to do and the dwelling house still remains on the church land, unoccupied as it has been since the pastor removed. The church has not collected any rent for the building, but has been paid in full for the same. On May 1, 1948 the assessor assessed the same as non-exempt property and the church has now appealed to our county board for restoration of that property to exempt classification on the grounds that it is property to be used exclusively for church purposes."

Question

Are the lot and dwelling house, or either, entitled to exemption from ad valorem assessment for 1948?

Opinion

It is the opinion of this office that the lot itself is entitled to exemption from ad valorem assessment for 1948, as church property, if its contemplated use as part of the church grounds is reasonably necessary for church purposes.

In applying the constitutional tax exemption of "all churches, church property and houses of worship," the Minnesota Supreme Court has stated that the test is the use to which the property is devoted or about to be devoted.

State v. Second Church of Christ, Scientist (1932) 185 Minn. 242, 240 N. W. 532.

The court in that case stated that an institution such as a church generally cannot use real property for its activities until some reasonable time after it acquires title thereto, and that if at the time of acquisition there is a present good faith intention to make use of the property in the near future the property is entitled to exemption even if it is not actually being so used on the assessment date.

From the time the church discontinued the use of the property in question as a parsonage, it appears that there was a present good faith intention to make use of the lot as part of the church grounds, as evidenced by the fact that the church immediately sold the dwelling house located on the lot and provided for its removal from the lot by the purchaser prior to May 1, 1948. That the purchaser failed to remove the dwelling house in accordance with his agreement with the church, in our opinion, does not alter

the situation. The church still intends to use the lot as part of the church grounds, as soon as the purchaser of the dwelling house can be made to live up to his agreement to remove it.

It remains to consider the question of whether the dwelling house is subject to assessment, and, if so, how it should be assessed.

M. S. A., Section 272.03, Subd. 3, provides in part as follows:

"For the purposes of taxation, 'personal property' includes:

* * * * * * * * *

"(3) All improvements * * * upon land the title to which is still vested in any railroad company or other corporation whose property is not subject to the same mode and rule of taxation as other property."

In our opinion the dwelling house in question constitutes personal property, assessable as such, because it is an improvement upon a lot which is owned by a religious corporation, whose property is exempt from ad valorem assessment and is therefore not subject to the same mode and rule of taxation as other property. It is therefore our opinion that the dwelling house should be included in the personal property assessment made against its owner, and that it should be entered on the listing sheets opposite Item 52 under Class 4 as "All other taxable personal property not included in the foregoing items."

CHARLES P. STONE,
Special Assistant Attorney General.

Yellow Medicine County Attorney.

July 22, 1948. 414-D-6

200

Church property—Parsonage—Jointly occupied by pastor and renters— Const., Art. IX, Sec. 1, MSA, Sec. 272.02.

Facts

A church in the city of Detroit Lakes has a large parsonage which is furnished rent-free to the pastor of the church. Previously, the pastor of the church always has been a married man with a family, and all of the available room in the parsonage has been required by them. The present pastor, however, is a single man. He feels that his occupancy of the parsonage alone is not satisfactory, and, during the present housing shortage, is not right. He contemplates taking into the parsonage a married couple with whom he will have joint use of the house. The pastor will retain the rent which he charges the couple. His salary from the church will not be changed.

Question

Under this arrangement, would the parsonage continue to enjoy exemption from ad valorem assessment as church property?

Opinion

In an opinion of this office dated April 28, 1936 (Opinion No. 364, 1936 Report of Attorney General), it was ruled that a church parsonage was entitled to exemption from ad valorem assessment even though the second floor thereof was rented to a tenant, upon the theory that the building was principally used as a dwelling place for the pastor of the church. In another opinion of this office dated August 3, 1944 (Opinion No. 359, 1944 Report of Attorney General), it was ruled that a four-flat building which a church contemplated purchasing, only one apartment of which was to be used as the parsonage and the other three apartments of which were to be rented out to private parties, would not be entitled to exemption, upon the theory that it would not be principally used as a dwelling place for the pastor.

The parsonage in the instant case apparently is one designed to afford living quarters to only one family, and, if the pastor were a married man, would be used in its entirety by him and his family. Even under the arrangement proposed, the main accommodations which the building possesses will continue to be used by the pastor, and are therefore necessary or desirable for the purposes of the church. Upon the theory that the parsonage will still be used principally as a dwelling place for the pastor, we are of the opinion that the parsonage should continue to enjoy its status of exemption from ad valorem assessment, as church property.

CHARLES P. STONE,
Special Assistant Attorney General.

Becker County Attorney.

September 19, 1947. 414-D-12

201

Church property—Parsonage—Newly purchased—Old parsonage still occupied by pastor—Constitution, Art. IX, Section 1, MSA, Section 272.02.

Facts

On April 5, 1946, a church in Cottonwood County entered into a contract for deed for the purchase from a private owner of a residential property. The contract for deed provided that possession was to be given to the church on July 31, 1946. This residential property was acquired by the church to be occupied by the pastor as a parsonage as soon as the private individual from whom it was acquired could arrange to move therefrom. The individual delivered possession of the property about July 25, 1946, and from that date the property was occupied as a parsonage by the pastor.

The church also owned another residential property which the pastor had been occupying as a parsonage up to the time he moved into the newly acquired property. On May 14, 1946 the church entered into a contract for deed for the sale of the old parsonage to two private individuals. The

contract for deed provided that possession was to be surrendered on August 1, 1946.

The local assessor assessed the old parsonage which was being occupied by the pastor on May 1, 1946, and exempted the newly acquired parsonage.

Questions

"1. Was it proper to assess the residence which was actually being used as a parsonage on May 1, 1946?

"2. Was it proper to exempt the residence purchased for parsonage purposes and which was actually used as such, beginning July 25, 1946?"

Opinion

It is the opinion of this office that both properties were entitled to exemption from ad valorem assessment for the year 1946.

(1) The old parsonage was both owned by the church and being occupied by its pastor as a parsonage on May 1, 1946. It clearly constituted "church property" as that term is used in Article IX, Section 1 of the Minnesota Constitution.

(2) On May 1, 1946, by virtue of the contract for deed which it had entered into on April 5, 1946, the church was the equitable owner of the new parsonage.

6 Dunnell's Minn. Digest, Sec. 10,045.

This office previously has ruled that the interest of a vendee under a contract for deed is sufficient to entitle the propery to a **homestead classification** if the vendee is occupying the property as his homestead.

Opinion 796, 1934 Report of Attorney General.

For the same reason, we are of the opinion that the interest of a vendee under a contract for deed is sufficient to entitle the property to **exemption** from ad valorem assessment, if the facts requisite to the granting of such exemption are present.

It remains to consider whether the fact that the newly acquired property was not actually being occupied as a parsonage on May 1, 1946, prevents its being entitled to exemption. In applying the constitutional tax exemption of "all churches, church property and houses of worship," the Minnesota Supreme Court has stated that the test is the use to which the property is devoted or **about to be devoted.**

State v. Second Church of Christ, Scientist (1932) 185 Minn. 242, 240 N. W. **530.**

The court in that case stated that an institution such as a church generally cannot use real property for its activities until some reasonable time after it acquires title thereto, and that if at the time of acquisition there is a

present good faith intention to make use of the property in the near future the property is entitled to exemption even if it is not actually being used at the exact time when the tax is assessed. Since the contract for deed to the new parsonage specifically provided that possession was to be given on July 31, 1946, we think it clear that at the time the contract for deed was entered into there was a present good faith intention to make use of the property in the near future, and that the new parsonage was therefore entitled to exemption as of May 1, 1946 as church property.

CHARLES P. STONE,
Special Assistant Attorney General.

Cottonwood County Attorney.

July 31, 1947. 414-D-12

202

Homestead—Housing and Redevelopment Authority—Units of row housing owned by cooperative not homestead for tax exemption for state taxes —MSA § 273.13, Subd. 7.

Facts

"The Housing and Redevelopment Authority of the City of St. Paul has submitted the following matter for the consideration of the Division of Housing and Redevelopment.

'Another question has also arisen concerning the matter of taxing the real estate of cooperatives. The development proposes the construction of one-story row housing where, although units may have party walls, a definite area of land can and will be assigned to each unit. The real estate is owned by a cooperative consisting of members who each occupy one unit and assume the obligation to pay the proportionate cost of such unit. Can said property be assessed upon a homestead basis for each unit so that the property will be assessed upon the basis of 25% of the full and true value for the first $4,000, instead of 40% of the entire full and true value?

'I am aware of the Attorney General's opinion with reference to a cooperative apartment, in which he has held that the valuation applicable to each apartment cannot be assessed upon the homestead basis, but that opinion is based upon the theory that there can be only one assessment for each tract or lot. In the proposed cooperative there will be a separate tract or lot allocable to each dwelling unit so that each assessment would pertain to a separate and distinct parcel of land'."

Question

"In a case where real estate is owned by a cooperative consisting of members who each occupy one unit of row type housing, where each

assume the obligation to pay the proportionate cost of such unit, and in which there is a separate tract or lot allocable to each dwelling unit, can said property be assessed upon a homestead basis for the separate and distinct parcels of land?"

M. S. A. Sec. 273.13, Subd. 7, provides in part:

"The first $4,000 full and true value of each tract of such real estate used for the purposes of a homestead shall be exempt from taxation for state purposes;".

Opinion

In an opinion in which there is a comprehensive discussion of the meaning of the word "homestead" as used in the foregoing provision, it was said:

"If we hold that 'homestead' is used in the popular sense of 'home,' that $4000 limitation can be applied with reasonable equality throughout the state. Under this interpretation such an area of land, whether urban or rural, can be included in the low-assessment classification as is used by the owner for the purposes of a home, subject, of course, to the provision of the statute, that if the true and full value thereof is in excess of $4000, the amount of such valuation in exess of $4000 shall be valued and assessed at the higher rate provided for by Class 4." 1934 Report of Attorney General, Op. 795, (file 232-D).

It is evident that in order to qualify for the homestead exemption from taxation for state purposes, two elements must be present, namely: ownership and occupancy by the owner for the purposes of a home. You state: "The real estate is owned by a cooperative * * * ." Obviously, even though the individual stockholders in the cooperative occupy the respective units for the purposes of a home, the other requisite, ownership of the real estate, is not present. We are compelled to hold that the separate tract or lot allocable to each dwelling unit cannot be assessed as a homestead under M. S. A. Sec. 273.13, Subd. 7.

In an opinion of May 29, 1940, file 232-D, to the Todd County Attorney, we said:

"The exemption under the statute goes only to an individual taxpayer occupying the premises as his homestead, not to a corporation."

We have examined the opinion to which you refer. The first portion of the opinion has no applicability here. The second question and its answer are pertinent. The question:

" 'Is the cooperative association entitled to the benefits of the reduction in the valuation applicable to homesteads?'

"It is my opinion that a cooperative association could not properly receive the homestead exemption from taxation, as it could not fulfill

the requisites of residence and occupancy." 1940 Rep. A. G. Op. 307 (232-D).

Your question is answered in the negative.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Commissioner of Administration.

November 23, 1948. 232-D

203

Public property—County historical society—Minn. Const., Article IX, Sec. 1.

Facts

"The Grant County Historical Society is of the usual type, authorized by statute. Recently, under a will, they came into possession of certain real estate located in Grant County, which real estate is used for agricultural purposes. This real estate was given to the Grant County Historical Society to be used in the furtherance of their usual work. It was contemplated that the real estate should be sold and the proceeds from the sale used to erect a building to house the Grant County Historical Society's relics and records. During the past year, which was the first year that the Grant County Historical Society owned this real estate, it rented the land out under the usual farm rental contract and received the usual income therefrom the same as if they were an ordinary land owner renting out the property."

Question

"Is this land subject to real estate tax?"

Opinion

It is the opinion of this office that the land in question is subject to ad valorem taxation.

In Minnesota, all real and personal property is taxable except such as is by law exempt from taxation.

M. S. A., Sec. 272.01.

Article IX, Section 1 of the Minnesota Constitution exempts from taxation "public burying grounds, public schoolhouses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property and houses of worship, institutions of purely public charity, public property used exclusively for any public purpose, * * * ." The Historical Society clearly is not a seminary of learning.

See Opinion No. 352, 1930 Published Opinions of the Attorney General (file 414-D-14).

