REPORT

OF THE

ATTORNEY GENERAL

TO THE

GOVERNOR
STATE OF MINNESOTA

1949 - 1950

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 1949-1950.

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, 1950.

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, 1950

ATTORNEY GENERAL

J. A. A. Burnquist

DEPUTY ATTORNEYS GENERAL

Arthur Christofferson
George B. Sjoselius

ASSISTANT ATTORNEYS GENERAL

Joseph J. Bright
Lowell J. Grady
Victor H. Gran
Charles E. Houston
Donald C. Rogers
Knute D. Stalland
Charles P. Stone
Ralph A. Stone

SPECIAL ASSISTANT ATTORNEYS GENERAL

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

LAW CLERK

Edward M. Arundel

DEPARTMENT CLERK

Genevieve K. Spangenberg

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UNITED STATES SUPREME COURT

DOCKET	TITLE	ACTION	DECISION OR STATUS
5905	Earl Guy v. Warden, State Prison	Certiorari	Denied
6191	Land O'Lakes Dairy Co. v. State of Minnesota, et al.	Tax	338 U. S. 897
	State v. Land O'Lakes Dairy Co.		338 U. S. 945
6211	Roy F. Gagnon v. Warden, State Prison	Habeas corpus	339 U. S. 988 41 N. W. 2d 579
6352	Sam James Perkins v. Warden, State Prison	Habeas corpus	Denied
6353	Theodore Harold Shaw v. Warden, State Prison	Certiorari	Denied

UNITED STATES DISTRICT COURT

6296	T. B. Walker Foundation, Inc. v. Kenneth R. Walker et al., and State of Minnesota, Intervener	To recover Foundation profits	Settled
6307	U. S. A., Chippewa Tribe, et al.	Condemnation—state fish rearing pond	Final certificate filed
6342	Richard Clarence Willis and Weldon Burl Meadows v. Warden, State Prison	Habeas corpus	Denied

MINNESOTA SUPREME COURT, CIVIL

DOCKET	TITLE	ACTION	DECISION OR STATUS
6120	Port of Authority v. N. P. Ry. Co.	Inter-terminal and intra-terminal switching	39 N. W. 2d 752
6186	John W. Bentley, et al.	Flowage damages	45 N. W. 2d 185
6191	Land O'Lakes Dairy Co. v. State et al.	Taxation	39 N. W. 2d 164
	State v. Land O'Lakes Dairy Co.		
6239	Rubin Shetsky v. Warden, State Prison	Habeas corpus	36 N. W. 2d 126
	State v. Rubin Shetsky	Appeal from judgment of re-sentence	40 N. W. 2d 337
6240	American Federation of State and Municipal Employees Local Union No. 9 A.F.L. v. Minneapolis General Hospital and United Workers Local No. 77 C.I.O.	Certiorari — certificate of bargaining unit	38 N. W. 2d 845
6249	Albert Lea Amusement Corporation v. Freeborn County Attorney et al.	Declaratory judgment — "Bank Night"	43 N. W. 2d 249
6258	North Star Army & Navy Store, United Army Store v. Department of Business Research and Development	Use of name "Army" or "Navy"	42 N. W. 2d 414
6264	Kenneth D. Hassler v. Commissioner of Insurance, et al.	Injunction — policy surcharge	38 N. W. 2d 386
6276	G. O. McCoy, et al.	Escheated bank accounts	38 N. W. 2d 386
6278	Harold Gene Pinkerman	Appeal from order denying habeas corpus	43 N. W. 2d 97
6285	State v. City of Hudson	Personal property tax (Hudson Bridge)	42 N. W. 2d 546
6294	Ralph Hitchcock	Tax—family partnership	37 N. W. 2d 378
6295	Norman Meyer	Certified question — constitutionality of L. 1947, c. 595	37 N. W. 2d 3
6308	Roy H. Benham v. Independent School Districts 111 - 74 et al.	Restrictions—state deed	Dismissed as to State
6317	Town of Balkan	Public Examiners fees	48 N. W. 2d 515
6318	Constance M. Otten v. University Hospitals	Workmen's Comp.	40 N. W. 2d 81
6320	Richard F. Spurck v. Civil Service Board	Certiorari—back pay	42 N. W. 2d 720
6332	Carl J. Jackson v. Bunn T. Willson and Jule Joe Alpert et al., Interveners	Writ of prohibition	40 N. W. 2d 910
6334	Alvin Hansen v. Warden, State Prison	Habeas corpus	40 N. W. 2d 441
6342	Richard Clarence Willis and Weldon Burl Meadows	Habeas corpus	42 N. W. 2d 818
6344	Roy Stolpestad	Habeas corpus	42 N. W. 2d 813
6345	Elizabeth C. Quinlan Estate, Lahiff et al.	Inheritance taxes	45 N. W. 2d 807
6350	Western Union Telegraph Co. v. Commissioner of Taxation	Income franchise tax	44 N. W. 2d 440
6352	Sam James Perkins v. Warden, State Prison	Habeas corpus	43 N. W. 2d 258 44 N. W. 2d 113
6353	Theodore Harold Shaw v. Warden, State Prison	Habeas corpus	43 N. W. 2d 781
6357	Arthur N. Bolier v. Commissioner of Taxation	Income tax	45 N. W. 2d 802
6364	Thomas v. Duluth Housing & Redevelopment	Declaratory Judgment	48 N. W. 2d 175
6365	James J. Dougherty v. Secretary of State	Election ballot—descriptive words	44 N. W. 2d 83
6366	Elsie Froedtert Lyng Estate	Inheritance tax	46 N. W. 2d 676

MINNESOTA SUPREME COURT, CIVIL—Continued

DOCKET	TITLE	ACTION	DECISION OR STATUS
6372	Vance Washburn v. Warden, State Prison	Habeas corpus	Denied
6375	Chester G. W. Gustafson v. Secretary of State	Election ballot—Sup. Ct. Justices—MSA 206.54	44 N. W. 2d 443
6377	Youngdahl, J. M. v. Eastvold, D.F.L. Candidate for Congress	Election contest	44 N. W. 2d 459
6380	Norris Grain Company	Writ of prohibition	46 N. W. 2d 94
6387	Benj. Senske v. State Treasurer et al.	Special compensation fund	45 N. W. 2d 640

Legal Staff of Division of Employment and Security

Bucko v. Quest Foundry	Benefits due to lockout	38 N. W. 2d 223
Nicollet Hotel Company	Contributor's rate	40 N. W. 2d 622
Larson Boat Works	Experience rating	Affirmed
Howard J. Jackson v. Minneapolis-Honeywell Regulator Company	Benefits — Plants closed for vacation period	47 N. W. 2d 449
Honeymead Products Company	Transfer of experience record	47 N. W. 2d 754

Legal Staff of Highway Department

Paskewitz et al.	Damages to bridge	47 N. W. 2d 199
Peter J. Schmitt et al.	Mandamus Land alleged damaged	46 N. W. 2d 468

MINNESOTA SUPREME COURT, CRIMINAL

849a	Arthur DeZeler	Murder	41 N. W. 2d 313
850a	Mylo Bock	Forgery	39 N. W. 2d 887
851a	Harry Joseph Pease	Criminal negligence	Dismissed
852a	Jerome Silvers	Assault	40 N. W. 2d 630
853a	Leonard Boulton, Richard Kwiatkoski, Edward Swedzinski	Assault	40 N. W. 2d 417
854a	Leonard C. Klammer	Cruelty to animals	41 N. W. 2d 451
856a	Roy X. Gorman	Indecent assault	40 N. W. 2d 347
857a	August Gensmer, Jr.	Bribery	Pending
858a	Peder H. Quinnild	Carnal knowledge	42 N. W. 2d 409
859a	Joseph Bilotta	Nonsupport	43 N. W. 2d 111
860a	Sherburn B. Flowers, Harvey J. Nolan	Refusal to assist public examiner — certified question as to immunity	44 N. W. 2d 66
863a	Raymond Schaub	Manslaughter — certified questions	44 N. W. 2d 161
864a	Henry Masteller	Check without funds	45 N. W. 2d 109
865a	Arlane Brandvold	Check without funds	45 N. W. 2d 111
866a	Gilbert Hedstrom, Harvey Hedstrom	Game and fish laws	45 N. W. 2d 715
867a	Viola Gavle	Murder	48 N. W. 2d 44
869a	Otto Gottfred End	Indecent exposure	45 N. W. 2d 378
870a	John E. Lowrie	Attempted bribery	Briefs filed
872a	Hubert Thurmes	Failure to support child	46 N. W. 2d 258

MINNESOTA DISTRICT COURTS

DOCKET	TITLE	ACTION	DECISION OR STATUS
6067	Lake Mining Company	Royalties — iron ore — Syracuse Lake bed	Escrow $1,375,580 collected
6078	Youngstown Mines Corp. et al.	Iron ore — Rabbit Lake bed	Submitted
6081	Louis Anderson	Flowage — intervention	Motion to set aside findings in process of preparation
6164	The Shawmut Co. et al. v. State	Boundary dispute — mine property	Judgment for state
6171	Milton Culver's Food Market v. Pharmacy Board	Injunction	Judgment—vitamins, drugs, appealed to Supreme Court
6230	Patsy M. Reed et al. v. State	*Declaratory judgment* — mineral reservation	Dismissed
6234	Tyler R. Hagen v. Yellow Medicine County et al.	Old age assistance	Judgment entered for state and county
6245	Application of Genevra Bingenheimer et al. to register title to lands	Ore under lake bed	Title of applicants confirmed
6253	Josephine S. Swan, et al.	Land registration — mineral rights	Submitted
6254	Schaeffer v. Newberry, Village of Elbow Lake, et al.	Quiet title	Judgment for state, appealed to Supreme Court
6260	Western Surety Co. of Sioux Falls, South Dakota	Contract bond	Judgment for $2,081
6278	Harold Gene Pinkerman	Habeas corpus	Denied
6279	State Agricultural Society v. KSTP	Rent claim	Dismissed
6280	*Constance F. Adams, et al.*	Title to iron ore under Carlson Lake	Tried
6281	Robert Morford Adams, et al.	Title to iron ore under Rabbit Lake	Tried
6288	Robert M. Adams, et al.	Title to iron ore under Portage Lake	Tried
6289	Cherrill M. Adams, et al.	Title to iron ore under Jeune Lake	Tried
6290	Adams Corporation, et al.	Title to iron ore under Pascoe Lake	Tried
6291	Adams Corporation, et al.	Title to iron ore under Spruce Lake	Tried
6292	H. N. Noack and Sons v. Commissioner of Agriculture	Injunction—egg candling license	Dismissed
6293	Arthur Iron Mining Co. v. State et al.	Registration of title — boundary line (Snowball Lake)	Submitted
6297	Adams Holding Co., et al.	Title to iron ore under Clinker Lake	Tried
6298	Byron H. Coolidge, et al.	Title to iron ore under Curley Lake	Tried
6299	Will C. Brown, et al.	Title to iron ore under Little Blackhoof Lake	Tried
6300	Cherrill Adams, et al.	Title to iron ore under Mud Lake	Tried
6301	Robert M. Adams, et al.	Title to iron ore under Mahnomen Lake	Tried
6302	The Adams Corporation	Title to iron ore under Little Rabbit Lake	Tried
6303	Canadian National Ry. Co. et al.	Rates—straw and flax	Dismissed
6305	Ideal Life Association	Dissolution	Dissolved
6310	State v. Ervin Anderson	Motion for vacation of sentence	Dismissed
	State ex rel. Ervin Anderson v. Superintendent, St. Peter State Hospital	Habeas corpus	Discharged
6311	Andrew Polan v. Warden, State Prison	Habeas corpus	Discharged
6312	Park District of City of Bemidji	Condemnation for State Teachers College	Certificate approved