It seems equally clear that it is not an institution of purely public charity. This leaves for consideration the question of whether the land under consideration is "public property used exclusively for any public purpose." While it is true that Minnesota Statutes Annotated, Section 138.06 permits the County Board of Grant County to make a limited annual appropriation to the county historical society "to be used for the promotion of historical work within the borders thereof, and for the collection, preservation, and publication of historical material, and to disseminate historical information of the county, and in general to defray the expense of carrying on the historical work in said county," the fact remains that the land in question is owned by the Historical Society and not by Grant County. It is not public property. This office has ruled that two small plots of ground owned by a county historical society, upon which rested two of its markers, were subject to taxation, since the plots were not owned by the public.

Opinion dated December 30, 1930 (File No. 414-A-11).
That ruling applies here.

Even if the land in question were owned by Grant County, upon the facts which you have stated it would not be entitled to exemption. Since it is being rented out to private parties, it clearly is not being used exclusively for a public purpose.

Opinion No. 830, 1920 Published Opinions of Attorney General (file 414-A-11).

Opinion No. 300, 1940 Published Opinions of Attorney General (file 414-A-11).

The fact that the income received from the rental of the land is used by the Historical Society in the furtherance of its work is not material.

County of Anoka v. City of St. Paul (1935) 194 Minn. 554, 261 N. W 588:

> "It is no answer to the conclusion here reached to point out that the revenue derived from the rental of this land accrued to the city and was used by it to help defray the cost of operating the waterworks. The actual use to which these acres of land were devoted was not a public or governmental one. Consequently, it is immaterial what the city did with, or how it used, the rent money."

CHARLES P. STONE,
Special Assistant Attorney General.

Grant County Attorney.

December 21, 1948. 414-A-11

204

Public property—Farm property received by city as gift with condition that revenue therefrom be expended for park purposes—Minn. Const. Art. IX, Sec. 1; MSA, Sec. 272.02.

Facts

"On or about the 9th day of February, 1940, Mr. Charles O. Gilfillan delivered to the City of Redwood Falls a conveyance of certain real estate situated within the corporate limits of the City of Redwood Falls as a gift to the City 'for the purpose of a public park and community building.' At about the same time he gave to the City a sum of money for the purpose of constructing a community building in the park to be used as a ladies' rest room. Concurrently with the deed above mentioned, Mr. Gilfillan delivered to the City a deed conveying to the City an eighty acre tract of land situate in Redwood County, Minnesota,

'in trust for the uses and purposes hereinafter stated:

> This conveyance is made to the City of Redwood Falls in trust under Chapter 133, General Laws of the State of Minnesota, 1925, for the benefit of the park and community building in the park in the City of Redwood Falls, Minnesota.'

On the 9th day of February, 1940, the City Council of the City of Redwood Falls, by resolution duly passed and adopted accepted the aforementioned gifts and conveyances, 'subject to all the terms and conditions as provided and stipulated for in the offers of said Charles O. Gilfillan as set forth in the several deeds of conveyances heretofore described.'

The park and community building were duly constructed and have been operated and maintained in accordance with the gifts and trust. At no time has the income from the farm exceeded the cost of operation and maintenance of the park and community building."

Question

"On the basis of the facts hereinabove set forth is the eighty-acre tract of farm land therein referred to exempt from taxation?"

Opinion

It is the opinion of this office that the 80-acre tract of farm land is entitled to exemption from ad valorem assessment, by virtue of the provisions of M. S. A., Section 501.11 (7), which provides as follows:

"Any city or village may receive, by grant, gift, devise, or bequest, and take charge of, invest, and administer, **free from taxation,** in accordance with the terms of the trust, real or personal property, or both, for the benefit of any public library, or any public cemetery, or

any public park, located in, or within ten miles of, such city or village, or for the purpose of establishing or maintaining a kindergarten or other school or institution of learning therein." (boldface ours)

This office previously has ruled that the provisions of this particular section are not unconstitutional and should be observed.

Opinion dated February 27, 1945 (File No. 414-A-11).

As a matter of fact, the 80-acre tract of farm land in question probably is the same property referred to in the February 27, 1945 opinion, it being there described as the N½ SE¼ of Section 33-112-36, deeded to the city of Redwood Falls for the maintenance and upkeep of a park and community building located in the city. The 1945 opinion ruled that the property was entitled to exemption from ad valorem assessment.

CHARLES P. STONE,
Special Assistant Attorney General.

Redwood Falls City Attorney.

May 25, 1948. 414-A-11

205

Public property—Municipally owned light and power plant—Light and power lines located in another municipality—MSA 273.36, MSA 272.03 sd. 3.

Facts

About a year ago the City of Redwood Falls purchased the electric light and power plant of the Redwood Falls Light and Power Company. Part of the property of the plant consists of light and power lines in the Village of North Redwood. While the plant was in private ownership, the poles and line located in the Village of North Redwood were assessed as personal property by the local taxing authorities of the village.

Question

Now that the electric light and power plant is owned by the City of Redwood Falls, are the light and power lines in the Village of North Redwood, which are used for the furnishing of light and power to the village and its residents, subject to ad valorem assessment by the village of North Redwood taxing officials?

Opinion

If the light and power lines located in the Village of North Redwood are subject to assessment, they are assessable as personal property in the Village of North Redwood, under the provisions of M. S. A., Section 272.03, Subd. 3, which defines personal property as including all poles and wires

of electric light, heat or power companies, together with the conduits, poles and wires of such companies erected or laid in connection therewith, and Section 273.36, which provides that personal property of electric light and power companies having a fixed situs in any city, village or borough in this state shall be listed and assessed where situated, without regard to where the principal place of business of the company is located.

There remains the question of whether the light and power lines located in North Redwood are entitled to exemption from ad valorem assessment because of the fact that they are owned by the City of Redwood Falls.

This office previously has ruled that if the sale of electricity by the municipality owning the plant, to private concerns outside the corporate limits, is confined to the sale of surplus and is incidental to the maintenance of the plant by such municipality for the purpose of furnishing itself and its inhabitants with electricity, the lines outside the corporate limits are exempt from ad valorem assessment as public property used for a public purpose, under the rules applied in the case of **City of Anoka v. City of St. Paul,** 194 Minn. 554.

Opinion Nos. 402 and 411, 1938 Report of Attorney General.

It is a question of fact whether the sale of electricity to private consumers outside the limits of a municipality is the sale of surplus, and incidental to the operation of the municipally owned plant.

It follows that if the sale of light and power by the City of Redwood Falls to the village and its inhabitants, is a sale of surplus electricity only, and is incidental to the maintenance of the plant for the use of Redwood Falls for the purpose of furnishing itself and its inhabitants with electricity, the light and power lines located in your village would not be subject to ad valorem assessment.

If the sale of light and power to the village and its inhabitants is not incidental or the sale of surplus, the question of whether the light and power lines located in your village are exempt from taxation is one which has never been passed upon directly by the Minnesota Supreme Court, and one upon which the courts of other states are not in accord. It cannot be answered with any degree of finality until such time as our court has passed upon it in an appropriate court action.

CHARLES P. STONE,
Special Assistant Attorney General.

North Redwood Village Attorney.

October 8, 1947. 414-D-7

206

Public property—Real property—Acquisition—Cities fourth class may acquire, maintain, operate housing for veterans without profit. Such property is free from taxation—MSA, Sec. 411.80.

Facts

"Marshall is a fourth class city under the general laws of this state. Following cessation of hostilities in the last war the city council recognized the existence of an emergency in respect to housing for returning veterans, and in the winter of 1945-1946 completed a housing project consisting of 12 houses and one laundry, all 20′ by 24′; money therefor was appropriated from the general fund; the houses are located on the municipal air field. The houses are all occupied by veterans of the last war.

"When launching this project the council estimated that the emergency would last three or four years; they believed that by charging a moderate rent during the emergency and by sale of the units to farmers when the emergency ceased, the city's investment might be substantially retired. It was considered that the city has authority to provide such relief for war veterans under section 411.40 M. S. A. which provides that

> " 'The common council . . . shall have full power and authority to make, enact, ordain, establish, publish, enforce, alter, modify, amend, and repeal all such ordinances, by-laws, rules, and regulations for the government and good order of the city . . . as it shall deem expedient.' Also under section 411.80 M. S. A. which provides that
>
> " 'Each city may purchase and hold real and personal estate for public purposes, sufficient for the convenience of the inhabitants thereof, and may sell and convey the same and the same shall be free from taxation.'

"The city clerk has informed me that an ad valorem tax was levied against said housing units as 'personal property on leased land,' and has paid such tax."

Questions

"(a) Whether the City of Marshall had authority to acquire and maintain the housing units above mentioned for the purpose of furnishing housing to war veterans in the situation above mentioned?

"(b) Whether such property is subject to taxation?"

Opinion

The City of Marshall was organized under the provisions of General Statutes 1894, Sections 1045-1195 (now M. S. A., C. 411). Section 411.80 provides as follows:

> "Each city may purchase and hold real and personal estate for public purposes, **sufficient for the convenience of the inhabitants thereof,** and may sell and convey the same and the same shall be free from taxation." (Emphasis ours)

The Attorney General has twice held, on September 28, 1945, and on October 11, 1945, file 59-A-40 that a city under home rule charter provisions authorizing the city to take and hold, by purchase, condemnation, gift or devise, and lease and convey any and all real, personal, or mixed property, within or without its boundaries, as its purposes may require, or as may be useful or beneficial to its inhabitants, was broad enough to authorize the city to lease temporary houses, portable shelter units and trailers on a dollar a year basis from the National Housing Agency, move such units from their location to the city in question and erect, operate and maintain them provided that they are leased only to veterans and servicemen and their families and that no profit was to be made. There appears to us no substantial difference between Section 411.80, quoted above, and the charter provisions referred to. It is our conclusion that the City of Marshall had the authority to acquire and maintain the housing units above mentioned for the purpose of furnishing housing to war veterans in the situation above mentioned, provided that no profit was made thereon.

Having ruled that the city had the authority to acquire and maintain housing units for the purpose of furnishing housing to veterans without profit thereon, it necessarily follows that under the specific language of Section 411.80, quoted above, the property so purchased and held is free from taxation.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Marshall City Attorney.

July 12, 1948. 414-A-11

207

Public property—Real property—Acquisition by village subsequent to May 1—Whether immune from taxation if acquired prior to extension of taxes—MS 1945, 270.07.

Facts

The Village of Carlton purchased a lot in the village for village purposes on September 20, 1945. At that time the taxes for 1945 had not been extended. The 1945 tax thereafter was extended and the lot appeared on the delinquent tax list for 1945.

Question

Is the village in a position to make application for cancellation and abatement of the 1945 tax? If not, is there any provision of law which will relieve the village from paying the 1945 tax?

Opinion

The Minnesota Supreme Court has stated that until the tax is extended, as evidenced by the county auditor's certificate, there is no specific tax in existence,

McCormick v. Fitch (1869) 14 Minn. 252 (Gil 185, 193)
and has held that all proceedings to assess real property for taxes, taken after the real property becomes public property, and all proceedings in attempting to enforce and collect the tax, are void.

Foster v. City of Duluth (1913) 120 Minn. 484, 140 N. W. 129

In re Delinquent Real Estate Taxes, (Polk County) (1931) 182 Minn. 437, 234 N. W. 691

Based upon these decisions, this office, in at least two opinions (Opinions 347 and 348, 1940 Published Opinions of the Attorney General) has ruled that immunity from taxation of public property attaches when the fee title of the property vests in the public authority, and that the county auditor has no authority to spread taxes against such property after the title has passed.

Assuming that the Village of Carlton acquired the lot in question for a proper municipal purpose and either immediately or within a reasonable time put the lot to such use, it is the opinion of this office that the 1945 tax should not have been spread against the lot.

There remains the practical question of how to remove the tax from the records in the office of the county auditor. We are of the opinion that an application to the Commissioner of Taxation made by the Village of Carlton for abatement of the tax under the provisions of Minnesota Statutes 1945, Section 270.07, is in order. It is our suggestion that if such an application is made, it recite specifically the public purpose for which the lot was acquired by the village, and whether the lot was put to such use immediately upon acquisition or within a reasonable time thereafter.

CHARLES P. STONE,
Special Assistant Attorney General.

Carlton Village Attorney.

March 11, 1947. 414-A-11

208

Railroads—Granted lands owned by railroads—6 Dunnell's Minn. Digest 9542, 9546, 9553.