MINNESOTA DISTRICT COURTS—Continued

DOCKET	TITLE	ACTION	DECISION OR STATUS
6313	Arthur J. Robinson v. State Board of Hairdressers	Declaratory judgment — rule of separate 'phone for beauty school and beauty shop	Answer interposed, no further action by Plaintiff
6314	State ex rel. Rev. Joseph M. Endres v. Director of Social Welfare et al.	Habeas corpus	Discharged
6315	Ernest L. Nelson v. Conservator of Rural Credit	Reformation of state deed	Ordered reformed
6316	State v. Carroll Broadbent	Bribery	Acquitted
6319	Chicago, St. Paul, Minneapolis and Omaha Ry. Co. v. Railroad and Warehouse Commission	Agency service — appeal from decision of board	No further action taken by Ry. Co.
6320	Richard F. Spurck v. Civil Service Board	Certiorari — back pay	Order vacated
6321	Minn. Anti-Vivisection Soc. v. State Live Stock Sanitary Board et al.	Injunction — anti-vivisection	Dismissed
	Mrs. Beatrice Shebel v. State Live Stock Sanitary Board et al.	Injunction — anti-vivisection	Dismissed
6322	Great Minneapolis Surplus Store, Inc.	Injunction—advertising	Dismissed
6323	Klein's Super Markets	Injunction—advertising	Temporary injunction granted
6324	Cut Price Super Markets	Injunction—advertising	Temporary injunction granted
6325	Forum Super Markets	Injunction—advertising	Temporary injunction granted
6326	Levine Fruit & Produce Co., Inc. v. Lester McComber et al. State of Minnesota, amicus curiae	Wholesale dealer's bond	Dismissed
6330	Sophie Whiteside et al.	Quiet title	Judgment—lands subject to tax lien
6331	Clifford H. Thomas et al. v. State Auditor et al.	School land certificate sale	Demurrers served
6332	Jule Joe Alpert, Psychopathic Personality	Appeal from order of Probate Court denying restoration	Denied
6333	Max Berc, et al.	Wholesale produce dealer's bond	$7,000 collected from surety
6335	Victor Johnson v. Titus J. Plettl et al.	Damages — search	Verdict for defendants
6336	Indianhead Truck Line, Inc.	Property damage — fairgrounds fence	$1,001.83 collected
6337	City of Mankato, John W. Powell	Condemnation for Mankato State Teachers College	Settled
6338	Andrew K. Johnson	Mortgage foreclosure (Rural Credit)	Bid in for state
6339	Adams Doggie Shop v. Livestock Sanitary Board	Declaratory judgment — constitutionality of L. 1949, c. 195	No justiciable controversy —plaintiff not within act
6340	Twin City Rapid Transit Co., et al.	Injunction — discontinuance of bus lines	Stipulation for petition to R.R & W.H. Comm.
6341	Levens Milling Company v. Railroad & Warehouse Commission	Appeal from order—loading spout and conveyor	Dismissed
6343	Kaposia Builders, Inc. v. Conrad Razidlo and State of Minnesota	Mechanic's lien—Hastings Hospital	Service on State set aside
6346	Marie Budd	Delinquent taxes	Settled
6348	Edward Sheridan et al.	Condemnation for Faribault School site	Certificate approved

MINNESOTA DISTRICT COURTS—Continued

DOCKET	TITLE	ACTION	DECISION OR STATUS
6355	Land of Lakes Mutual Life	Dissolution	Dissolved
6356	Board of Commissioners of Hennepin County et al. v. Railroad & Warehouse Commission	Appeal from order — overhead bridge	Affirmed
6358	Domestic Loan Company v. Commissioner of Banks	Appeal from order — small loan license	Dismissed
6359	Ernest Beyer et al. (4 cases) v. Commissioner of Education et al.	School consolidation election contest	Dismissed as to commissioner of education
6360	Duluth Lighthouse for the Blind Trust	Expenditure of trust funds	Authorized
6361	Republic Motor Sales Co. v. Secretary of State	Mandamus—auto license	Dismissed
6364	Richard J. Thomas et al. v. Duluth Housing and Redevelopment	Declaratory judgment — L. 1947, c. 487	Held constitutional, 48 N. W. 2d 175
6368	City of Duluth	Claim for public examiner's fee	Submitted
6369	W. R. Stephens Co. v. Commissioner of Taxation et al.	Personal property tax — unused motor vehicles	Demurrer sustained
6370	Village of Pierz	Claim for public examiner's fee	Awaiting trial
6371	Village of Keewatin	Claim for public examiner's fee	$6,300.00 collected
6373	John H. Nelson v. Secretary of State	Mandamus — withdrawal of name from ballot	Name stricken
6374	*Roy Sell v. Superintendent*, St. Peter State Hospital	Habeas corpus	Submitted
6376	Village of Lonsdale	Claim for public examiner's fee	Awaiting trial
6379	Eleanor Landy v. Civil Service Board	Certiorari (lay-off)	Affirmed
6383	Einer W. and Audrey M. Frederickson v. Social Welfare	Adoption	Consent filed
6386	Christian Benevolent Society, National Mutual Life Asso., Park Region Life Asso.	Dissolution	Dissolved

MINNESOTA DISTRICT COURT — CRIMINAL

DOCKET	TITLE	ACTION	DECISION OR STATUS
855a	Elmer Meier	Assault	Pleaded guilty
857a	August Gensmer, Jr.	Bribery	Found guilty
861a	Laura Safford Miller	Murder	Dismissed by judge at close of testimony
867a	Viola Gavle	Murder	Found guilty—affirmed 48 N. W. 2d 44
868a	Lawrence Nobles	Murder	Found guilty—appealed to Supreme Court—dismissed 47 N. W. 2d 473

PROBATE COURTS

DOCKET	TITLE	PROCEEDING	DECISION OR STATUS
6262	Minnie Funk, Deceased	Probate of estate (legacy to Gillette Hospital)	$7,058.44 received
6287	William Bodmann, Deceased	Probate of estate (Soldier's Home sole legatee)	$400.25 received
6304	Emma Gebser, Deceased	Probate of estate (legacy to Gillette Hospital)	$1,000 received
6320	Jule Joe Alpert, Psychopathic Personality	Restoration	Denied
6328	August Hendrickson, Deceased	Claim to escheated estate	Final decree amended
6362	Florence N. Mitchell, Deceased	Descent (Humane Society, residuary heir)	Property awarded to Society
6378	Carl Forsman Estate (Soldiers Home)	Probating estate	Settled

JUVENILE COURTS

DOCKET	TITLE	PROCEEDING	DECISION OR STATUS
6314	Dependency of Frank, Rosella, Dorothy, Marie and Robert Holec	Guardianship of Director of Social Welfare	Discharged

INTERSTATE COMMERCE COMMISSION

DOCKET	TITLE	PROCEEDING	DECISION OR STATUS
6202	Butler Brothers v. G. N. Ry. Co., State of Minnesota Intervener	Rates on crude ore	Dismissed

STATE BOARDS AND COMMISSIONS

Pharmacy Board

DOCKET	TITLE	PROCEEDING	DECISION OR STATUS
6329	Richard Falk	Revocation of license	Reprimanded
	Irving Earl Kaplan	Revocation of license	Continued
	Harry Lebow	Revocation of license	Suspended 6 months
	Edward Shirley	Revocation of license	Continued
	Albert S. Karpness	Revocation of license	Reprimanded

Civil Service

DOCKET	TITLE	PROCEEDING	DECISION OR STATUS
6391	John Driessen	Dismissal	Reinstated

TABLE NO. 1
PROSECUTIONS REPORTED BY COUNTY ATTORNEYS FOR 1949 AND 1950

COUNTY AND COUNTY ATTORNEY	IN DISTRICT COURT							
	Pleaded Guilty		Found Guilty		Acquitted		Dismissed	
	1949	1950	1949	1950	1949	1950	1949	1950
Aitkin—John T. Galarneault	28	13	1	1	1	2	4	4
Anoka—L. Darrah Cutter*—**								
Becker—Carl G. Buck, Jr.	25	27	1		1	1	2	3
Beltrami—Herbert E. Olson	29	18	1	1			2	3
Benton—J. Arthur Bensen	3	5	1		1		3	2
Big Stone—C. J. Benson	8	6		1				
Blue Earth—Milton D. Mason—Carl W. Peterson	26	21						1
Brown—George D. Erickson	14	11	2					3
Carlton—Thomas Bambery	46	35	1		1	2	1	5
Carver—John J. Fahey**								
Cass—Edward L. Rogers	20	24	4	4	8	1	8	2
Chippewa—Sigvald B. Oyen	12	4					8	
Chisago—Carl W. Gustafson—Howard F. Johnson	4	15					1	1
Clay—Goodwin L. Dosland	28	51	2	2	4		3	4
Clearwater—Oscar E. Lewis	9	18		1				1
Cook—J. Henry Eliasen	1							
Cottonwood—M. F. Juhnke	9	8					1	
Crow Wing—Arthur J. Sullivan*—**								
Dakota—R. C. Nelsen	22	44			1		4	9
Dodge—Bruce A. Erickson**	5				1			
Douglas—Keith L. Wallace	10	13					3	1
Faribault—Harold C. Lindgren	30	13				1	1	2
Fillmore—George E. Frogner	13	19				1		
Freeborn—Rudolph Hanson	27	19	1	1			5	4
Goodhue—Milton I. Holst	16	20	1		1		4	24
Grant—I. L. Swanson	3	8						
Hennepin—Michael J. Dillon	440	440	8	19	11	8	44	71
Houston— L. L. Roerkohl	5	3					3	1
Hubbard—James A. Wilson	3	4					6	6
Isanti—Robert B. Gillespie	2	5						
Itasca—Ben Grussendorf	25	25	1					
Jackson—Karl Rudow	1	9						
Kanabec—Robert W. Nyquist	1							
Kandiyohi—Roy A. Hendrickson	10	11	6	1	2		2	1
Kittson—Lyman A. Brink	51	5			2			1
Koochiching—L. P. Blomholm**	21						2	
Lac qui Parle—H. W. Swenson	5	6	1	1				
Lake—Emmett Jones	3	5						
Lake of the Woods—Frank H. Timm**								
Le Sueur—George T. Havel	6	18					5	

Lincoln—E. T. McEvoy	16	6						2
Lyon—C. J. Donnelly	28	39	1	1				1
McLeod—Hubert G. Smith	2						2	1
Mahnomen—L. A. Wilson	14	5	1		1		1	1
Marshall—A. A. Trost	9	4			1			1
Martin—Arthur T. Edman	26	18					3	1
Meeker—Sam G. Gandrud	15	2	2					
Mille Lacs—John S. Nyquist	12	10	1					4
Morrison—Attel P. Felix	11	11		1		1	2	1
Mower—Wallace C. Sieh	22	19	3	1	1	2		8
Murray—J. T. Schueller	5	3						
Nicollet—A. L. McConville	14	5						
Nobles—Raymond E. Mork	13	10		1				
Norman—Olav E. Vaule	10	14					7	6
Olmsted—Thomas J. Scanlan	21	37	3	3			7	10
Otter Tail—Chester G. Rosengren	39	32					7	7
Pennington—L. W. Rulien*—**								
Pine—George E. Sausen	15	17		1				
Pipestone—J. H. Manion	3	2						
Polk—F. H. Stadsvold	31	36	1	1		1	1	2
Pope—Wm. Merrill	1	4						
Ramsey—James F. Lynch	290	317	5	8	1	6	4	13
Red Lake—Charles E. Boughton, Jr.*		2						
Redwood—Tom Reed	14	29						
Renville—Russell L. Frazee	12	9	1	1		1	4	2
Rice—Urban J. Steimann	11	12	1	1	1		5	1
Rock—Mort B. Skewes	3	6						
Roseau—Bert Hanson	10	6	3		1		2	2
St. Louis—Thomas J. Naylor	142	118	10	9	2	3	23	15
Scott—Harold E. Flynn—M. J. Daly	8	2					2	
Sherburne—Howard S. Wakefield	16	2					2	
Sibley—Everett L. Young	1	3						1
Stearns—David T. Shay*—**								
Steele—John P. Walbran	10	8						
Stevens—Thomas J. Stahler	1	6			1		1	
Swift—Frank A. Barnard	5							
Todd—Frank L. King	25	19	4	5	2		1	2
Traverse—Earl E. Huber	1	3					2	
Wabasha—Arnold W. Hatfield	9	13		3		1		1
Wadena—Charles W. Kennedy	13	15						4
Waseca—Einer Iversen	6	9	1		1			
Washington—Wm. T. Johnson	15	15		1			2	4
Watonwan—Paul V. Fling	7	9	1	2		2		2
Wilkin—R. N. Nelson	2	5	1					
Winona—W. Kenneth Nissen	26	21	1	1	6		5	3
Wright—Walter S. Johnson	12	13						5
Yellow Medicine—Robert M. Baker	5	8					1	
Totals	1,912	1,847	71	72	52	33	196	249

*No report received for 1949.

**No report received for 1950.

TABLE NO. 1—Continued
PROSECUTIONS REPORTED BY COUNTY ATTORNEYS FOR 1949 AND 1950

COUNTY AND COUNTY ATTORNEY	IN MUNICIPAL COURT							
	Pleaded Guilty		Found Guilty		Acquitted		Dismissed	
	1949	1950	1949	1950	1949	1950	1949	1950
Aitkin—John T. Galarneault	79	112	.....	1	.....	.....	.....	.....
Anoka—L. Darrah Cutter*—**	.....	.....	.....	.....	.....	.....	.....	.....
Becker—Carl G. Buck, Jr.	412	240	11	37	1	2	16	12
Beltrami—Herbert E. Olson	36	35	1	5	1	1	4	.....
Benton—J. Arthur Bensen	109	51	11	26	.....	1	10	23
Big Stone—C. J. Benson	93	82	.....	.....	.....	.....	3	7
Blue Earth—Milton D. Mason—Carl W. Peterson	926	1,143	46	46	15	11	15	18
Brown—George D. Erickson	158	170	.....	.....	.....	.....	.....	6
Carlton—Thomas Bambery	713	669	19	25	.....	.....	12	32
Carver—John J. Fahey**	33	.....	.....	.....	.....	.....	3	.....
Cass—Edward L. Rogers	164	144	1	9	3	.....	5	3
Chippewa—Sigvald B. Oyen	91	139	.....	.....	.....	.....	2	3
Chisago—Carl W. Gustafson—Howard F. Johnson	297	238	36	9	.....	3	10	6
Clay—Goodwin L. Dosland	232	387	97	41	.....	.....	2	3
Clearwater—Oscar E. Lewis	214	153	.....	1	.....	.....	1	1
Cook—J. Henry Eliasen	67	48	13	6	3	.....	3	8
Cottonwood—M. F. Juhnke	155	114	4	.....	.....	.....	2	1
Crow Wing—Arthur J. Sullivan*—**	.....	.....	.....	.....	.....	.....	.....	.....
Dakota—R. C. Nelsen	1,323	944	27	18	9	6	9	4
Dodge—Bruce A. Erickson**	174	.....	3	.....	.....	.....	1	.....
Douglas—Keith L. Wallace	243	185	14	5	4	2	10	10
Faribault—Harold C. Lindgren	68	64	2	3	1	1	.....	3
Fillmore—George E. Frogner	114	142	6	2	.....	2	6	5
Freeborn—Rudolph Hanson	338	422	9	13	3	3	10	2
Goodhue—Milton I. Holst	419	349	11	21	1	2	4	7
Grant—I. L. Swanson	6	44	.....	2	1	.....	.....	.....
Hennepin—Michael J. Dillon	2,861	1,783	58	40	7	9	27	16
Houston—L. L. Roerkohl	187	193	13	18	3	.....	.....	1
Hubbard—James A. Wilson	158	159	12	21	2	1	4	14
Isanti—Robert B. Gillespie	76	96	1	2	.....	3	1	.....
Itasca—Ben Grussendorf	529	462	20	14	3	.....	12	3
Jackson—Karl Rudow	155	88	.....	.....	.....	.....	.....	2
Kanabec—Robert W. Nyquist	132	122	2	.....	.....	.....	1	4
Kandiyohi—Roy A. Hendrickson	101	99	16	2	3	2	15	21
Kittson—Lyman A. Brink	7	40	.....	.....	.....	.....	.....	2
Koochiching—L. P. Blomholm**	240	.....	19	.....	.....	.....	3	.....
Lac qui Parle—H. W. Swenson	116	62	.....	.....	.....	.....	3	6
Lake—Emmett Jones	195	233	.....	.....	.....	.....	.....	.....
Lake of the Woods—Frank H. Timm**	62	.....	.....	.....	4	.....	3	.....
Le Sueur—George T. Havel	81	87	.....	.....	.....	.....	.....	.....

Lincoln—E. T. McEvoy	84	52					2	
Lyon—C. J. Donnelly	197	225			1	1	4	6
McLeod—Hubert G. Smith	100	330		65	1		19	
Mahnomen—L. A. Wilson	103	104						2
Marshall—A. A. Trost	103	55	2	1			6	
Martin—Arthur T. Edman	263	250		1				2
Meeker—Sam G. Gandrud	71	110						
Mille Lacs—John S. Nyquist	298	305	15	12	4	6	7	7
Morrison—Attel P. Felix	285	306		1	1	7	23	11
Mower—Wallace C. Sieh	180	274	10	15	2	2	14	19
Murray—J. T. Schueller	105	89	2	2			3	4
Nicollet—A. L. McConville	146	118						
Nobles—Raymond E. Mork	141	171	2	2			3	2
Norman—Olav E. Vaule	97	52				1	50	49
Olmsted—Thomas J. Scanlan	665	959	18	16	4	6	19	20
Otter Tail—Chester G. Rosengren	180	256	1	1	3		8	20
Pennington—L. W. Rulien*—**								
Pine—George E. Sausen	225	186	1				4	
Pipestone—J. H. Manion								
Polk—F. H. Stadsvold	83	115		1				9
Pope—Wm. Merrill	117	52	3	35	1			1
Ramsey—James F. Lynch	1,860	1,982	33	38		28	4	5
Red Lake—Charles E. Boughton, Jr.*		85						2
Redwood—Tom Reed	202	289	4			1	6	10
Renville—Russell L. Frazee	64	96	6	2			6	2
Rice—Urban J. Steimann	364	502	13	28	4	3	20	9
Rock—Mort B. Skewes	104	76		1				
Roseau—Bert Hanson	53	50	6	8				
St. Louis—Thomas J. Naylor**	486	375	10	3			30	35
Scott—Harold E. Flynn—M. J. Daly	182	157					3	3
Sherburne—Howard S. Wakefield	257	120	3	3	2	1		
Sibley—Everett L. Young	160	187	6	16	2		12	14
Stearns—David T. Shay*—**								
Steele—John P. Walbran	600	566	2	1	5	1	1	
Stevens—Thomas J. Stahler	149	175	9	9	1	3	7	4
Swift—Frank A. Barnard	210	151		1				2
Todd—Frank L. King	151	150	12	16	2		2	1
Traverse—Earl E. Huber	121	146						
Wabasha—Arnold W. Hatfield	151	230	4		1		6	4
Wadena—Charles W. Kennedy	215	184	3					
Waseca—Einer Iversen	76	111	3	2			4	8
Washington—Wm. T. Johnson	320	620	17	9	1	4	20	27
Watonwan—Paul V. Fling	275	275			1		3	12
Wilkin—R. N. Nelson	288	362	1				1	2
Winona—W. Kenneth Nissen	2,938	4,304	9	17	3	2	14	33
Wright—Walter S. Johnson	283	529	1	2	1	1	4	2
Yellow Medicine—Robert M. Baker	45	49	1			1	3	3
Totals	24,361	25,079	649	675	104	117	505	553

*No report received for 1949.
**No report received for 1950.