Facts

There are a number of tracts of land in the county, ranging in size from 40 to 320 acres, which were part of original land grants made to various railroad companies and which are still owned by these railroad companies. These tracts do not constitute railroad right of way, and are not used for railway purposes. None of these tracts has ever been assessed for taxation purposes.

Question

Should these tracts of land be placed on the tax rolls?

Opinion

We assume that the tracts of land in question were granted to the railroad companies which now own them, by territorial charter, and that the tracts have remained in the ownership and possession of the same railroad companies ever since the date of their acquisition by them. Upon this assumption, we are of the opinion that the tracts of land should not be placed on the tax rolls, even though they do not constitute part of the right of way and are not being used for railway purposes. The charters granted to the railroad companies by the Territorial Legislature, specifically provided that the payment by the companies of a tax based upon the commuted system of gross earnings was to be in lieu of all other taxes, and that their granted lands should be exempt from all taxation until sold and conveyed by the companies. This policy was originally adopted to induce capital to engage in the hazardous enterprise of building railroads in an undeveloped country.

6 Dunnell's Minn. Digest, Taxation, Sec. 9542.

To quote from the opinion of Justice Mitchell in the case of **County of Traverse v. St. Paul, M. & M. Ry. Co.** (1898) 73 Minn. 417, 424:

> "The policy adopted was to provide for these companies paying to the state a certain percentage of their gross earnings in lieu of all other taxation on their railroads, and also on their granted lands until sold by the company; this latter being (unfortunately, as subsequent experience has proven) without limitation as to time."

The exemption from ordinary taxation which was granted by territorial charter, constitutes a contract which could not be impaired by subsequent legislation.

6 Dunnell's Minn. Digest, Taxation, Sec. 9546.

First Div. St. Paul & Pacific Ry. Co. v. Parcher (1869) 14 Minn. 297 (224).

If the tracts of land in question, after having been granted to the particular railroad companies by territorial charter, were sold by the companies and then later reacquired by them, we are of the opinion that they should be placed on the tax rolls. The territorial charter provisions granting exemption of granted lands from taxation provided for such exemption only until the lands were sold and conveyed by the companies. As to what constitutes a sale of granted lands, see 6 Dunnell's Minnesota Digest, Sec. 9553, and cases cited therein.

CHARLES P. STONE,
Special Assistant Attorney General.

Ottertail County Attorney.

March 29, 1948. 414-D-13

209

School buildings—Leased—School closed—Buildings and grounds leased as living quarters—Constitution, Art. IX, Section 1.

Question

"Are the school grounds and the school house situated thereon, in a closed school district, subject to taxation under Article IX, Section 1, of the Minnesota Constitution, where such buildings and grounds have been leased out for living quarters and regular monthly rent is paid to and collected by the School Board for the rental of such school building and premises?"

Opinion

Article IX, Section 1, of the Minnesota Constitution, exempts from taxation "public school houses" and "public property used exclusively for any public purpose." Whether the property in question is exempt from taxation under this constitutional provision involves facts which we do not have before us. We refer to such matters as whether or not the school has been permanently closed or merely closed for a temporary and limited period of time; whether, if merely temporarily closed, the care and preservation of the buildings requires their occupancy; and whether, if permanently closed, efforts are being made to sell the grounds and buildings and it is being rented only for such intervening period of time as may be necessary to effect the sale.

In an opinion dated March 7, 1928 addressed to the Minnesota Tax Commission, (Opinion No. 279 of the 1928 Published Opinions) our predecessors in office ruled on a somewhat similar question. A school district had purchased three lots for the purpose of constructing a new high school building thereon within the near future. Pending the beginning of construction work and as part of the consideration for the purchase of the lots, it allowed the former owners to remain in possession for two years. At the end of that time, due to the failure of banks in the county, the funds of the district were tied up and it was impossible to proceed with the building of the high school. The old buildings standing on the newly purchased property were therefore leased until the funds became available. It was ruled that if the lots in question were reasonably necessary as a site for the school building, and were acquired by the district with the intention of appropriating them to that use within a reasonable time, they were exempt from taxation and the temporary leasing thereof would not deprive them of that exemption.

We also call to your attention Opinion No. 360, 1944 Report of the Attorney General, which discusses the question of whether a county poor farm loses its exempt status by reason of the discontinuance of its operation and subsequent lease to a farmer for agricultural purposes.

The assessor should ascertain all of the facts. By application of the foregoing rules the problem probably can be solved. If the facts are not readily available or are in dispute thereby leaving any doubt as to whether the

property in question should continue to enjoy a tax exempt status, the property may be listed for taxation and assessed. Application for abatement of the tax can then be made under the provisions of M. S. A., Section 270.07, and the matter will reach the Commissioner of Taxation for his consideration and determination.

CHARLES P. STONE,
Special Assistant Attorney General.

Renville County Attorney.

February 4, 1947. 414-B-2

210

Social corporation—Recreational center—For members and families of Brotherhood of Lutheran churches—Constitution, Art. IX, Sec. 1.

Facts

The members of the Brotherhood of one of the Lutheran churches in Jackson County intend to incorporate under Minnesota Statutes 1945, Chapter 309. After incorporation the corporation plans to take title to a few acres of land which it will improve and upon which it will erect a building for use as a recreational center for the members of the corporation and their families.

Question

Will the property be entitled to exemption from ad valorem assessment?

Opinion

Article IX, Section 1, of the Minnesota Constitution, exempts from taxation "public burying grounds, public schoolhouses, public hospitals, academies, colleges, universities and all seminaries of learning, all churches, church property and houses of worship, institutions of purely public charity, public property used exclusively for any public purpose." Upon the facts which you have stated, the property in question cannot qualify under any of these classifications. The fact that all members of the corporation will be members of the Brotherhood of one of the churches does not make the property church property. Your inquiry does not suggest that charity is to be administered, but even if such were the case, the improvement cannot be considered property of an institution of purely public charity because the use of the center apparently will be limited to the members and their families. Commendable as this project may be in its social and civic purposes, we regret to advise that the constitution and statutes of this state do not permit exemption from ad valorem assessment in this instance.

CHARLES P. STONE,
Special Assistant Attorney General.

Jackson County Attorney.

February 20, 1947. 414-D-14

HOMESTEAD

211

Classification—Undivided interests owned by minor heirs not occupying property.

Facts

A was the owner of an undivided one-half interest in a tract of rural land. He died while residing upon the property. He left surviving him as his heirs three minor children—his wife had predeceased him. The minor children have been placed in other homes by their guardian.

Question

Is the property entitled to the homestead classification?

Opinion

Presumably, while A was occupying it, the property was receiving the homestead classification to the extent of 50 per cent of the first $4000 of true and full value, since A was the owner of an undivided one-half interest therein. If all three of the heirs continued to occupy the property as their homestead, the property would be entitled to receive the homestead classification to the same extent. If only one of the heirs occupied the property it would be entitled to the homestead classification only to the extent of one-sixth (one-third of one-half) of the first $4000 of full and true value.

See Opinion No. 371, 1936 Report of Attorney General. Opinion dated June 18, 1943 (File No. 232-D).

Where, as in the instant case, none of the heirs occupies the property as his homestead, the homestead classification cannot be granted at all, insofar as the undivided one-half interest owned by the three heirs is concerned.

The fact that the heirs are minor children and are prevented from occupying the property as their homestead only because of their minority and not by reason of their own desire, is not material. In order to be entitled to the homestead classification property must be both owned and occupied by the owner as his homestead.

See Opinion No. 424, 1938 Report of Attorney General.

In this case the property, while owned by the three heirs (to the extent of an undivided one-half interest), is not being occupied by them as their homestead.

CHARLES P. STONE,
Special Assistant Attorney General.

Grant County Attorney.

October 21, 1948. 232-D

LEVIES

212

Per capita tax—Limitation does not apply to levy of special benefit tax for housing and redevelopment purposes—Section 462.545, Subd. 6.

Facts

"The Village of Mountain Iron intends to establish a Municipal Housing and Redevelopment Authority pursuant to Section 462.425 Minnesota Statutes Anno., and is desirous of knowing whether it can make a special levy for the same."

Question

Does Subdivision 6, Section 462.545, permit the village to levy a special tax for redevelopment purposes **over and above** any present and existing tax limitation laws, including the per capita limitation law, Sections 275.11 and 275.13 to 275.161?

Opinion

All references in this opinion are to Minnesota Statutes Annotated unless otherwise expressly stated.

The applicable limitation found in Section 275.11 is a per capita limitation of $55.00 per capita for the year 1948 upon the total amount of taxes levied by or for any city or village having a population of 3,000 or less.

In order that we may answer your question, we must first determine whether the special benefit tax levy authorized by Section 462.545, Subdivision 6 is levied by or for the Village of Mountain Iron.

Subdivision 6, last referred to, provides that "All of the territory included within the area of operation of any authority shall constitute a taxing district for the purpose of levying and collecting special benefit taxes for redevelopment purposes as provided in this subdivision.", and authorizes under prescribed conditions levy by the authority of a special benefit tax "upon all property, both real and personal, within that taxing district." This subdivision then prescribes the manner and method by which such tax is levied, extended, spread, and included "as a part of the general taxes for state, county, and municipal purposes." It further provides for the keeping of the proceeds of such tax levy in a separate fund and a method of expenditure thereof. An authority is created in each municipality in this state which, however, may not transact any business until certain prescribed conditions have been met. Section 462.425, Subd. 1. An authority, as used in this opinion, means "a housing and redevelopment authority created or authorized to be created by the Municipal Housing and Redevelopment Act."

From the foregoing provisions of the Municipal Housing and Redevelopment Act, it appears clear that a tax levy made for an authority is for a

public body corporate and politic which is entirely separate and distinct from a village which is a municipal corporation. Assuming that the steps prescribed by the Municipal Housing and Redevelopment Act for the organization and activation of the housing and redevelopment authority in and for the Village of Mountain Iron have been properly taken, it is our opinion that the special benefit tax provided for by Section 462.545, Subdivision 6, is not a tax levied by or for the Village of Mountain Iron and does not come within the limitations of the per capita tax law found in Sections 275.11 and 275.13 to 275.161. This answers the inquiry which we believe you have in mind, although it does not answer the question as stated for the reason that the village does not levy a special benefit tax for redevelopment purposes under Section 462.545, Subd. 6.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Attorney for Village of Mountain Iron.

September 13, 1948. 519-I

213

School districts—Emergency tax anticipation certificates issued by school district the fiscal year of which begins July 1 and ends June 30 in the calendar year following may, in view of definition in law, at the time of general tax levy, include a sum sufficient to retire warrants issued that year—L. 1947, C. 575, MSA, Sec. 125.091.

Facts

In pursuance of authority of L. 1947, C. 575, independent school district No. 39, of St. Louis County at Eveleth, issued emergency tax anticipation certificates. Sec. 3 of the act requires that:

> "At the time of making its general tax levy in the year 1949 the district may levy a tax in excess of any existing limitations in an amount sufficient for the payment of any such certificates issued in the year 1948 with interest thereon. * * "

A similar provision relates to a tax levy in the year 1950 for the payment of such certificates issued in the year 1949, plus interest.

This district operates on a fiscal year basis, beginning July 1 and ending June 30 in the following calendar year.

Sec. 5 of the act defines the word "year" to mean calendar year "unless a district keeps its accounts on a school or fiscal year basis, in which event such word shall mean the school or fiscal year ending in the calendar year specified."

Questions

May the district in its general tax levy to be made in the calendar year 1948 include an amount required to pay the emergency tax anticipation certificates, plus interest, issued in the year 1948 and due in 1949; and in the year 1949, may the district at the time that it makes its general tax levy include an amount sufficient to retire the emergency tax anticipation certificates which may be issued in the year 1949 and become due in 1950?

Opinion

In view of the definition hereinbefore stated, in the latter half of either the years 1948 or 1949 at the time of the general tax levy, such sums may be included.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.

November 16, 1948. 519-M

214

School district—Rate—On agricultural lands for school maintenance—Not to be added to rate fixed by the county for tuition and transportation— L. 1947, C. 633, § 21, subd. 4 and 5; L. 1947, C. 228, § 1, subd. 1; MSA 127.05, 128.088.

Question

"Will the levies as provided in Laws 1947, Chapter 633, Section 21, Subdivisions 4 and 5, for county tuition and transportation be included in determining the average rate for school maintenance on similar lands in common school districts of the same county as provided in Laws 1947, Chapter 228, Section 1, Subdivision 1?"