TABLE NO. 2

TABULATED STATEMENT OF CRIMINAL CASES AS REPORTED BY COUNTY ATTORNEYS FOR 1949 AND 1950

NATURE OF ACCUSATION	DISTRICT - MUNICIPAL - JUSTICE COURTS							
	Pleaded Guilty		Found Guilty		Acquitted		Dismissed	
	1949	1950	1949	1950	1949	1950	1949	1950
I. Crimes Against the Person (Ch. 619)								
Murder—1st degree	2	1		2		1		1
2nd degree	1	2			1			
3rd degree	1	5	1			2		1
Manslaughter—1st degree	2	3	1	1	1	1		1
2nd degree	1	4	1	1	1	2	2	
Assault—1st degree	8	10	1					3
2nd degree	36	45	16	8	6		10	8
3rd degree	413	382	55	70	18	14	64	75
Robbery—1st degree	43	59	2	5		3	1	7
2nd degree	5	14	1	1				1
3rd degree	7	17					1	1
Kidnaping		3					8	2
Slander		1	1					
II. Crimes Against Morality, etc. (Ch. 617)								
(a) Sex Crimes, Indecency, etc.								
Rape	8	3	2	1			2	3
Carnal knowledge	10	4			1		1	3
Female under 10	1			1				
Female 10 to 13	3	5	2		1			
Female 14 to 17	63	82	2	2		1	8	14
Indecent assault	45	50	3	2	2	2	2	6
Adultery	7	4					6	5
Abortion	9	3						
Bigamy	6	3					1	
Fornication	14	8				1		
Incest	4	4						1
Sodomy	2	14				1	1	1
Abduction	3							
Public Indecency	61	78	1	6		2	3	
Miscellaneous	8	3	1	2				
(b) Crimes against Children, etc.								
Paternity, illegitimate child (Ch. 257)	270	243	16	14	12	7	14	22
Abandonment, wife or child	110	111	4	4	1	2	44	47
Non-support, wife or child	224	190	25	24	2	2	44	51
Neglect of minor	1							
Contributing to minor's delinquency	10	21	1	1			1	1
Cruelty to child	2	1					1	1

Child labor law violations	7	4						
Miscellaneous	2	3	1	1			1	
(c) Miscellaneous Crimes against Morality, etc.								
Public dance laws, violations	1	5						1
Gambling and lottery laws, violations	23	15	1	2			1	3
III. Crimes Against Property (Ch. 620-622)								
Arson—1st degree	2					1		
2nd degree	1	2						
3rd degree	17	6		2			3	
Burglary—1st degree	5	9	1					
2nd degree		5	1				2	
3rd degree	126	152	2	4	3	2	4	8
Unlawful entry	21	14	1	1			2	2
Forgery—1st degree	10	6						1
2nd degree	81	106	2	2			1	16
3rd degree	10	12					1	2
Larceny, grand—1st degree	87	106	1	3	4	2	13	13
2nd degree	317	287	4	6	2	2	34	49
Larceny, petit	326	339	7	13	4	7	23	18
Giving check without funds	287	376	3	2	1	1	126	153
Receiving stolen property	16	18	1					5
Mortgaged chattels, sale, removal, etc.	38	32	1	2	2		6	11
Malicious mischief	69	85	1	5	1	2	7	13
Extortion	2							1
Trespass	19	7		2	1	1	1	
Fraud	13	30		2	1	1	3	3
Fraud on innkeeper (Ch. 327)	11	14	1	1	2		4	2
Miscellaneous	7	3	2	1			1	
IV. Crimes Against Sovereignty (Ch. 612), **Public Justice** (Ch. 613), **Safety** (Ch. 616), **Peace** (Ch. 615), **etc.**								
Bribery (giving or receiving)	17						1	
Perjury	2							
Resisting or interfering with officer	58	50	5	8	1		8	4
Concealed weapons, carrying, etc.	15	16	1	2			3	2
Language provocative of assault	35	25	8	2	1	2	2	2
Contempt of court	3	10		2				
Escape	34	12		1			2	2
Breach of peace	138	62	13	4	2		17	10
Disorderly conduct	329	264	18	11	3	4	6	5
Public Nuisance	29	52	3	8	1		4	1
Miscellaneous	13	23	1	1			1	1

TABLE NO. 2—Continued

TABULATED STATEMENT OF CRIMINAL CASES AS REPORTED BY COUNTY ATTORNEYS FOR 1949 AND 1950

NATURE OF ACCUSATION	DISTRICT - MUNICIPAL - JUSTICE COURTS							
	Pleaded Guilty		Found Guilty		Acquitted		Dismissed	
	1949	1950	1949	1950	1949	1950	1949	1950
V. Miscellaneous Crimes (and various special statutes)								
Cruelty to animals (Ch. 614)	9	4	2	.....	4	.....	.....	2
Vagrancy	145	130	6	4	.....	.....	2	2
Violations of laws re:								
Compulsory education	10	15	1	3	.....	.....	9	3
Forestry	22	36	2	.....	2	.....	2	7
Wild animals (game and fish) (Chaps. 97-102)	1,845	1,253	51	57	16	7	20	13
Health	53	35	18	.....	1	.....	3	.....
Food	30	40	1	2	.....	1	3	3
Motor vehicles, traffic	12,185	14,589	294	343	33	60	91	100
Motor vehicles, tampering	29	28	.....	1	.....	.....	3	5
Motor vehicles, intoxicated driver	923	1,045	27	48	9	5	6	8
Motor vehicles—Criminal negligence causing death	10	9	2	.....	1	3	2	2
Motor vehicles, unauthorized use	2,768	159	32	2	4	.....	29	16
Drunkenness	2,190	2,035	48	37	1	3	16	10
Intoxicating liquor	145	115	7	2	9	2	13	15
Non-intoxicating liquor	94	89	7	7	1	3	3	4
Narcotics	3	8	.....	.....	.....	.....	.....	.....
Gas tax	21	66	1	1	.....	.....	1	.....
Aeronautics	22	13	.....	.....	.....	.....	.....	.....
Miscellaneous crimes and ordinance violations	2,218	3,734	6	7	.....	.....	7	29
Totals	26,273	26,926	720	747	156	150	701	802

SELECTED OPINIONS

CONSERVATION

DRAINAGE

1

Bridges—Cost of—Engineer's report—M. S. A. 106.121.

Assessments—Discharge of waters from ditch 1 into ditch 2—Improvement on ditch 1 increasing flow—Terms to be imposed upon permitting outlet of ditch 1 into ditch 2—M. S. A., Sec. 106.531.

Facts

"There now exists in Chippewa County Drainage Ditch 'A.' A petition for a new ditch has been approved. The new ditch, ditch 'B,' will include within it ditch 'A.' Certain owners along ditch 'A' at the time of the construction of ditch 'A' were paid damages under the old law with which to construct a bridge across ditch 'A.' No such bridge was ever constructed."

Question

"Under the present law should the County build a bridge across ditch 'A' which is now a portion of ditch 'B' and if so who should bear the expense?"

Opinion

You do not specify the point of progress which has been attained in the proceedings for the establishment of ditch B. I make no assumptions thereon. If the proceedings are at the stage where the engineer is preparing his final report under authority of M. S. A., Sec. 106.121, L. 1947, C. 143, Sec. 12, it will be noted that under Subd. 3 of that section, in paragraph (c), the engineer's report shall contain plans for all private bridges proposed to be constructed by and as a part of the ditch system. If the engineer's report does not contain plans for the private bridge mentioned in the foregoing statement of facts, then it appears to me that no private bridge is contemplated to be built as a part of the drainage system. If such bridge is planned by the engineer, then it becomes the duty of the viewers to take into consideration the building of that bridge as a part of the ditch project in determining benefits and damages contemplated by Sec. 106.151.

If such bridge is not specified by the engineer as a part of the project, then in determining the damages, it appears to me that it would be proper for the viewers to take into consideration when damages are determined that when ditch A was constructed an award of damages was made or benefits were diminished in view of the fact that it was then known and considered to be just that an allowance should be made to landowners for the construction of the bridge across ditch A. In contemplation of that fact situation, it seems to me that those authorized to determine damages would be justified in taking into consideration the fact that such damages were allowed before ditch A was established and that in contemplation of law

such damages are the equivalent of a bridge whether constructed or not. If landowners saw fit to use the money thus awarded as damages for a purpose other than building a bridge, they should not be heard to say that they have not already been compensated. It is conceivable that if the ditch should be widened or deepened in the proceedings for the construction of ditch B at the point where the bridge was contemplated on ditch A, additional damages might be suffered because of such change. It appears to me that no precise answer can be given to your question without knowing all the facts pertinent thereto. But I have said enough to express my views concerning the basis for a conclusion on this question.

Second Problem

Facts

"At the present time ditch '1' flows into ditch '2.' There is to be an extensive improvement of ditch '1' which will greatly increase its capacity and will therefore dump a considerably larger amount of water into ditch '2'."

Questions

1. If the capacity of ditch 2 is sufficient so that no alteration thereof is necessary, should there be any assessment against owners of land on ditch 1 because of the fact that it outlets into ditch 2?
2. Assuming that the capacity of ditch 2 must be increased to accommodate the waters discharged thereinto from ditch 1, should there be an assessment against owners of land on ditch 1?
3. If the answer to question 2 is yes, how should the cost of increasing the capacity of ditch 2 be apportioned as between the owners of land on ditches 1 and 2?

Opinion

The facts do not show when the respective ditches were established and constructed. Depending upon when they were established and constructed, the law in force at the time will apply. Perhaps I am entitled to assume that the parties interested at the time that ditch 1 was established observed the requirements of M. S. A., Sec. 106.531, so that the right was established to drain the waters from ditch 1 into ditch 2. I may be justified in this assumption on the theory that public officers have done their duty. Assuming that this law was observed, the county board made an order granting authority to drain the waters from ditch 1 into ditch 2. That order fixed the terms and conditions for the use of ditch 2 as an outlet for ditch 1 and fixed the amount that should be paid therefor by ditch 1. Thereupon, the right to drain waters from ditch 1 into ditch 2 was established. When the time for review of that order had passed, the right thereby granted became a property right. The order had the same effect as a judgment in rem. A new status was thereby created. See **Lupkes v. Town of Clifton,** 157 Minn. 493, 196 N. W. 666. The status thereby created was the one which existed when ditch 1 was established. It is now contemplated that extensive improvements on ditch 1

are to be made. If and when these improvements contemplated are made, the discharge of waters from ditch 1 into ditch 2 will be greatly increased. This is not the situation contemplated at the time that the order of the county board was made permitting discharge of waters from ditch 1 into ditch 2. It, therefore, appears to me that before there can be any work of improvement on ditch 1, which will increase the discharge of waters into ditch 2, a new application must be made to the county board for permission so to do under Sec. 106.531, and an order must be made by the county board under the terms of that section and the limitations thereof, granting the specific right to increase the capacity of ditch 1 to discharge waters into ditch 2, and such order, in compliance with that section, will specify the terms upon which the order is made.

The fact, standing alone, that the capacity of ditch 2 is sufficient to carry the increased discharge from ditch 1 after alteration, does not mean necessarily that no additional burden is imposed upon ditch 2 by the increased discharge. The increase in the flow of water would naturally tend to increase the probability of erosion. I consider this a fact question which must be resolved by the board, depending upon the facts as they are developed.

Assuming that the capacity of ditch 2 must be increased to accommodate the increase discharge from ditch 1, Sec. 106.531, supra, is applicable. Again, we have a question of fact to be resolved by the board. It is not a question of law what the assessment should be. Owners of land benefited by the original construction of ditch 2 and who were assessed for the payment of benefits resulting should not be assessed additional benefits because of additional burdens imposed upon ditch 2. The order which the board will make will take all relevant facts into consideration and the board will place the burden where it belongs. If the board shall ascertain from the facts presented by the evidence that those benefited by the construction and improvement of ditch 1 should bear the entire cost of increasing the capacity of ditch 2 because of the fact that it carries waters from ditch 1, it would seem that such a conclusion would be sound.

CHARLES E. HOUSTON,
Assistant Attorney General.

Chippewa County Attorney. 642-B-11
February 9, 1949. 602-B

2

Construction Cost—Total cost of construction of drainage ditch plus administrative costs and damages to be paid may not exceed total benefits assessed—County officers not warranted in payment to contractor of a sum in excess thereof—M. S. A., Sec. 106.19, 106.27, 106.31.

Facts

In 1946, when the ditch was established, contracts were let. Reports of the engineer show that the cost of construction of the ditch will exceed the total benefits assessed in the sum of about $600.

You call attention to M. S. A., Sec. 106.19. The last paragraph of that section reads:

> "The amount any tract of land, public or corporate road, or railroad shall be liable for on account of the location, construction, and establishment of any drainage system or systems under the provisions of this chapter or on account of the repair thereof shall in no event exceed the benefits which will accrue thereto as determined in the proceedings for such location, construction, and establishment or repair."

In connection therewith, you call attention to **Nostdal v. Watonwan County**, 221 Minn. 376, 22 N. W. (2d) 461. You say that in this case, the landowners shall share their burden of excessive cost, but neither the case nor the statute is very clear as to what method the county board shall follow to secure contributions by the owners to make up the excess over the benefits.

You seek the Attorney General's views as to the law as it applies to these facts.

Opinion

The above quoted paragraph, from Sec. 106.19, relates to the assessment of benefits and award of damages in respect to a single tract of land and that is the question which was discussed in the Nostdal case, supra. I understand this quoted section of the statute to mean this: Assume that 100 tracts of land are benefited by the construction of a drainage ditch. Tract 1 is benefited to the extent of $500, but tract 1 is also damaged to the extent of $600. The damages exceed the benefits. As a result, the owner of tract 1 will receive the payment of $100 net damages, that being the amount of his damages in excess of his benefits and that is what is held in the Nostdal case. On page 390 in the opinion in that case, it is said:

> "* * * If damages exceed benefits, the difference is allowed as such and must be met out of the total benefits found. * * *"

This means that this $100 will be included as a part of the cost of construction of the ditch and will be paid by the owners of the lands assessed for the construction.

But neither the quoted section of the statutes nor the Nostdal case applies to your problem except in this: That no tract of land can be assessed for benefits in excess of the amount determined in the proceeding as such benefits.

If, upon the final hearing held under M. S. A., Sec. 106.27, it had been found by the county board as a fact that the estimated benefits to be derived from the construction of the improvement were not greater than the total costs, including damages awarded, then the construction of the ditch could not have been ordered. It is only when the benefits exceed the damages and costs that the board has authority to order the construction. The contract for the construction must not require the expenditure of more money for construction than the amount estimated by the engineer, plus 30%. Sec. 106.30. Under the requirements of Sec. 106.31, the work must be done and completed as provided in the plans and specifications and report of the engineer.

The contractor is charged with knowledge of the law.

The only source of revenue from which the entire cost of construction of a drainage ditch can be paid is that realized from the assessment of benefits. County officers will not be warranted in paying the contractor a sum in excess of the contract price when the result will be that the total cost of construction of the ditch with the administrative costs added will exceed the total net benefits assessed against lands and corporations, municipal and private.

CHARLES E. HOUSTON,
Assistant Attorney General.

Blue Earth County Attorney.
February 23, 1949. 602-C

3

Contract—Benefits—Viewers' Report—Abandonment—Order establishing ditch, nonaction of officers in failing to let contract for construction of ditch does not constitute abandonment of proceedings. Viewers' determination of benefits to village unaffected by action of village of availing itself of drainage into another drainage system—M. S. 1949, 106.441, 106.661, 106.231, M. S. 1941, 106.27.

Facts

August 1, 1944, the county board established Branch 2 of County Ditch No. 12 of Redwood County. Under authority of M. S. 1941, 106.30, the county auditor and chairman of the county board proceeded to advertise for bids for the construction of the ditch. The bids were called for as of September 29, 1944. A second call for bids required such bids to be made January 19, 1945. In response to one of such calls one bid was received, which was rejected as excessive. On the second call for bids, no bid was submitted. Meanwhile the law has changed. The law now applicable to letting of contracts is M. S. 1949, 106.231.

The viewers' report found certain benefits to the village of Belview. Apparently, this was upon the theory, at least in part, that the village would have an outlet for its sanitary sewer and for surface water drainage. No contract for the construction of the ditch having been made and no ditch having been constructed, the village made arrangements for an outlet into another drainage ditch and it is now using such other outlet.

Questions

1. Has the ditch been abandoned, or may a contract for its construction be made by the county?
2. May the village of Belview withdraw from the ditch and be relieved from liability for assessment on account of the construction of the ditch upon the assumption that the ditch has been abandoned?

Opinion

I see no evidence in these facts of any abandonment. There is a statute on the subject of abandonment, M. S. 1949, 106.661, but that relates to abandonment of the ditch and not abandonment of the proceedings. The facts disclose no ditch having been constructed. The facts disclose that a drainage ditch was established. There is no provision in the law that the officers charged with administrative duties in a drainage proceeding, such as required in M. S. 1949, 106.231, the letting of the contract, may by their nonaction defeat the law and the action of the county board in the establishment of the ditch.

It is my opinion that the proceeding has not been abandoned and that the duty imposed by Sec. 106.231 should be performed by the auditor and chairman of the county board.

The order establishing the ditch made under authority of M. S. 1941, 106.27, presumably determined that the viewers' report was made and that all other proceedings in the matter were had and taken in accordance with the provisions of law and that the estimated benefits to be derived from the construction of the improvement were greater than the total cost including damages awarded and that such benefits were duly assessed and that the determination of benefits as to the village is complete, just and correct. The order established the ditch and such order has never been reversed. It has the same effect as a judgment in rem. **Lupkes v. Town of Clifton,** 157 Minn. 493, 196 N. W. 666.

CHARLES E. HOUSTON,
Assistant Attorney General.

Redwood County Attorney.
June 28, 1950. 602-E

4

Control Works—May not be installed in drainage system under guise of repair—May not be installed by landowners without permission—Procedure for improvements required—M. S. 1949, 106.121; 106.231, subd. 4; 106.471, subd. 1; 106.501.

Facts

"County Ditch A is a County Ditch in Sibley County. County Ditch A has a Lateral Number 1, which runs into some more land along the ditch. County Ditch A is filled up and does not serve its original purpose. As a result of filling in County Ditch A beyond the point where Lateral 1 outlets into the ditch when the water is high in the main ditch it backs up into the Lateral and floods a great deal of low ground. Farmers owning land along Lateral 1 have put in a stop culvert so that the water can run out, but cannot back up into the Lateral. This causes some additional flooding along the main ditch and such farmers com-

plain of the stop culvert. Those farmers on Lateral 1 argue that they must protect themselves against the flooding that occurs because of the filling of the main ditch."

Questions

1. "In your opinion may the farmers on Lateral 1 of their own accord put in such stop culvert to protect themselves from flooding?"

2. "In your opinion do you believe that if the County Board should determine that the farmers on Lateral 1 were in need of some protection to their lands and that the flooding along the main ditch caused by the stop culvert would be less than the flooding on the Lateral if the water were not stopped, could the County Board then grant permission to the farmers on Lateral 1 to put in a stop culvert or might the County Board determine that one be put in at the expense of the ditch system?"