Answer

The portion of Laws 1947, Chapter 228, Section 1, Subdivision 1 (M. S. A. 127.05) here material reads as follows:

"The rate of taxation of agricultural lands for school maintenance in any school district of the state maintaining a graded elementary or high school and in unorganized territory shall not exceed by more than ten per cent the average rate for school maintenance on similar lands in common school districts of the same county; provided such county has 20 or more common school districts; * * *."

Laws 1947, Chapter 633, Section 21, Subdivisions 4 and 5 (M. S. A. 128.088) provide for tax levies to be made by the county board for tuition and transportation.

The part of Section 127.05 above quoted was enacted in Laws 1941, Chapter 169, Article VIII, Section 5, and reenacted in Laws 1945, Chapter 408, and Laws 1947, Chapter 228, without change. It is obvious that "the rate of taxation of agricultural lands for school maintenance in any school district of the state" referred to therein was limited to not more than 10% above the average rate applied on agricultural lands in the common school districts of the same county. When that portion of Section 127.05 was enacted and reenacted there were no levies by the county for tuition and transportation as now provided in Section 128.088. Therefore, the limitation on the rate referred to in the law was clearly based on the average rate established pursuant to levies by the local boards of the common school districts of the county and by no other governmental subdivision.

The question now arises as to whether, in determining the rate of taxation of agricultural lands designated in Section 127.05 so as not to exceed by more than 10% the average rate for school maintenance applied on agricultural lands in common school districts of the same county, there should be included the rate imposed by the county for tuition and transportation under Section 128.088, Subdivisions 4 and 5.

As above stated, the only rates referred to in Section 127.05 as a basis for determining the average rate therein provided are the rates established pursuant to levies in and by school districts and by no other governmental subdivision. If the legislature, in fixing such a basis for limitation of rate as is provided in Section 127.05, had intended in the 1947 session to add to the common school district rates pursuant to levies imposed in and by common school districts the rate pursuant to a levy imposed by the county under Section 128.088 for tuition and transportation, Section 127.05 should have been amended to that effect. No such amendemnt was enacted, and there appears to be no reason for implying that the legislature intended that the rate referred to in Section 127.05 should be based on any rates of taxation other than the average rate of those applied pursuant to levies in and by the common school districts.

Therefore, in my opinion, the average rate of taxation on agricultural lands for school maintenance in the common school districts of the counties having 20 or more such districts must be ascertained on the basis of the rates on such lands fixed pursuant to levies in and by the common school districts and not by adding thereto the rate fixed by the county for tuition and transportation.

J. A. A. BURNQUIST,
Attorney General.

Commissioner of Education.

December 15, 1947. 519-M

215

School districts—For tuition of pupils residing in the county in a district wherein no secondary school is conducted under MSA, Sec. 128.088.

Facts

Joint Independent School District No. 84 is situated within St. Louis and Koochiching Counties. The school building is in Koochiching County. Your letter does not state whether this school district maintains secondary schools. But I have ascertained by inquiry that it does not.

Question

When computing the county tax levy for tuition for nonresident high school pupils from Koochiching County, should the levy be computed on the basis of the assessed valuation for the entire district or on the assessed valuation of that portion of the district that lies within Koochiching County?

Opinion

The levy of taxes has nothing to do with assessed valuation. When the county board levies taxes, it determines the number of dollars needed for a specific purpose and imposes the burden of raising and collecting that number of dollars as a tax upon the property of the district subject to the levy.

Under Sec. 128.088, I consider it the duty of the county superintendent of schools in Koochiching County to ascertain the place of residence of all pupils who attend a secondary school in Koochiching County. It is the duty of the county superintendent to report to the county board of every county in Minnesota the name and place of residence in that county of every pupil attending a secondary school in Koochiching County who resides outside the district wherein he attends school. The report to the county board should show the district attended by the pupil, the length of time attended by the pupil and the tuition charged for each pupil by the district which furnished the instruction.

When the county board receives this information and the information from other county superintendents who will report to the board, it then becomes the duty of the board to ascertain the sum to be paid as tuition on account of the attendance of all such pupils within the county who attended a secondary school outside the school district of his residence which school district maintained no secondary school. The county board will then make its tax levy under the rules stated in this section. This levy has nothing to do with the assessed valuation of the property of the county or of any school district therein, or the assessed valuation for pupil unit as appears to have been assumed by the superintendent when the question was submitted.

Each county will make its levy for the tuition of its resident pupils and it makes no difference whether they attended school in a joint school district, a special school district, or a district by some other designation.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.

August 1, 1947. 519-D-1

PERSONAL PROPERTY

216

Delinquent—Distress of personal property in collection of personal property taxes. Warrant authorizes seizure of property belonging to the person charged with taxes, not belonging to the person who purchased the property from the tax debtor—MSA, Sec. 277.03.

Facts

On May 1, 1947, "A" owned the personal property of the Canby Bakery. I presume that this means that "A" operated a bakery under the trade name of Canby Bakery. On May 17, he sold the assets of the Canby Bakery to "B." The assessment was made by the assessor against "Canby Bakery."

Question

Can the sheriff now, acting under the authority of MSA, Sec. 277.03, distrain sufficient goods and chattels of the Canby Bakery from "B," the present owner, to enforce payment of personal property taxes for the year 1947?

Opinion

M. S. A., Sec. 277.03, is authority to the sheriff, upon a receipt of the warrant of the clerk of the district court showing the taxes and penalties embraced in the delinquent personal property tax list, except those to which an answer has been filed, to proceed to collect the same. If such taxes are not paid upon demand, it is the duty of the sheriff to distrain sufficient goods and chattels **belonging to the person charged with such taxes,** if found within the county, to pay the same with the penalty specified and costs.

But from the facts stated, it appears that "B" is the owner of the goods and chattels which constitute the assets of the Canby Bakery. The warrant issued by the clerk is authority to the sheriff only to collect personal property taxes owing by "A" from the personal property belonging to "A."

Personal property taxes are assessed against the person and not against the property. If, on May 1, 1947, "A" was doing business under the trade

name of Canby Bakery, the assessment of the taxes against Canby Bakery is equivalent to the assessing of taxes against "A." The tax being assessed against "A," it cannot be collected from "B" and that appears to be the question involved in the problem. See Dunnell's Digest, Sec. 9263.

In **In re petition of S. R. A., Inc.,** 213 Minn. 487, on page 493, the court said, in speaking of real estate taxes:

> " * * * Proceedings to enforce them are strictly in rem. In that respect they differ from personal property taxes, which are enforced in personam, although assessed and imposed because of property ownership. * * "

In this opinion, we do not pass upon the question of who owns the property. That is a question of fact. But if the title passed from "A" to "B," then after the title passed, the property did not belong to "A," and the sheriff cannot treat it as being "A's" property and subject to seizure.

CHARLES E. HOUSTON,
Assistant Attorney General.

Yellow Medicine County Attorney.

May 10, 1948. 421-A-5

217

Household credit—Nonresidents occupying lake cottages during summer months—MSA, Sec. 272.02.

Facts

"There are a good many summer residents of Hubbard County who live in other states, but who own lake cottages in Hubbard County which are occupied by them anywhere from one to six months a year in the summer season."

Question

"Are such non-residents of the State of Minnesota owning summer cottages within the State, entitled to the householder's exemption provided for by M. S. A. 272.02 (8) (A)?"

Opinion

M. S. A. Section 272.02, insofar as here material, reads as follows:

"All property described in this section to the extent limited shall be exempt from taxation to-wit:

* * * * * * * * *

"(8) (a) Personal property of every household of the value of $100. The county auditor shall deduct such exemption from the total

valuation of such property as equalized by the Tax Commissioner assessed to such household, and extend the levy of taxes upon the remainder only. The term 'household' as used in this section is defined to be a domestic establishment maintained either (1) by two or more persons living together within the same house or place of abode, subsisting in common and constituting a domestic or family relationship, or (2) by one person.

" . . . The personal property of each household claimed to be exempt shall be limited to property in one taxing district, except in those cases where a single domestic establishment is maintained in two or more adjoining districts."

In our opinion, a lake cottage occupied by members of a family or even by the entire family for from 1 to 6 months each year during the summer season, is not a "household" as that word is defined in the Minnesota Statutes. The owner of such a lake cottage maintains his permanent place of abode elsewhere. That place of abode is where he is maintaining his domestic establishment. That is where he and his family are living together within the same house or place of abode, subsisting in common and constituting a domestic or family relationship.

Under the terms of Section 272.02 providing that the personal property of each household claimed to be exempt shall be limited to property in one taxing district, the Minnesota taxing officials have consistently ruled that a Minnesota resident who lives in a rented home or apartment, or in a home owned by him, in one taxing district, during the fall, winter and spring months, and who owns a lake cottage in another taxing district which he and his family occupy during the summer months, is not entitled to a household exemption on the household goods in the summer cottage, since he is already receiving a household exemption upon his household goods in the home in which he resides during the other months of the year. It would be manifestly unfair to apply a different rule to non-residents of the State of Minnesota.

CHARLES P. STONE,
Special Assistant Attorney General.

Hubbard County Attorney.

May 7, 1948. 421-B-5

218

Household credit—Other than Class 2 property—MSA, Sec. 272.02 (8).

Question

"Minnesota Statutes 272.02 (8) provides that personal property of every household of the value of $100 shall be exempt from taxation and then defines the term 'household' to be a domestic establishment maintained by two or more persons living together with the same house or

place of abode, subsisting in common and constituting a domestic or family relationship or by one person."

" * * * a question has arisen as to whether a farmer would be entitled to have the $100 exemption applied to property other than that listed in class 2 of the Personal Property Return. In connection with this problem it is noted that items in class 3A and 3D are assessed at 10% and 20% of the true and full value respectively whereas items in class 2 are assessed at 25% of true and full value."

" * * * Will you therefore kindly advise whether M. S. 272.02 (8) authorizes an exemption of personal property other than that listed in class 2 of the Personal Property Return?"

Opinion

This office previously has ruled that the personal property exemption provided in M. S. A., Section 272.02 (8) is applicable to any personal property which the taxpayer may own and is not limited to the household goods described in Section 273.13, Subdivision 3.

Opinion 327, 1940 Report of Attorney General.

Section 272.08 (8) specifically provides that the county auditor shall deduct the exemption from the total valuation of the property as equalized by the Commissioner of Taxation, and extend the levy of taxes upon the remainder only. The fact that class 3a, class 3d and class 2 property are assessed at different percentages, is therefore not material. If a local assessor, in assessing the personal property of a farmer, places a true and full value of $300 upon his household goods, $100 upon his grain, and $500 upon his livestock and machinery, the total assessed valuation of the farmer's personal property will be $185. (25 per cent of $300, 10 per cent of $100, and 20 per cent of $500). From the total assessed valuation of $185, the County Auditor will deduct the $100 exemption, and extend the levy of taxes upon the remainder of $85 assessed valuation.

CHARLES P. STONE,
Special Assistant Attorney General.

Becker County Attorney.

February 17, 1948. 421-B-5

219

Household credit—Physicians employed at state institutions—MS 1945, Sec. 272.02 (8).

Facts

Physicians employed by the Minnesota Department of Public Institutions at the Fergus Falls State Mental Hospital receive their living quarters

and subsistence from the State of Minnesota as a portion of their compensation. In some cases the living quarters furnished consist of an individual cottage located on the hospital grounds and in other cases, the doctor and his family occupy a two or three room apartment and bath. In all of these cases the quarters are furnished with furniture owned by the State of Minnesota except as for such items as radios, pianos, sewing machines, rugs, clocks, irons and toasters and all personal effects of the individuals occupying them. In some cases these doctors and their families prepare their own breakfasts on hot plates in their respective living quarters but, otherwise their meals are served to them in a central dining room where all of these families eat together. Their subsistence is furnished by the State of Minnesota and their laundry work is also done for them by the state.

Question

Are the doctors at the Fergus Falls State Hospital qualified to receive the household exemption from personal property taxes allowed under M. S. A. 272.02, under the facts outlined above?

Opinion

M. S. A., Section 272.02, provides as follows:

"All property described in this section to the extent herein limited shall be exempt from taxation:

* * * * * * * * *

(8) (a) Personal property of every household of the value of $100." The term "household" as used in Section 272.02 is defined to be a domestic establishment maintained either (1) by one or more persons living together within the same house or place of abode, subsisting in common and constituting a domestic or family relationship, or (2) by one person.