Opinion

Before a ditch is constructed, under authority of M. S. 1949, C. 106, an engineer is appointed. After the engineer has made a detailed survey he makes his report. M. S. 1949, 106.121. This report includes a profile of all lines of ditch proposed showing graphically the elevation of the ground and gradient at each 100 foot station. The report includes plans for all private bridges and culverts proposed to be constructed and as a part of the ditch system. It shows a list of the required minimum waterway opening at all railway and highway open ditch crossings and at other prospective open ditch crossings where bridges and culverts are not specified to be constructed as a part of the ditch. It shows plans and estimates of the cost of highway bridges and culverts. In fact, this report is intended to give a true picture of the ditch as it will exist upon construction.

When the ditch is established by order of the board or court, it is established according to the plans and report of the engineer. Specifications not contemplated by the engineer's report are not a part of the ditch.

When the contract for the construction of the ditch is let, the engineer attends the letting and no bid should be accepted without his approval as to compliance with the plans and specifications. Sec. 106.231, subd. 4.

It is the duty of the county board to maintain the ditch lying within its county. This is done by making repairs from time to time as needed. The term "repair" means restoring a ditch system as nearly as practicable to the same condition as when originally constructed or subsequently improved. Sec. 106.471, subd. 1. Repairs are distinguished from improvements. Sec. 106.501. The statute provides a definite procedure for improvements. Sec. 106.501.

The installation of a stop culvert not being specified in the original plan and not having been installed in the ditch when constructed, it appears to me to be in the nature of an improvement not originally designed and under the guise of repairs, the board would not be authorized to install such a

culvert in the system. If it is considered desirable that such a culvert be installed, it seems to me that the procedure preliminary thereto is that required in the statute for improvements. Surely, the landowners themselves have no authority to install in the ditch any contrivance not included in the original plan. If either a repair or improvement is contemplated, the statutory procedure must be observed.

CHARLES E. HOUSTON,
Assistant Attorney General.

Sibley County Attorney.
September 27, 1950. 602-H

5

Control Works—Not designed in plan, how accomplished—M. S. 1949, 106.121, subd. 4, subd. 8; 106.471, subd. 1; 106.501.

Facts

It appears that in Swift County certain landowners, who claim that their lands are affected by a drainage ditch, desire to place control dams at various places in the ditch to restrain the water from flowing except when there is a surplus of water on the land.

The opinion dated Sept. 27, 1950, No. 4 this report, was to the effect that this could not be done except in an improvement proceeding for the reason that it was a change of plan. That opinion was to the effect that the installation of dams in a ditch would have to be accomplished, if at all, in an improvement proceeding.

In reading M. S. 1949, 106.121, subd. 4a, you will notice that the legislature used the words "other proposed improvements" with reference to the data contained in the engineer's report. In paragraph d, it used the word "works." I consider dams to be included in the works. In the same section, subd. 8, the engineer is required to make revisions of his plans, profiles and designs of structures. The designs of structures would include dams.

Lupkes v. Town of Clifton, 157 Minn. 493, 196 N. W. 666, held that when a ditch is established and constructed, a new status is thereby created for the lands affected, and it becomes a property right, appurtenant to the lands, and not to be taken or impaired even through governmental action, except by due process of law. The property owners assessed for and who paid assessments for the construction of the ditch acquired a property right in it as it was established and constructed. No one has a right to take anything away from it or add anything to it except by due process of law. The plans included in the engineer's report not showing any dams in the ditch, dams are not a part of the ditch.

In M. S. 1949, 106.471, we read that after the construction of a county or judicial drainage system has been completed, the county board is empowered to **maintain** the same or such part thereof as lies within the county and provide the repairs required to render it efficient to answer its purpose. The word "repair" is defined in Subd. 1 of that section. But the county board has no power under this authority to maintain to make changes. It cannot add new works not included in the plan.

You have called attention to the improvement statute, Sec. 106.501, in the particular that that section relates to improvement by tiling, enlarging or extending. If the statute shall be construed by the court that improvements are limited to tiling, enlarging or extending, then I see no method of authorizing dams in ditches unless it be by a new proceeding for a new ditch on the line of the old one with these control dams installed therein. That would require all of the proceedings required for a new ditch in a place where one was not built before.

CHARLES E. HOUSTON,
Assistant Attorney General.

Swift County Attorney.
October 3, 1950. 602-H

6

Ditch System—Abandonment of—M. S. 1949, 106.661.

Opinion

M. S. 1949, 106.661, establishes procedure by which a public drainage ditch may be abandoned.

When the procedure established by this section is followed and the county board, or the court, as the case may be, makes an order finding the essential facts mentioned in this section, and that the ditch is no longer a public benefit and utility, and the order provides that the ditch is thereby abandoned, the result is that the ditch thereafter will not be considered to legally exist.

When the petition for abandonment, which is provided for in this section, is presented to the board, the board must take the action which the law requires.

CHARLES E. HOUSTON,
Assistant Attorney General.

Swift County Attorney.
September 14, 1950. 602

7

Establishment—Appeal—Order—Time for appeal runs from date of order—M. S. A. 106.631, Subd. 2. Order should be dated on day it is signed. Order may modify engineer's and viewers' reports—M. S. A. 106.191, Subd. 2.

Facts

The county board in proceedings for the establishment of a new drainage system, after final hearing on the engineer's and viewers' reports, makes some changes in the benefits and damages reported and adopts a resolution accepting or approving the report as so amended and orders the establishment of the ditch.

In many proceedings in the county for the establishment of new ditches, the order mentioned is not drawn and signed until a week or ten days, or even longer, has elapsed after the day on which the board met and adopted such resolution.

Questions

1. Does the thirty day appeal period begin on the day that the board meets and approves the reports of the engineer and viewers as amended by the board, or does the time for appeal begin to run on the day that the order is finally drawn and signed, establishing the ditch?

2. When the final order is signed establishing the ditch, should it be dated on the day that the board considered the matter at its meeting, or on the day the order is signed?

Opinion

On the final hearing, "At the time and place specified in the notice, or at any adjournment thereof, the board or court shall consider the petition for the drainage system, together with all matters pertaining to the engineer's, viewers' and director's reports. The board or court shall hear and consider the testimony presented in behalf of all parties interested. The engineer, or his assistant, and at least one viewer shall be present. The director may appear and be heard. If the director does not personally appear, his report shall be read in open hearing. The hearing may be adjourned from time to time as may be found necessary." M. S. A. 106.191, Subd. 1, L. 1947, C. 143, Sec. 19.

So, it appears from the law that on this final hearing, the board has the power to amend the engineer's or viewers' reports, or both. It also has power to make findings in relation thereto such as the board considers to be necessary and proper in the circumstances. That is the situation which, I understand, we are considering.

When the proceeding is pending in court, the court has the same power as the board has when the proceeding is pending before the board. If this proceeding were before the court and the court made an order modifying the

engineer's report in some respects and modifying the viewers' report in some respects and then confirming both reports as modified and ordering the ditch established in accordance with the engineer's report as modified and the viewers' report as modified, I would consider it proper if the court should date such order on the date that it was written and approved, although this might be some time subsequent to the hearing. Likewise, the board may in principle approve the engineer's report, but with such modification as the evidence requires should be made, and the board may approve the viewers' report with such modification as the evidence requires should be made. Until the modifications are stated, no one can say what they are. Accordingly, it appears to me that it is proper that the date of the order should be the day on which the order is signed.

Another reason why it appears proper that the date of the order should be the date on which it is actually signed is that the time for appeal runs from the date of the final order. If the order is dated back, say a week or ten days, then the statutory time for appeal is shortened the same number of days. To render an appeal effective, a notice of appeal must be filed within thirty days of the date of the final order. M. S. A. 106.631, Subd. 2 (b), L. 1947, C. 143, Sec. 63. The date of the order will be taken from the order itself. In my opinion the date disclosed by the order is prima facie the date thereof. Of course, the order is not effective until it is filed and it might be that the court would say that the real date is the date on which the order is filed, although it might bear a previous date.

So, it is my conclusion that the appeal period begins to run from the date of the order establishing the ditch.

CHARLES E. HOUSTON,
Assistant Attorney General.

Renville County Attorney.
April 11, 1949. 602-E

8

Repair—Ditch Banks—Under the guise of repair, ditch banks may not be resloped or waste banks leveled to the extent that damage is caused not contemplated when the ditch was originally constructed. Such proceedings must be under the improvement statute—M. S. A. 106.471, 106.501.

Facts

A county ditch was constructed for drainage purposes. The proceedings were commenced in 1915 and completed in 1918.

Repair proceedings are now pending. The contractor is about to remove trees on either side of the ditch to permit resloping and leveling of the waste banks. This operation may require the appropriation to the ditch of more land of the owners than was originally taken by the original waste banks

which were not leveled. At the time that the ditch was constructed and at the time that it was established the lands through which the ditch passes were considered damaged and damages were calculated on the basis of acreage. It is now claimed that more acres will be appropriated to the ditch when the banks are resloped and the waste banks leveled.

Question

In such a proceeding, is the county liable for damage resulting from a change of slope of the banks and leveling the waste banks, including the removal of trees to make possible the operation?

Opinion

Our drainage laws are based upon the police power, the power of eminent domain and the taxing power. **Dunnell's Digest**, Sec. 2819.

I presume that the present pending repair proceedings are pending under authority of M. S. A. 106.471. Subd. 1 of that section defines the term "repair." Under that definition, a repair may include resloping of open ditches and leveling the waste banks thereon if deemed essential to prevent further deterioration. Under this definition it appears that a repair is intended to restore the system as nearly as practicable to the same condition as when originally constructed or subsequently improved. Whether the resloping and leveling is a repair or improvement would, in my opinion, depend largely upon the character of the area through which the ditch passes. If the ditch is comparatively shallow, the resloping process and the leveling process might result in no damage and might in fact be an actual benefit to the land by the elimination of abrupt banks and making it possible for livestock, machinery and vehicles to pass through the ditch from one side to the other.

But assume another situation. The area is not comparatively level. The surface is abruptly rolling. A deep ditch is required with wide excavation. Great quantities of earth were removed when the ditch was constructed, and deposited in high waste banks. Buildings and valuable trees were in close proximity to the ditch. If in such a situation the waste banks are resloped and the waste banks leveled, it requires the removal of buildings and trees. The character of the operation might be such that the result would not be to place the ditch in the same condition as when originally constructed or subsequently improved. It would be more in the nature of an improvement than in the nature of a repair. In the situation last described it could not be said that the resulting damage was contemplated when the ditch was constructed. It could not be said that the damages paid at the time of construction contemplated the taking of the property which was taken or destroyed in making the so-called repair. In other words, it could not be said that Minn. Const. Art. I, sec. 13, had been observed. It could not be claimed with any justification that just compensation had been paid or secured for the property damaged or destroyed. If the proceeding taken at the time that the ditch was established did not contemplate the taking of

the property intended to be taken in the repair proceeding, then such property cannot be taken or damaged without just compensation first paid or secured.

It appears to me that it is not so much a question of law as it is a question of fact whether property is to be damaged in the repair proceeding beyond that contemplated at the time of the original construction or subsequent improvement of the ditch.

There may be a lurking danger in confusing repair proceedings under Sec. 106.471 with improvement proceedings authorized by Sec. 106.501.

It is true as stated in the opinion of the Attorney General, File 602d, dated July 21, 1948, that the law relating to the repair of ditches does not contemplate the payment of damages in repair proceedings. But in proceedings for the improvement of a ditch there is machinery through which damages may be ascertained and paid. M. S. A. 106.501, subd. 2.

I am of the opinion that the definition above mentioned, relating to repairs, must be read and applied with discretion. I fail to see how the county could be held liable for damages. **Gaare v. Board of County Commissioners,** 90 Minn. 530, 97 N. W. 422. But if the repairs involved damage to the land not contemplated by the original construction, the right to so damage the land must be acquired through the right of eminent domain. **Westerson v. State,** 207 Minn. 412, 291 N. W. 900. This contemplates an improvement proceeding rather than a repair proceeding.

In this opinion only the rights of the county are considered. No attempt is made to consider the rights of the landowners to enjoin the doing of an unauthorized act.

CHARLES E. HOUSTON,
Assistant Attorney General.

Steele County Attorney.
September 12, 1949. 602-J

9

Soil Conservation District—Powers—Lacks power and authority to purchase or lease lands exclusively for a recreation area—M. S. A., C. 40.

Question

As to the power and authority of a soil conservation district to lease lands to be used as a recreation area.

Opinion

The manner and method of creating a soil conservation district is provided for in Sec. 40.04. Such a district when created, and upon compliance with said section, subdivision 6 thereof, shall become a governmental sub-

division of the state and a public body corporate and politic. The powers of the district thus created and constituted are enumerated in Sec. 40.07. No specific authority or power to purchase or lease lands exclusively for a recreation area or for recreation purposes has been by statute conferred upon a soil conservation district. The title of the original act, Laws 1937, c. 441, which is as follows:

> "An act to cause to be created soil conservation districts to engage in conserving soil resources, and preventing and controlling soil erosion, to establish the state soil conservation committee and to define its powers and duties and to define the powers and duties of soil conservation districts, and to provide for means and methods of establishing land use practices and to provide for the establishment of boards of adjustment in connection with land use regulations and to define their powers and duties, to provide for the enforcement of the provisions hereof, and to provide for the discontinuance of such soil conservation districts."

negatives any presumption that a soil conservation district, authorized to be created under this law, or amendments thereto, should carry on recreational activities and acquire or lease lands for such purpose. These statutory provisions and the title of the original act compel the conclusion that a soil conservation district does not have the power to purchase or lease lands exclusively as a recreation area or for recreational purposes.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Minnesota State Soil Conservation Committee.
March 24, 1949. 705-A-3

COURTS AND CRIMINAL LAW

COURTS

10

Actions—Habeas Corpus—Children—Dependent or Neglected—Custody—Enforcement of court order by contempt proceedings or habeas corpus— M. S. A., 260.11.

Facts

Under authority of M. S. A. 260.11, a petition was filed which resulted in a court finding of neglect and an order committing the children named in the petition to the custody of the Director of Social Welfare.

Your letter calls attention to language found in the cited section, "Upon making an order of commitment to the director of social welfare, the judge or clerk shall mail or deliver a copy thereof to the director of social welfare,

and the child shall be delivered by order of the court to the county welfare board, as the representative of the director of social welfare, to be cared for as directed by the director of social welfare."

Questions

1. Is this statute to be understood as authorizing the court to make an order directing the person who has custody of the children to deliver them to the county welfare board?
2. Is such order to be enforced in contempt proceedings?
3. What is the procedure to enforce the order requiring delivery of the children to the welfare board?

Opinion

The court makes an order of commitment. That order determines the director of social welfare to be the lawful custodian of the child. The words of the statute "and the child shall be delivered by order of the court to the county welfare board" constitute authority to the person in custody of the child at the time that the order is made to hand over to the county welfare board the person of the child. The law imposes the duty on the part of the custodian. It appears to me that that duty would not be increased if the order mentioned contained a positive command on the custodian to make delivery of the child to the county welfare board.

Under certain facts, contempt proceedings might be appropriate for the enforcement of the order. But in order that contempt proceedings be considered appropriate, there should be personal service of the order on the custodian and this service would necessarily be made in the same manner as the service of a restraining order. Prerequisite also would be a demand by the director upon the custodian at the place of detention and a refusal by the custodian to deliver to the director at such place.

After it had been adjudged that the proper custodian is the director, custody could be obtained by the director through a writ of habeas corpus.

CHARLES E. HOUSTON,
Assistant Attorney General.

Dodge County Attorney.
January 10, 1950. 840-A-9

11

Actions—Replevin—Service of Process—Claim and Delivery Proceedings. Sheriff has no authority to serve requisition in county other than own and to take thereunder personal property located in county other than his own—M. S. A. 565.04.

Facts

"Section 542.06 (M. S. A.) provides that actions to recover the possession of personal property wrongfully taken shall be tried in the county in which the taking occurred, or, at plaintiff's election, in the county where he resides; and in other cases in the county in which the property is situated.

"A replevin action has recently been started here in Renville County where the venue has been laid in Renville County, the county in which the taking occurred; the property, however, is situated in another county adjoining Renville County. A Writ of Replevin has been issued to the Sheriff of Renville County to take the personal property involved in the action.

"The question has arisen as to whether or not the Sheriff of Renville County, in which county the venue of the replevin action is laid, has the authority to serve the Writ of Replevin and take the property where the property is situated in another county. It would seem to me in this case, where the venue was laid in Renville County, that the Writ of Replevin would have to be directed to, served by and the property taken and seized by the Sheriff of the County in which the property is located.

"The statute is silent on a situation of this kind, and I am unable to find any law backing me up one way or the other."

Although you do not so specifically state, we assume the action was commenced in the District Court of Renville County under the claim and delivery statute, M. S. A. 565.01 et seq., and that the "Writ of Replevin" to which you refer is the statutory requisition to the sheriff prescribed by M. S. A. 565.04.

Question

In the circumstances stated, does the Sheriff of Renville County, as sheriff, have the authority to serve in a county other than his own the requisition in the claim and delivery proceedings and to take the personal property located in a county other than his own under the requisition?

Opinion

The question is answered in the negative.

We concur in your view that, where the venue is laid in Renville County and the personal property described in the affidavit of claim and delivery is located in another county, the requisition should be "directed to, served by and the property taken and seized by the Sheriff of the County in which the property is located."

Authority for this conclusion is found in **Daigle v. Summit Mercantile Company** (1919), 144 Minn. 178, 174 N. W. 830. The case cited was an action to recover damages for malicious assault. The defendant Mercantile Company held a chattel mortgage against the plaintiff. The company began an action in the District Court of Beltrami County to foreclose the mortgage

and, in connection therewith, instituted replevin proceedings to obtain possession of the mortgaged property. The Sheriff of Beltrami received the papers for service and turned them over to a deputy, one Simon Thompson. The deputy Sheriff went to plaintiff's house **in Itasca County** to serve the papers. While attempting to do so, Simon Thompson got into an altercation with the plaintiff, which was followed by an assault upon him. The trial resulted in a verdict for the plaintiff against the defendants. On appeal from an order denying a motion for new trial, the Mercantile Company assigned as error the trial court's refusal to direct a verdict in its favor, the company's principal contention being that the request should have been granted because Simon Thompson was not the company's agent at the time of the assault and that, even if he was, he was not acting within the scope of the agency or in furtherance of the company's business. In respect of such contentions, the Supreme Court, in affirming, said:

> "We do not sustain either contention. **As deputy sheriff of Beltrami county, Thompson had no authority to serve a summons or take property under the replevin papers in Itasca county.** As an individual, he had a right to serve the summons there, but not to take the mortgaged property against the will of the plaintiff. **In all that he did in these respects he was acting as the agent of the Mercantile Company and not as a public officer."**

See also 5 Dunnell's Minnesota Digest, § 8740.

Your attention is directed to the following expressed language of M. S. A. 565.04:

> "* * * and upon receipt of the affidavit, endorsement, and bond the sheriff shall forthwith take the property, **if in the possession of the defendant or his agent,** and retain it in his custody until delivered as hereinafter provided."

LOWELL J. GRADY,
Assistant Attorney General.

Renville County Attorney.
December 13, 1949. 390-A-21

12

Appeals — Assessments — Local Improvements—Appeals from assessment of benefits — Under city charter, not entitled to trial of such issue by jury as a matter of right — The court could in its discretion submit special questions of fact to the jury.

Facts

"Sections 185-186-187 of the City Charter of the City of Willmar deal with appeals to the District Court by any person interested in any property assessed for local improvements, such as the construction of curbing, laying of bituminous paving, etc.

"Section 187 states in part as follows:

" 'Such appeal shall be tried by the Court, **without a jury**, at a general or special term without pleading, other than above stated.'

"As City Attorney, I have had served upon me two notices of appeal from orders confirming assessments, the appellant seeking to obtain trial of the issue of benefits and damages to a jury, which is specifically excluded by our Charter."

Question

Whether the appellant is entitled to a trial by jury.

Opinion

I do not feel that the appellant is entitled to a trial by jury as a matter of right. The constitution guarantees the right to a trial by jury as it existed at the time the state was admitted to the union. That right to a trial by jury would not extend to the trial of an appeal from the assessment or benefits for local improvements.

The charter specifically provides that such an appeal shall be tried by the court without a jury. This is not in contravention of the constitution or of any statute.

However, the court could in its discretion submit special questions of fact to a jury for its answer. The appellant could by motion ask the court to submit such special questions. It would then be in the discretion of the court whether to submit special questions or not.