It is the opinion of this office that the physicians in question are householders within the definition of the term "household" and are therefore entitled to the $100 household exemption. Each physician, with his family, is maintaining a domestic establishment. The fact that the physician is not paying any rent for his living quarters, and that the quarters are furnished with furniture, and the fact that the physician and his family may eat all or part of their meals elsewhere, is not, in our opinion, material. Each physician and his family are living together within the same house or place of abode, subsisting in common and constituting a domestic or family relationship. That is all that is required.

CHARLES P. STONE,
Special Assistant Attorney General.

Fergus Falls City Attorney.

February 19, 1948. 414-A-9

220

Situs—Building contractor—Having registered office in village but place of business in adjoining township—MSA, Sec. 273.28.

Facts

A corporation which is engaged in the building contracting business has its registered office in the village. However, since incorporation it has never maintained an office in the village but has maintained its office and place of business in an adjoining township where all of its personal property is and always has been located. The corporation does not have any other offices in Minnesota.

Question

Where should the personal property of the corporation be assessed?

Opinion

The pertinent statutory provisions are as follows:
M. S. A., Section 273.26:

> "Except as otherwise in this chapter provided, personal property shall be listed and assessed in the county, town or district where the owner, agent, or trustee resides."

M. S. A., Section 273.28:

> "The capital stock and franchises of corporations and persons, except as otherwise provided, shall be listed and taxed in the county, town or district where the principal office or place of business of such corporation or person is located in this state; if there be no such office or place of business, then at the place in this state where such corporation or person transacts business."

Section 273.26 lays down the general rule of situs of personal property for ad valorem assessment purposes. To that general rule there are several exceptions. One of these exceptions is that dealing with corporations. Section 273.28 provides that the capital stock and franchises of corporations, except as otherwise provided, shall be listed in the taxing district where the principal office or place of business of the corporation is located in Minnesota. As far back as 1894, this office has ruled that the words "capital stock and franchises" include all forms of personal property owned by the corporation.

Opinion No. 204, 1894 Report of Attorney General.

To our knowledge, that opinion has not been challenged since that time. It has been followed by this office as recently as 1941.

See Opinion 329, 1940 Report and Opinion dated March 3, 1941 (File No. 421-C-28).

According to your statement of facts, the principal office or place of business in Minnesota of the corporation in question is located in the township adjoining the village. The fact that the corporation has its **registered** office in the village is not important where, as here, the registered office is maintained as a mere formality to comply with Minnesota Statutes 1945, Section 301.33, and the **principal** office is located elsewhere.

It is therefore the opinion of this office that the personal property of the corporation in question has its situs for ad valorem taxation in the township adjoining the village.

CHARLES P. STONE,
Special Assistant Attorney General.

Cass County Attorney.

March 12, 1948. 421-A-17

221

Situs—Custom threshing machine—Temporarily outside state—MSA, Sec. 272.01.

Facts

"A resident of the Village of Lakefield, Jackson County, Minnesota, is the owner of a threshing machine with which he does custom threshing.

"This threshing machine was assessed by the assessor on May 1, 1946, and it now appears that the owner took the machine to the State of Oklahoma in the fall of 1945 where he did custom threshing, and finally returned the machine to Minnesota in October, 1946. During all this time his household goods were located in Lakefield, Minnesota, where his wife had continued to reside.

"The owner has now made an application to the County Board requesting that the assessment on the threshing machine be eliminated on the ground that the machine was out of the state on May 1, 1946."

Question

Was the threshing machine subject to the May 1, 1946 assessment for ad valorem tax purposes, in the Village of Lakefield?

Opinion

M. S. A., Section 272.01, provides that all personal property in this state and all personal property of persons residing therein, is taxable, except such as is by law exempt from taxation. Although it would seem that the legislative intent was that all personal property of a Minnesota resident is to be assessed, even though the property may be outside the state, our

predecessors in this office have ruled that tangible personal property **permanently** located in another state, so that it has acquired an actual situs there, and having no connection with this state except that its owner resides here, is not taxable in Minnesota.

Opinion 484, 1914 Report of Attorney General.

In a more recent opinion, this office has ruled that where a Minnesota resident owning a hive of bees customarily removed them from Minnesota in November and brought them back into the state about May 15th of each year, the bees were subject to assessment in Minnesota on May 1 even though at that date they were **temporarily** out of the state.

Opinion 343, 1942 Report of Attorney General.

This ruling was based upon the reasoning that where the personal property has not acquired an actual situs elsewhere, the owner of the property is not deprived of his property without due process of law by reason of the taxation thereof by the state of his residence.

In the instant case the commercial threshing machine was outside the state for approximately a year. Whether it acquired an actual situs elsewhere is a question of fact which the County Board will have to decide. If the owner of the machine merely started in Oklahoma and worked his way north following the harvest, it would seem clear that the machine could not have acquired an actual situs elsewhere. The fact, which we gather from your letter, that the owner of the machine stayed with it during the entire period of time would also indicate that it was outside the state only temporarily.

While the solution to your problem rests principally upon consideration of fact rather than law and for that reason cannot be definitely supplied by this office, in the absence of any facts other than those stated in your letter, it would appear that the machine was outside the state only temporarily, and was correctly assessed in Minnesota on May 1, 1946.

CHARLES P. STONE,
Special Assistant Attorney General.

Jackson County Attorney.

February 13, 1947. 421-A-17

222

Situs—Livestock—Grain—Machinery—Farm in two districts—MSA, Sec. 273.26.

Facts

Independent School District No. 24 is located within the corporate boundaries of Sleepy Eye, Minnesota. The farm of Oliver F. Martin is located partly in School District No. 24 and partly in adjoining School District No. 30. The dwelling house on the farm, which Mr. Martin occupies, is

within the boundaries of School District No. 24. The barn, granary and other outbuildings are within the boundaries of School District No. 30. Mr. Martin's livestock, grain and machinery have been assessed in the taxing district which includes School District No. 30.

Question

Where should the livestock, grain and machinery be assessed?

Opinion

It is the opinion of this office that Mr. Martin's livestock, grain and farm machinery should be assessed in the village of Sleepy Eye, where he resides.

M. S. A., Section 273.26, provides as follows:

> "Except as otherwise in this chapter provided, personal property shall be listed and assessed in the county, town, or district where the owner, agent or trustee resides."

There are several exceptions to the above general rule, but none of them, in our opinion, applies to this case. Since the owner of the livestock, grain and machinery resides in the village of Sleepy Eye, the situs of such personal property, for purposes of ad valorem taxation, by the plain provision of Section 273.26, is in that taxing district.

We refer you to Opinion No. 436 of the 1938 Report of the Attorney General, which comes to the same conclusion on a similar set of facts.

CHARLES P. STONE,
Special Assistant Attorney General.

Attorney for School District No. 24, Brown County.

April 5, 1948. 421-A-17

223

Situs—Manufacturer—Lime and rock crushing business—MSA Sec. 273.29.

Facts

"..... Bros. who live in the Village of Harmony, Minnesota, operate a lime and rock crushing business. Their business office is located in the Village of Harmony as well as their garage for trucks and repair shop for equipment. However, the quarry from which they obtain their rock is located in Harmony Township. They lease the land on which the quarry is located from the owners of the land. At the quarry they obtain the rock and crush the rock, thereby producing crushed rock and lime for the use of farmers in this community. All of their equipment at the quarry is portable and can be moved but not all of it is on wheels."

Question

"On the basis of the above facts should the equipment of ..... Bros. be assessed in the Village of Harmony or in the Township of Harmony?"

Opinion

We assume that ..... Bros. is a partnership and not a corporation. The pertinent statutory provisions are as follows:

M. S. A. Sec. 273.26. "Except as otherwise in this chapter provided, personal property shall be listed and assessed in the county, town, or district where the owner, agent, or trustee resides."

M. S. A. Sec. 273.29. "The personal property pertaining to the business of a merchant or of a manufacturer shall be listed in the town or district where his business is carried on. * * * "

Section 273.26 lays down the general rule of situs of personal property for ad valorem assessment purposes. To that general rule there are several exceptions. The only one pertinent here is that dealing with personal property of merchants and manufacturers. Section 273.29 provides that the personal property pertaining to the business of a merchant or of a manufacturer shall be listed in the taxing district where the manufacturing business is carried on.

In our opinion, the firm of ..... Bros., in the quarrying of rock and the production of crushed rock and lime therefrom, is a manufacturer within the following definition of that term found in M. S. A., Section 272.03:

" 'Manufacturer' includes every person who purchases, receives, or holds personal property for the purpose of adding to its value by any process of manufacturing, refining, rectifying, or by the combination of different materials, with a view of making gain or profit thereby,"

and within the definition adopted by the Minnesota Supreme Court that a manufacturer is one who by labor, art or skill transforms raw materials into some kind of a finished product or article of trade.

See **Graff v. Minnesota Flint Rock Company** (1920) 147 Minn. 58, 179 N. W. 562.

We believe that the production from the quarry of crushed rock and lime clearly constitutes manufacturing within these definitions.

Since the manufacturing operation is carried on in the Township of Harmony, it follows that the personal property pertaining to the rock crushing and lime business should be assessed in the Township of Harmony.

CHARLES P. STONE,
Special Assistant Attorney General.

Fillmore County Attorney.

October 22, 1948. 421-A-17

REAL PROPERTY

224

Unsurveyed island—County auditor—Duty to certify as to payment of taxes upon unsurveyed island and to list the same for assessment—Minn. St. 1945, § 273.03, as amended by L. 1947, C. 331; Minn. St. 1945, § 272.12.

Facts

"The county auditor has a warranty deed and has asked how the transfer can be made upon his records. Such deed purports to transfer the following described property:

> "That certain island in Long Lake lying north of Government Lot Eight (8) in Section Five (5), and being an unsurveyed and unnumbered lot or island in said Lake and section, in township one hundred thirty-nine (139) north, Range twenty-nine (29) west, of Fifth Principal Meridian, Cass County, Minnesota.

"A 55c Revenue Stamp has been secured. The County Treasurer has endorsed taxes for the year 1946 as being paid.

"We know that if this is an unsurveyed island it is still government property, or possibly it might belong to Lot 8."

Question

"How shall the transfer be made and how may taxes be assessed against this particular tract of land?"

Opinion

It is the duty of the county auditor when a deed or other instrument conveying land is presented to him for transfer to certify, "taxes paid and transfer entered," if the taxes have been paid, or, "paid by sale of land described within." It is the duty of the register of deeds or the registrar of titles to refuse to receive or record the instrument unless it bears the auditor's certificate showing that taxes have been paid. If the land is properly described, the county auditor is not vested with any discretion in determining whether such certificate should be made. If there are no taxes unpaid against the land so described, it is his duty to make the appropriate certificate upon the conveyance. Minnesota Statutes 1945, Section 272.12. If the land had not theretofore been upon the tax rolls, it is the duty of the auditor, when he makes out the real property assessment book, to add the description of such land to the list of lands in the same manner as he would if the land were state trust fund lands which were being conveyed for the first time. Id. § 273.03, as amended by Laws 1947, Chapter 331. The land would be described in the assessment book in the same manner as described in the conveyance.

The foregoing answer to your question is predicated upon the auditor determining that the description which is given in the conveyance is sufficiently definite and certain so that he can identify the parcel of land which is to be assessed. If the auditor finds that the description is not sufficiently definite and certain to enable him to identify the parcel of land sought to be conveyed, he may refuse to make his certificate on the ground that it is impossible for him to certify to the payment of taxes upon the land because of the vagueness and indefiniteness of the description.

This answers your question.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Cass County Attorney.

September 5, 1947. 357

225

Urban or Rural—Plat not recorded by May 1—MSA, Sec. 273.13.

Facts

A tract of real property containing approximately 20 acres, described by metes and bounds, was included within the corporate limits of the city of Austin some five or six years ago. Until the spring of 1948 the tract was used as farm land. In the spring of 1948 the owners decided to plat the property. The plat called for 66 lots, with appropriate streets. The owners filed a petition with the city council to have the plat accepted, and on April 16, 1948 it was accepted by resolution of the council. Prior to that time the property had been staked out into lots, and the streets were laid out. The plat was not filed for record in the office of the register of deeds prior to May 1, 1948, because of discrepancies in description discovered by the city engineer, necessitating a resurvey of part of the property. As of May 1, 1948 there were no improvements on the property.

The city assessor of Austin would like to assess the property as platted property at about $300 per lot for a total of $19,800 (66 lots) but the owners insist that because the plat was not of record on May 1, 1948, the property must be assessed as farm land. If the assessor is required to assess the tract as farm land, he feels that he will be limited to an assessment of about $2100 (20 acres at $105 per acre).

Question

"Can the City Assessor assess this property as platted property or must he assess it as farm land?"

Opinion

M. S. A., Section 273.03, provides that the county auditor shall annually make out, in the real property assessment book, complete lists of all lands or lots subject to taxation, showing the names of the owners, the number of acres, and the lots or parts of lots or blocks, included in each description of property. It further provides that the assessment books must be in readiness for delivery to the assessors on or before the third Monday in April of each year. Since the plat in question was not filed for record in the office of the register of deeds until after May 1, 1948, the county auditor necessarily was limited to using the same metes and bounds description of the 20-acre tract which presumably had been in use in prior years, when he made up the 1948 city of Austin real property assessment book. He would have had no authority to use lot descriptions until after the plat had been both accepted by the city council and filed for record in the office of the register of deeds.

Opinion dated July 30, 1941 (File No. 474-J-2).

Since the assessor has no authority to change the descriptions appearing in his real property assessment book, it follows that the city assessor of Austin must assess the property in question as one 20-acre tract and not as 66 separate lots.

But this does not mean that the assessor must **value** the tract as farm land. M. S. A., Section 273.11 provides that all property "shall be assessed at its true and full value in money," and that the assessor shall value each description of property "at such sum or price as he believes the same to be fairly worth in money." Section 272.03 provides that "full and true value" means "the usual selling price at the place where the property to which the term is applied shall be at the time of assessment; being the price which could be obtained therefor at private sale and not at forced or auction sale." And Section 273.12 provides that in determining the value of lands for the purpose of taxation, it shall be the duty of every assessor "to consider and give due weight to every element and factor affecting the market value thereof, including its location with reference to roads and streets and the location of roads and streets thereon or over the same." If the assessor follows these statutory provisions, we see no reason why he should have any hesitancy in determining that the 20-acre tract of land in question, situated within the corporate limits of the city and staked out into lots, with streets laid out, thus indicating its intended use in the near future as development property, is worth much more, as between a willing seller and a willing buyer on May 1, 1948, than ordinary farm land.

Nor does it follow, because the assessor cannot assess the property as 66 separate descriptions, that he must **classify** it as farm land. M. S. A., Section 273.13 provides that "all real estate which is rural in character and devoted or adaptable to rural but not necessarily agricultural use" (except homestead property), shall be valued and assessed at 33⅓ per cent of the full and true value thereof, and that "all other real estate" (except homestead property), shall be valued and assessed at 40 per cent of its full and true value. The fact that land has not been "platted" is not important.

State ex rel Chase v. Minnesota Tax Commission (1916) 135 Minn. 205, 160 N. W. 498.

It is the character of the real estate, together with its use or adaptability to use, which controls.

Opinion 391, 1944 Report of Attorney General.

One of the best expressions by a court on the subject of the distinction between "rural" and "urban" real estate is that of the Pennsylvania Supreme Court in the case of **City of Philadelphia v. Brady**, 308 Pa. 135, 162 Atl. 173:

> "As regards liability for assessment, whether particular property is 'rural' or 'urban' depends on character of locality, streets, lots, improvements, and market value of property and neighboring property. In such case, if the buildings and improvements in the neighborhood are few and scattered, if they partake of the character of the country rather than of the city or town, and are occupied by persons engaged in rural pursuits, the locality should be considered 'rural', but, if the houses and improvements partake of the character of the city or town, and are mainly occupied by persons engaged in city pursuits, the locality should be considered as 'urban' and not 'rural'."

Whether the 20-acre tract of land in question is "rural in character and devoted or adaptable to rural use," or is urban in character and devoted or adaptable to urban use, of course, is a question of fact which must be determined by the city assessor. We merely point out that the facts may be such as to warrant his classifying the tract as urban property. To aid him in making his determination, we suggest that he thoroughly familiarize himself with Sections 268 through 271 of the 1948 Minnesota Assessors' Manual, which contain an excellent treatment of the subject of the classification of "rural" and "all other" real property.

CHARLES P. STONE,
Special Assistant Attorney General.

Austin City Attorney.

June 2, 1948. 474-J-2

TAX MONEY

226

Distribution—Apportionment—Cigarette tax and liquor tax—To villages—Auditor cannot take into account increase in population of village arising from annexation of new territory—L. 1947, C. 601, L. 1947, C. 619.

Facts

"According to the 1940 federal census the Village of New Brighton has a population of 648 persons. On September 3, 1946, said village

duly annexed certain additional territory, including a population of 594 persons, which facts were duly certified to the secretary of state on said date, and thereafter became a part of the official records of said office, as provided by law. Said village recently received approximately $1,059.00 as its share of the February 15, 1948, apportionment of said tax money for the preceding six months, which was based on said population of only 648 persons, whereas, in fact said village had at least a total population of record of 1242 persons on said date of September 3, 1946."

Questions

"1. Is the Village of New Brighton entitled to an apportionment of said tax money based on said total population of 1242 persons as shown by said official records of the secretary of state on September 3, 1946? If so, from what date?

"2. Should said official annexation census be included by the secretary of state in certifying the population of said village to the state auditor as provided by said statutes?

"3. If so, would the state auditor be authorized to apportion and pay said tax money according to such certificates of population?"

Opinion

The distribution of the liquor tax (Laws 1947, Chapter 601) and the distribution of the cigarette tax (Laws 1947, Chapter 619) is based upon the last federal census. No provision is made relating to the incorporation of additional territory into an old village. There is a provision in both laws as to newly incorporated municipalities, but New Brighton is not newly incorporated.

It is my opinion that the distribution of the liquor tax to the village of New Brighton must be based upon the 1940 census, as the law provides.

As there is no provision in the law for increasing the amount of the distribution when a village acquires additional population by annexing new territory, it is my opinion that the 1940 census is the basis of apportionment.

RALPH A. STONE,
Assistant Attorney General.

Attorney for Village of New Brighton.

March 8, 1948. 830-C

227

Distribution—Apportionment—Cigarette tax—Money received by county goes into general revenue fund—L. 1947, Ch. 619 § 13. Liquors—Excise tax—30%—L. 1947, C. 601, Sec. 2.

Questions

1. Under L. 1947, C. 601, Sec. 2, Subd. 2, should the county apportion liquor licenses and fees among the towns on the basis of their population?

2. Under L. 1947, C. 619, Sec. 13, Subd. 1, should the county transfer the cigarette tax moneys to the general revenue fund of the county to use for county purposes?

Opinion

In L. 1947, C. 601, Sec. 1, Subd. 1, I see no reference to liquor licenses and fees. An excise tax is imposed upon wines and liquors. Subd. 2 of Sec. 2 makes provision for dividing the tax. Thirty per cent of the tax is set aside to a separate account. It is apportioned by the state auditor to the several counties, cities, villages and boroughs. The proportion which each such municipality shall receive, based upon population, is provided. The state auditor, as provided in Subd. 3, issues his warrant to each such municipality. Subd. 2 provides that the amount thus received by the county is apportioned by the county among the towns of the county.

The cigarette tax money which the county receives under L. 1947, C. 619, Sec. 13, Subd. 1, is for county general governmental purposes, since it is not earmarked for a special fund. Accordingly, it becomes a part of the general revenue fund.

CHARLES E. HOUSTON,
Assistant Attorney General.

Waseca County Attorney.

February 20, 1948. 554-E

228

Distribution—Apportionment—Liquor—Excise tax—Distribution of proceeds by county to town—Town board has no authority to refuse its apportionment of the money.

Facts

"The Town Board passed a resolution not to accept their share of the liquor tax money distributed to them under Chapter 601, Section 2, Subdivision 2, Minnesota Laws, 1947.

"I might add that there has never been a vote of the people on this matter but that the town officials personally do not want to have anything to do with anything involving liquor."

Question

Whether the town board has a legal right to refuse the liquor tax money apportioned to it under said law.

Opinion

The answer to this question is in the negative. The town board possesses no power to pass upon the question whether the town shall or shall not

receive the liquor tax money. The money is apportioned to it by the county auditor and paid by county warrant drawn in favor of the town treasurer. It is the town treasurer's duty to accept and cash the warrant without consulting the town board.

RALPH A. STONE,
Assistant Attorney General.

Pine County Attorney.

September 29, 1948. 554-E

229

Distribution—Apportionment—Liquor—County's share of liquor tax to be redistributed to towns in proportion to population—County's share of cigarette tax to be retained by county—Laws 1947, Chap. 601, Laws 1947, Chap. 619.

Opinion

The 1947 legislature passed a law increasing the tax on intoxicating liquor. It passed another law increasing the tax on cigarette sales.

THE TAX ON INTOXICATING LIQUOR

Laws 1947, Chapter 601, amended M. S. 1945, § 340.60. Said law increased the state tax on intoxicating liquors. The amendment to said § 340.60 provides that 30 per cent of the proceeds of the taxes as so increased should be set aside in a separate fund to be paid to the several counties, cities, villages and boroughs of the state. The county auditor is to apportion the fund on February 15 and August 15 of each year, and it is provided:

> "Each county, city, village, and borough shall receive from the apportionment account an amount bearing the same relation to the total amount to be apportioned as its population bears to the total population of all the counties, cities, villages, and boroughs of the state; provided that for the purposes of this act the population of the county shall be that part of its population exclusive of the population of the several cities, villages and boroughs in said county. Each county shall apportion the amount received by it to the various towns of the county in proportion to their population, except that the county shall retain for its use any portion attributable to the population of unorganized territory within the county."

The state auditor issues to each county the amount apportioned to it under this section of the law. Upon receipt thereof the county is to pay the amount received by it from the liquor tax to the various towns of the county in proportion to their population, except that the county shall retain for its use any portion attributable to the population of unorganized territory within the county.

As to the amount of liquor tax received by the county, it is the duty of the county auditor to distribute it to the various towns in accordance with this statute, retaining for the use of the county such portion as is attributable to the population of the unorganized territory within the county.

What is said above applies only to the distribution of the amount realized from the liquor tax.

THE CIGARETTE TAX

Laws 1947, Chapter 619, coded as M. S. A. 297.01, et seq., and particularly M. S. A. 297.13. This law imposed a tax upon the sale of cigarettes. This tax is collected by means of the sale and affixing of tax stamps.

The stamp tax money in the first instance goes into the state treasury. Section 13 of said act (M. S. A. 297.13) provides as follows:

> "All revenues derived from taxes, penalties, and interest under this act and from license fees and miscellaneous sources of revenues shall be deposited by the commissioner in the state treasury and credited one-third to a special fund to be known as the 'Cigarette Tax Apportionment Fund,' which fund is hereby created, and the balance to the general revenue fund. The revenues in the apportionment fund shall be apportioned as provided in Subdivision 2 to the several counties, cities, villages and boroughs in this state. Each county, city, village and borough shall receive from the apportionment fund an amount bearing the same relation to the total amount to be apportioned as its population bears to the total population of all the counties, cities, villages and boroughs in this state; except, that for the purposes of this act the population of a county shall be that part of its population exclusive of the population of the several cities, villages and boroughs within the county."

The subdivision of the law following that last above quoted provides that the state auditor shall apportion the amount credited to the special fund on February 15 and August 15, and "issue his warrant in favor of the treasurer of each county, city, village and borough." There is no provision in this law that the county must redistribute any part of the amount which it receives to any other political subdivision. The warrant issued to the county for its share of the cigarette tax belongs to the county and should go into the general fund.

RALPH A. STONE,
Assistant Attorney General.

Marshall County Attorney.

February 20, 1948. 554-E

TAX FORFEITED LANDS

230

Conveyance—Housing and Redevelopment Authority—Conveyance of tax-forfeited land held under conditional deed effects reversion.—MSA § 282.01, Subd. 1; L. 1947, C. 487, Art. V, Sec. 24.

Facts

"The Housing and Redevelopment Authority of the City of Saint Paul has submitted the following matter for the consideration of the Division of Housing and Redevelopment.

'The Housing and Redevelopment Authority of the City of St. Paul proposes to acquire certain land which has been forfeited for non-payment of taxes to the State of Minnesota and to turn said land over to a redevelopment corporation for housing use. Your attention is called to Article 3, Section 8, Subdivision 1, of the Municipal Housing and Redevelopment Act, which provides:

"An authority shall be a public body corporate and politic and shall have all the powers necessary or convenient to carry out the purposes of this act";

and to Section 40, Subdivision 2, which provides

"Every redevelopment company organized and operated pursuant to the provisions of this article is declared to be an instrumentality of the state, organized and operating to carry out the public uses and purposes of this act."

'It is therefore apparent that both the Housing Authority and the redevelopment company are instrumentalities of the State of Minnesota. The Municipal Housing and Redevelopment Act provides for certain benefits, including that of tax exemption for qualified redevelopment corporations and provides for the power to dispose of said project by the redevelopment company after termination of tax exemption or upon the payment to the municipality of the total of all the accrued taxes for which an exemption was granted. At such time, it would appear that the public purpose for which the redevelopment corporation was organized had been fulfilled.

'Section 282.01 M. S. A. provides for the disposition of tax-forfeited lands. One of the methods is through conveyance by the commissioner of taxation to any governmental subdivision for any authorized public use without the payment of any consideration therefor. The act further provides that when any governmental subdivision to which tax-forfeited land has been conveyed for a specified public use shall fail to put such land to such use or shall abandon such use, the title shall revert to the State of Minnesota.

Under the proposed facts, would the title to tax-forfeited land held by a redevelopment company revert to the State of Minnesota upon the termination of the tax exemption period or upon conveyance by the redevelopment company?'

"The statement of the St. Paul Housing and Redevelopment Authority requires additional information with respect to one matter. Redevelopment companies organized pursuant to Article IX of the Minnesota Municipal Housing and Redevelopment Act may obtain the special benefits conveyed by the act and may be subject to special covenants between the local housing and redevelopment authority and the company even though tax exemption has expired or tax exemption has never been granted in connection with a particular project. The question concerning the disposition of property to third parties arises when the redevelopment company undertakes to convey the property to a third party free of the special limitations and the special privileges contained in the act. The situation, therefore, is similar to the situation contemplated by Article V, Section 24 of the state act which authorizes housing and redevelopment authorities to acquire sites in redevelopment areas and to convey those sites in accordance with the provisions of the act to any private individuals, firms, corporations, partnerships, insurance companies, or other private interests or public agencies."

Question

"Would title to tax-forfeited land conveyed to a housing and redevelopment authority pursuant to Section 282.01 M. S. A. and conveyed by the housing and redevelopment authority pursuant to Section 24 of the state act, or conveyed by the housing authority to an Article IX redevelopment company which transfers that property to a third party free of the Article IX obligations and privileges, revert to the State of Minnesota upon such conveyance?"

Opinion

M. S. A., Sec. 282.01, Subd. 1, provides in part:

"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."

There are then two separate provisions relating to the conveyance of tax-forfeited land for public purposes. The first provision authorizes the outright acquisition of tax-forfeited land by "any organized or incorporated **governmental subdivision** of the state" or by "any **state agency**" upon the payment of not less than their value as determined by the county board. The second provision authorizes conveyance of tax-forfeited land to any

governmental subdivision upon condition and subject to reversion. In order to answer your questions, it is necessary to determine whether the authority is a governmental subdivision, or a state agency or both. It is likewise necessary to make this determination as to a redevelopment company.

The terms "governmental subdivision" and "instrumentality of the state" are not synonymous terms. A governmental subdivision is always an instrumentality of the state, but the converse is not always true. An instrumentality of the state is not always a governmental subdivision. A governmental subdivision exercises some of the attributes of sovereignty delegated to it by the state within specific territorial boundaries. As commonly used in this state, it refers to a county, city, school district or some other subdivision such as the Minneapolis-St. Paul Sanitary District, **Barmel v. Minneapolis-Saint Paul Sanitary District**, 201 Minn. 622, 277 N. W. 208; see also M. S. A., Sec. 353.01, Subd. 6. An instrumentality of the state is one chosen by the state to accomplish one or more specific governmental purposes without the delegation of the attributes of sovereignty such, for example, as police power or the power of taxation. See **McCulloch v. Maryland**, 4 Wheat. 316, **Osborn v. Bank**, 9 Wheat. 738, **Smith v. Kansas City Title Co.**, 255 U. S. 180. The Housing and Redevelopment Authority of the City of St. Paul is a governmental subdivision. **Lennox v. Housing Authority of City of Omaha**, 290 N. W. 451, 459. A redevelopment company organized pursuant to L. 1947, Ch. 487, Art. IX, Sec. 37, is an instrumentality of the state, ibid. Sec. 40, Subd. 2, but does not have the elements which would make it a governmental subdivision. With these distinctions before us, we will reexamine the provisions of M. S. A., Sec. 282.01, Subd. 1, quoted above.

It is our conclusion that, upon compliance with this provision, the commissioner of taxation may convey as therein provided to the authority to be used by it for a proper specified public purpose, but he may not convey tax-forfeited land under this provision to a redevelopment company. Consideration of all the pertinent provisions of Subd. 1 makes it clear that the statute contemplates use of the conveyed land for a public purpose which the governmental subdivision to which the land is conveyed may lawfully carry on. In our opinion, conveyance to a redevelopment company or any other person or corporation by a governmental subdivision of tax-forfeited land conveyed to it on condition under authority of the provision here under consideration would effect a reversion of the title to the land to the state as trustee for the appropriate taxing subdivisions. The provisions of L. 1947, Ch. 487, Art. V, Sec. 24, authorizing an authority to dispose of its property do not in any manner affect the conditions imposed upon its title to tax-forfeited land acquired under authority of M. S. A., Sec. 282.01, Subd. 1.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Commissioner of Administration.

November 23, 1948. 430

231

Deed—Certificate of payment of taxes on deeds offered for record—Deeds presented by repurchaser under 282.241—May have deed certified unless there are taxes accrued since repurchase under the installment plan— MSA 282.07-282.241.

Facts

"A repurchaser of tax-forfeited lands in this County who has repurchased under the installment plan has presented several quit claim deeds to our County Auditor covering these lands, and has asked for a certificate by the County Auditor to the effect that the taxes are paid and for a transfer for the same on the tax records without paying up the unpaid installments due on the repurchase contract."

I infer from the foregoing statement that the repurchase was made by the former owner pursuant to M. S. A. 282.241.

Question

Whether the county auditor should make a certificate upon these deeds "Taxes paid and transfer entered" so that the quit claim deeds referred to can be recorded.

Opinion

You are of the opinion that the county auditor should not make such a certificate until all the installments due on the repurchase contract are paid in full. It is necessary to consider the effect of the forfeiture of the lands for taxes.

The effect of the forfeiture to the state is determined by M. S. A. 282.07, which requires the county auditor upon such forfeiture to immediately "cancel all taxes and tax liens appearing upon the records, both delinquent and current, and all special assessments, delinquent or otherwise."

Hence it follows that when these lands forfeited, all the back taxes and assessments were canceled and the lands became subject to sale.

A repurchase of the lands by the former owner under M. S. A. 282.241, is but another means of disposing of the same in lieu of disposing thereof at public sale, and I think the effect is the same as if the same had been disposed of at public sale.

Instead of determining the sale price by bids at the time of sale, the sale price is determined as provided in 282.241.

I think, therefore, that the holder of the quitclaim deeds would be entitled to have the same recorded, unless taxes have accrued and are unpaid which are not included in the sale price.

RALPH A. STONE,
Assistant Attorney General.

Aitkin County Attorney.

December 13, 1948. 373-B-17-D

232

Repurchase—Application—County Board must pass on each individual application to repurchase—Minn. St. 1945, § 282.241, as amended by L. 1947, C. 490.

Question

Whether or not the County Board, under the Statute in question, has a right to pass a general resolution authorizing re-purchases under the Chapter in question or whether or not it is necessary for the Board, under the Chapter, to pass an individual resolution upon individual applications to repurchase under the Chapter in question.

Opinion

Laws 1945, Chapter 296, which became Minnesota Statutes 1945, Sections 282.241 to 282.324, inclusive, as well as the repurchase laws preceding it, dealt with the right to repurchase a specific tract of land forfeited for taxes by the persons given the right of repurchase by the applicable law. There is nothing in the amendment of Section 282.241 by Laws 1947, Chapter 490, which changes this. Chapter 490 imposes a restriction upon the right of repurchase by requiring adoption of a resolution finding the facts therein prescribed before a repurchase is permitted. It appears evident that these conditions may change from time to time. The resolution must find that the necessary conditions exist at the time when the petition for repurchase is made. It follows that no blanket findings may be made before the question of the prescribed conditions is raised by the filing of a petition to repurchase.

Answering your question, it is our opinion that it is necessary for the county board to pass upon individual applications to repurchase.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Aitkin County Attorney.

June 25, 1947. 425-C-13

233

Repurchase—Refundment—Purported repurchases nullity—Lands should be offered for sale as prescribed by law—Payments on repurchase contract may be refunded under certain conditions—Taxes paid may not be refunded—L. 1933, Ch. 407—Ex. Sess. L. 1937, Ch. 88.

Facts

"E. J. was the owner of two lots known as Lots 29 and 30. He owned Lot 29 subject to a mortgage which was duly foreclosed and the period of redemption expired August 24, 1928. He also owned Lot 30 subject

to a mortgage which was duly foreclosed and the time to redeem therefrom expired June 11, 1928. E. J. occupied the premises at the time of foreclosure and has occupied the property to date during the entire period from the times of the expiration of redemption to date. He has made no payments of any kind to the owners but they have not disturbed his possession and the whereabouts of the owners is now unknown.

"Lot 29 became delinquent for real estate taxes for the years 1926 through 1935 and became forfeited to the State of Minnesota for nonpayment of taxes on January 18, 1937, as provided by Chapter 278 Laws 1935. On June 25, 1937, E. J. who claimed to be the owner of Lot 29 repurchased from the State under Chapter 407 Laws 1933. This repurchase contract was paid in full by E. J. on December 31, 1945. Lot 30 became delinquent for the years 1929 through 1936 and on June 24, 1937, became forfeited to the State for nonpayment of taxes as provided by Chapter 278 Laws of 1935.

"On February 28, 1938, E. J., claiming to be the owner, repurchased Lot 30 from the State under the provisions of Chapter 88 Laws 1937 and paid said contract in full on July 10, 1947. Taxes levied against each lot since each purported repurchase by E. J. have been paid by him. E. J. has requested the County Auditor to make application for a State deed running to him covering both lots but the Auditor has refused to make such application because it appears that E. J. was not the owner of these lots at the time of forfeiture and is not the owner at the present time. The property was never offered for public sale because of the repurchase by E. J. and these lots have been withdrawn from the forfeited list because of such repurchase."

Question

"1. Insofar as E. J. was not the owner of said lots at the time of forfeiture or repurchase, does the State still hold title through forfeiture to said lots?"

Opinion

An option to repurchase lands sold for the taxes of the years 1926 and 1927 is conferred by Laws 1933, Chapter 407, upon the owner at the time of forfeiture. In an opinion rendered on July 26, 1937, to the county attorney of Clay County, it was held that prior to the expiration of the time for redemption from the mortgage foreclosure sale a mortgagor who was the owner at the time of forfeiture could repurchase under the provisions of C. 407, supra.

The right to repurchase lands sold for taxes for one or more of the years 1926 to 1930, inclusive, is conferred upon an owner who was the owner at the time of forfeiture, or his heirs or representatives, by Extra Session Laws 1937, Chapter 88. The ruling cited above upon C. 407, supra, is equally applicable to C. 88.

Lot 29 was forfeited to the state on January 18, 1937, for the nonpayment of taxes of the years 1926 to 1935, inclusive. The time for redemption from the mortgage foreclosure sale expired on August 24, 1928. The attempt to repurchase under C. 407, supra, was made on June 25, 1937. E. J. was not the owner of Lot 29 at the time of its forfeiture to the state for nonpayment of taxes. He had no option to repurchase under C. 407, supra. His attempt to repurchase thereunder like that of any other strangers to the title under C. 407 was a nullity.

Lot 30 was forfeited to the state on June 24, 1937, for the nonpayment of taxes of the years 1929 to 1936, inclusive. The time for redemption from the mortgage foreclosure sale expired on June 11, 1928. The attempt to repurchase under C. 88, supra, was made February 28, 1938. E. J. was not the owner of Lot 30 at the time of its forfeiture to the state for the nonpayment of taxes. He had no right of repurchase under C. 88, supra. Here, also, his attempt to repurchase thereunder like that of any other stranger to the title under C. 88 was a nullity.

It follows that E. J. has acquired no title to either Lot 29 or Lot 30, nor any interest in either lot. The title to both Lot 29 and Lot 30 is vested in the State of Minnesota subject to the interests of the several taxing subdivisions of the state.

Question

"2. In the event that the State is the present owner of said lots, should these lots now be advertised and offered for public sale as forfeited properties?"

Opinion

These lots have the status of tax-forfeited land. As such, it is the duty of the county board and county auditor to take the steps prescribed by Minnesota Statutes 1945, Section 282.01, which will result in these lots being offered for sale as therein prescribed.

There may be some question as to the willingness of the public to purchase these lots on account of the purported repurchases. For this reason, the county board may wish to consider the desirability of bringing an action to quiet title pursuant to the provisions of Minn. St. 1945, § § 284.07 to 284.26. This determination, of course, is one of policy for the county board to make and we merely draw attention to it.

Question

"3. May the County refund money paid by E. J. for the repurchase of said property?"

Opinion

If a claim against the county is filed in the manner prescribed by law and if it is made to appear that the payments were made through error, the county board, if it determines in the exercise of sound discretion that the

facts upon which the claim is based are true, may allow the claim and order its payment from the forfeited tax sale fund and charged therein against the taxing subdivisions which received the payments on the purported repurchase contracts.

Question

"4. May the County refund the taxes levied from the time of such repurchase and paid by E.J.?"

Opinion

The law is well settled in this state that taxes voluntarily paid may not be recovered by the person who has paid them. **Falvey v. Board of County Commissioners**, 76 Minn. 257, 79 N. W. 302, **Gould v. Board of County Commissioners**, 76 Minn. 379, 79 N. W. 303. Your fourth question is answered in the negative.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Ramsey County Attorney.

September 19, 1947. 425-C-13

234

Sale—To veterans—What constitutes "cleared" land—Limitation on amount of credit to be allowed—Rate of credit allowable—L. 1947, C. 422.

I. WHAT CONSTITUTES "CLEARED" LAND AND LAND "WHICH HAS BEEN UNDER CULTIVATION" UNDER LAWS 1947, CHAPTER 422.

Facts

Laws 1947, Chapter 422, authorizes the sale of tax-forfeited lands to veterans of World War II under prescribed conditions. In Mahnomen County there are tax-forfeited lands of various types—timber lands which, if cleared of timber, would be productive and suitable for agriculture; virgin prairie lands without any timber or timber ground of any kind which have never been broken; prairie lands which at one time were broken and under cultivation but which have since been permitted to go back to sod; both timber and prairie lands which have sloughs and pot holes which could be drained and thus made suitable for agricultural use.

Questions

"1. What meaning should be given to the term '* * total acreage * * which has been under cultivation; * * ', appearing in section 1 of said chapter? Would that include lands that have at one time been under cultivation but have been permitted to go back to sod?

"2. What is the meaning of the words '* * cleared and placed under cultivation', appearing in section 3 of said chapter? I assume that a man removing timber from the land would clearly be entitled to credit for clearing such land. But, would the same be true of a man who merely breaks virgin prairie land? Or, who breaks land which has once been under cultivation but has been permitted to go back to sod? What would be the situation of a man who has drained sloughs and pot holes and made them suitable for cultivation? If it is held that something more than plowing or breaking is required, just what must the applicant do to earn the $20.00 per acre credit? There are lands which have a small amount of brush or timber growth which may be broken with very little clearing or with no clearing at all. There are also lands with a heavy timber growth that would require grubbing and clearing. Are all such lands to be treated the same, irrespective of the extent of the timber growth?"

Opinion

The determination of the number of acres of land which has been cleared and placed under cultivation by the purchaser between the date of purchase and up to the date of the application for the allowance of credit is one for the county board to make in the exercise of its best judgment in each individual case. In order to assist the county board in making such determination, we shall proceed to discuss the meaning to be given to the term "cleared and placed under cultivation."

The obvious purpose of the 1947 legislature in enacting Chapter 422 was to assist veterans of World War II to obtain land suitable for agricultural purposes and at the same time to encourage the agricultural development of that land. The legislature sought to accomplish this purpose by allowing a credit of $20 for each acre of the land purchased by the veteran which he cleared and placed under cultivation within five years from the date of purchase.

Section 2 of Chapter 422 provides that the resolution of the county board authorizing the purchase shall state "the number of acres which the board finds are cleared and suitable for cultivation at the time of sale" and shall state that the purchaser shall receive credit toward the purchase price for "any additional land cleared and placed under cultivation within five years." Section 3 provides that the purchaser shall be allowed a credit at the rate of $20 per acre up to but not exceeding the full amount of the purchase price, for all land which the county board shall determine has been "cleared and placed under cultivation by the purchaser up to the date of the application for allowance."

The land must be both cleared and placed under cultivation. The verb "clear" as used in connection with land may have different significations in various localities.

14 Corpus Juris Secondum, page 1198.

In those states in which timber lands predominate, the courts have held that in the absence of words of limitation, the term "clearing land" means removing therefrom all timber of every size.

7 Words and Phrases, pages 448, 455.

We think that is the commonly accepted meaning ascribed to the term in Minnesota. We, therefore, rule that land will have been "cleared" within the meaning of that word as it appears in Chapter 422 if all timber, brush and secondary growth has been removed therefrom. Of course, the land so cleared also must be placed under cultivation to entitle the veteran owner to the $20 per acre payment. We do not believe that the draining of land containing sloughs and pot holes, or the breaking of virgin prairie land, or the breaking of land which previously has been under cultivation a number of years ago but which has been permitted to go back to sod, constitutes "clearing" the land.

Section 1 provides that the application of the veteran shall state "the total acreage * * * which has been under cultivation." Section 2 provides that the resolution of the county board authorizing the purchase shall state "the number of acres which the board finds are cleared and suitable for cultivation at the time of the sale." The statements of acreage in the application and in the resolution of the county board will not necessarily be the same. The application must state the total acreage **which has been under cultivation.** This would include not only the land which was under cultivation during the last previous farming season but also land which had previously been cultivated. It would not include cleared land which has not yet been plowed or virgin prairie land. The acreage required to be stated in the resolution of the county board is the number of acres **cleared and suitable for cultivation** at the time of sale. This would include not only the land which was under cultivation during the last previous farming season and land which had previously been plowed but also cleared land which has not yet been plowed and virgin prairie land suitable for cultivation. It would not include land which has not been cleared of timber, brush or secondary growth.

II. LIMITATION ON AMOUNT OF CREDIT TO BE ALLOWED.

Facts

Section 3 of Chapter 422 provides that credit may be given by not exceeding the full amount of the purchase price and further that the applicant shall file his verified claim and provides for the payment of any excess due the purchaser.

Question

"I assume that the excess would be the difference between the credit allowed and the balance unpaid on the contract? In other words, an appilcant may be entitled to a refund of cash payments made by him if his credits equal the purchase price but in no event shall credits be allowed in excess of the purchase price?"

Opinion

This question has been ruled upon by the Attorney General in opinions dated October 3, 1947 and December 12, 1947 (file 310).

III. RATE PER ACRE OF CREDIT ALLOWABLE.

Question

"If credit is allowed at all, must it be at the rate of $20.00 per acre? I have in mind that the nature of the timber growth might be such that $5.00 or $10.00 per acre might be adequate compensation for clearing the land. Has the County Board any discretion in fixing the value of the clearing and may it fix less than $20.00 per acre or must it allow credit in the amount of $20.00 per acre or nothing?"

Opinion

Section 3 of Chapter 422 does not give the county board any discretion as to the amount per acre which can be allowed the purchaser for clearing and placing under cultivation additional land. Section 3 fixes the rate per acre at $20, regardless of whether the clearing consists of cutting a heavy timber growth or merely clearing away brush and secondary growth.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Mahnomen County Attorney.

May 12, 1948. 310

TAX SETTLEMENT

235

Housing and Redevelopment Authorities—Disbursement of tax proceeds by county treasurer—L. 1947, Ch. 487, Art. V, Sec. 28, Subds. 5 and 6.

Facts

"The Municipal Housing Authority Act so-called, Laws 1947, Chapter 487, makes provision for a chairman and clerk as officers of the Authority to be selected from its members (Sec. 7, p. 775), but there is no provision for the selection of a treasurer for the Authority. The only direct reference of a treasurer is contained in the last line of Section 10 (p. 780) namely, 'direct the treasurer of the Authority to pay the judgment.'

"Generally speaking, it seems that all major activities of the Authority must be first approved or consented to by the governing body of the Area of Operation for which the Authority is created. The City of Minneapolis has created an Authority under this Act."

* * *

Question

1. May the taxes placed in a special fund by the county treasurer pursuant to L. 1947, Ch. 487, Art. V, Sec. 28, Subd. 5, be paid over to the City of Minneapolis with the regular tax settlements?

Opinion

We assume that in referring to payment with the regular tax settlements you refer to the distribution authorized by M. S. A., Sec. 276.10. In our opinion, this section has no application here because there is no statute which provides that the city treasurer or the authority is entitled to receive the taxes here in question.

Subd. 5 is devoid of any express language directing payment of the taxes affected thereby to the city treasurer, the authority or any other named person. It must be presumed that the legislature intended two things, (1) that the money should not lie in the county treasury indefinitely, and (2) that the moneys should be paid out for the purpose for which they were set aside. Implicit in the provisions of Subd. 5 then is the authority of the county treasurer to pay the tax moneys in question for the retirement of bonds or other obligations issued to finance a redevelopment project by the authority which, with the consent of the governing body of the municipality in which it exists, notified the county treasurer to set aside in a special fund the tax revenue here involved but in no event to pay any bonds issued "to finance the acquisition and clearance of land in the redevelopment projects reserved for public use." In construing this provision we may not predicate one implied power upon another implied power but must reduce the implied power to its simplest terms which will accomplish the purpose of the law before us. This requires that subd. 5 be construed to authorize the county treasurer to pay to the owner of an eligible bond or other obligation of the appropriate authority from tax revenue in the special fund the amount due thereon. The county treasurer is not authorized to pay to the city treasurer or the authority tax revenues in a special fund authorized by Subd. 5.

Question

2. May the tax revenue derived from a special tax levied pursuant to the authority in L. 1947, Ch. 487, Art. V, Sec. 28, Subd. 6, be paid over to the City of Minneapolis with the regular tax settlements?

Opinion

Again, we assume that in referring to payment with the regular tax settlements you refer to the distribution authorized by M. S. A., Sec. 276.10. In our opinion, this section has no application to this question, because there is no statute which provides that the city treasurer or the authority is entitled to receive the taxes here in question and for the reason that the procedure prescribed in Subd. 6 for disbursement of the tax money negatives the idea that it shall be paid over under authority of M. S. A., Sec. 276.10.

Subd. 6 provides in part:

> " * * * as such tax * * * is collected by the county treasurer it shall be accumulated and kept in a separate fund to be known as the 'Redevelopment Project Fund' and shall be expended and applied for the purpose of this article, and for no other purpose whatsoever. It shall be paid out upon vouchers signed by the chairman of the authority or his duly authorized representative." (Emphasis supplied.)

These provisions compel a negative answer to your question. If it were intended that these tax revenues should be turned over to the city treasurer or the authority in a lump sum, there would be no purpose in prescribing the detailed procedure set forth in the language quoted above. There could be no reason for requiring each voucher to be signed by the chairman. We conclude therefore that the tax revenue derived from a special tax levied pursuant to the authority in L. 1947, Ch. 487, Art. V, Sec. 28, Subd. 6, may not be paid over to the City of Minneapolis with the regular tax settlements.

The answers to questions 1 and 2 having been stated above, it is unnecessary to discuss that part of your questions which relates to the city treasurer.

Question

3. Is it mandatory that such functions be performed by the county treasurer and county auditor respectively?

Opinion

We assume the functions to which you refer are the disbursements of the tax moneys referred to in your earlier questions. As the law specifies the manner of disbursement of the tax moneys, the county treasurer and county auditor have no discretion but must comply therewith. Your question is answered in the affirmative.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Hennepin County Attorney.

November 23, 1948. 430

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