RALPH A. STONE,
Assistant Attorney General.

Willmar City Attorney.
September 19, 1949. 6

13

Commissioner — May engage in private practice of law if it does not interfere with or conflict with official duties—M. S. A. 489.02, 525.763, 629.41, 570.01, 571.61.

Question

"May the Court Commissioner of Hennepin County engage in the private practice of law while he is acting as such Court Commissioner?"

Opinion

There is no statutory provision forbidding the Court Commissioner of Hennepin County to engage in the private practice of law.

However, in my opinion, it is incumbent on that commissioner to refrain from any outside activities which would unduly interfere with the proper performance of the duties of his office. The Court Commissioner of Henne-

pin County is paid a yearly salary for performing such duties as are imposed upon him by statute. For him to accept law business of a nature that would compel him to be absent from his office or require so much of his time as to render him unavailable for the discharge in a reasonable manner of his official obligations would, I believe, be inconsistent with the fulfillment of the responsibilities of the office held by him.

Among the duties of a court commissioner are those enumerated in M. S. A. 489.02, 525.763, 629.41, 570.01, and 571.61, which include the authority to "exercise the judicial powers of a judge of the district court at chambers." In the practice of law by a court commissioner, it would appear that he should not accept any private legal business which would in any way be in conflict with his above enumerated or other official duties or which involved any matter that reasonably could be assumed to be of a nature with which the court commissioner might in his official capacity become in some way connected.

J. A. A. BURNQUIST,
Attorney General.

Hennepin County Attorney.
March 6, 1950. 128-B

14

District — Clerk — Fees — Marriage certificate — For filing and recording. L. 1949, c. 374. M. S. A. 517.08, 517.10, 517.11, 517.12.

Question

Whether, under L. 1949, c. 374, the clerks of court are entitled to a fee of $3.00 or a fee of $3.25 "for services rendered in connection with the issuance of marriage licenses and recording the marriage certificates."

Opinion

The sections of M. S. A. here material provide as follows:

"517.11. Every person solemnizing a marriage shall immediately make a record thereof, and within five days after the ceremony file with the clerk of the district court **of the county in which the license was issued** the **third certificate,** as provided for in section 517.10, which certificate shall be filed and recorded by the clerk in a book kept by him for that purpose.[1]

"517.12. Every person solemnizing a marriage shall make a record thereof, and within one month make and deliver to the clerk of the district court **of the county where the marriage took place,** or of the county

[1]L. 1949, c. 374 deleted from M. S. A. 517.11 the following words: "and the clerk shall be entitled to receive 25 cents for recording the certificate from the person offering the same for record."

to which the county is attached for judicial purposes, a certificate under his hand containing the particulars mentioned in section 517.11, which certificate shall be filed and recorded by the clerk in a book by him kept for that purpose, and the clerk shall be entitled to receive the sum of 25 cents for recording the certificate from the person offering the same for record. The clerk of the court shall execute a receipt to the person delivering the certificate, which receipt shall be of even date with the delivery of the certificate and contain substantially all of the facts set forth in the certificate; be signed by the clerk and have affixed thereto the seal of the court."

The confusion arising from these two statutes as to the proper county for the filing of marriage certificates is the subject matter of Attorney General's opinion dated May 6, 1926, and printed as opinion No. 221 in the Attorney General's Report for 1926, to which you are referred.

G. S. 1894, § 4778 provided that the marriage certificate should be filed with and recorded in the office of the clerk of the district court of the county where the marriage took place. This provision was carried forward into R. L. 1905 as § 3562, with no change therein. At the legislative session of 1905, at which session the Revised Laws of 1905 were adopted, G. S. 1894, § 4778 was amended by L. 1905, c. 294, in certain particulars, but the provision thereof requiring that the certificate be filed and recorded in the office of the clerk of the district court of the county where the marriage took place remain unaffected. Accordingly, at the close of the 1905 session the law on the matter was R. L. 1905, § 3562, as amended by L. 1905, c. 294. That section of R. L. 1905, as so amended, was the same as what now appears as M. S. A. § 517.12.

L. 1909, c. 386, amended R. L. 1905, § 3562, so as to require that the certificate be filed and recorded in the county in which the license was issued. That chapter is the genesis of the present M. S. A. 517.11. What is now carried as § 517.12 was supplanted by the provisions of L. 1909, c. 386, now carried into § 517.11. For some reason which defies explanation, the editor of General Statutes 1913 carried the provisions of R. L. 1905, § 3562, as amended by L. 1905, c. 294, into G. S. 1913, § 7099, notwithstanding that such provisions had been amended by L. 1909, c. 386. The provisions of L. 1909, c. 386, were carried into General Statutes 1913 as § 7098. Immediately following § 7099 the editor of General Statutes 1913 made the following note:

> G. S. 1894 § 4778 "was G. S. 1866 c. 61 § 11, amended by 1871 c. 94 §1, and 1883 c. 68 § 1. Said acts were repealed by §§ 9428, 9434, 9445"; and the editor acknowledged that what he carried into G. S. 1913 as § 7099 was apparently superseded by G. S. 1913, § 7098.

G. S. 1913, § 7098, was ultimately carried forward, without amendment, into Minnesota Revised Statutes as § 517.11.

And, for some other reason equally defiant of explanation, the provisions of G. S. 1913, § 7099, were ultimately carried forward into Minnesota

Revised Statutes as § 517.12 thereof, immediately following which, in M. S. A., the revisor makes this observation: "This section may be superseded by section 517.11."

The 1945 act of the legislature adopting and enacting the "Minnesota Revised Statutes" is quoted in 1 M. S. A. p. vii. Under § 1 of that act, M. S. A. 517.12 was "adopted and enacted," but § 3 of that act expressly provides:

> "Sec. 3. The laws contained and compiled in 'Minnesota Revised Statutes' are to be construed as continuations of the acts from which compiled and derived and not as new enactments."

If any effect be given to the language of § 3 of that act, it appears that the revisor's observations that M. S. A. 517.12 "may be superseded by section 517.11" is correct. In any event, we know that L. 1949, c. 374, is the latest expression of the legislative will on the subject matter, and by that chapter the legislature deleted from M. S. A. 517.11 the former provision that "the clerk shall be entitled to receive 25 cents for recording the certificate from the person offering the same for record." That evinces a clear intention on the part of the legislature that the filing and the recording of the marriage certificate should be covered by the $3.00 fee payable to the clerk under M. S. A. 517.08 "for administering the oath, and issuing, recording, filing all papers required." This conclusion is fortified by the circumstance that, in amending § 517.10 by L. 1949, c. 374, the legislature made the requirement that the person solemnizing the marriage shall "prepare under his hand three certificates thereof," one of which shall be given to each of the contracting parties, and the third certificate is required to be filed and recorded under the provisions of § 517.11, the amendment of which by L. 1949, c. 374, deleted the 25 cent fee for the clerk.

LOWELL J. GRADY,
Assistant Attorney General.

Chisago County Attorney.
May 20, 1949. 144-B-17

15

District—Clerk—In tax proceedings—When payable—M. S. A. 279.24.

Opinion

The fees of the clerk of the district court specified in M. S. A. 279.24, are paid for all services of the clerk in tax proceedings, except oaths to witnesses on trial. The charge may be made by the clerk at any time that he wishes to make it but it appears that it cannot be paid until the service is complete, and the service is not complete until the tax judgment is entered. But such statutes must be practically administered. Suppose there are two

cases contested and in all other cases judgment is entered by default. If the county board allowed the fees and they were paid before the entry of the judgment in the two cases, it would appear to me that the maxim **de minimis non curat lex** applies.

CHARLES E. HOUSTON,
Assistant Attorney General.

Washington County Attorney.
March 1, 1949. 144-B-5

16

District — Clerk — Judgments — Execution — On whose application issued — Endorsement — M. S. A. 550.01, 550.04.

Facts

The clerk of the district court has refused to issue executions on judgments for the payment of money to any person except the judgment creditor or his assignee or his attorney if the application for the execution was made within two years after the date of the judgment.

Parties other than those above named request the issuance of an execution and they then direct the sheriff upon receipt thereof to proceed to levy on the property of the judgment debtor. You say that you have advised the sheriff that before he proceeds to enforce the judgment under execution that the execution should be endorsed by the party applying therefor, or his attorney, as required by M. S. A. 550.04.

Questions

1. Has the Clerk of Court the authority to issue Execution to any one other than the party in whose favor a Judgment is given, or to the Assignee of such Judgment?
2. When the person demanding the Execution claims to be an Assignee of the Judgment, is it not proper for the Clerk to require him to produce and file his Assignment?
3. Should not the Sheriff require that the Execution be endorsed by the party applying therefor or his attorney before proceeding thereunder?

Opinion

I concur in your conclusion that the clerk should not deliver an execution issued on a judgment requiring the payment of money except to the judgment creditor, or the assignee of the judgment, or the attorney for either of them. M. S. A. 550.01.

A judgment is a contract. Contracts are assignable. The clerk has in his office a record of the judgment and until an assignment thereof is filed in his office he has no evidence of any rights of the assignee and he is justified in refusing to issue an execution upon an application of the assignee of a judgment when the assignment of the judgment has not been filed in his office.

One of the things required by M. S. A. 550.04 is that the execution be endorsed by the party applying therefor, or his attorney. If the sheriff receives an execution in all other respects complying with this section, but not endorsed by the party applying therefor, or his attorney, that execution does not meet the requirements of the statute. When the sheriff receives an execution, the law requires him to execute it. Sec. 550.08. But he is required to execute the writ called for in Sec. 550.04 and when the writ does not conform to those requirements, it is my opinion that it calls for the performance of no duty on the part of the sheriff. It is, accordingly, my opinion that, when the sheriff receives an execution which is not endorsed by the judgment creditor or the assignee thereof or the attorney for either of them, he should return the execution to the person from whom he receives it and call attention to the defect.

CHARLES E. HOUSTON,
Assistant Attorney General.

Faribault County Attorney.
October 14, 1949. 144-B-3

17

District — Clerk — Records — Public — Right of inspection and examination generally.

Question

What are the rights of the public to inspect public records in the office of the clerk of the district court?

Opinion

The term "public records" has been frequently defined by our courts. No hard and fast rule can be laid down. Public records are frequently defined as those which a public officer is required by law to keep. **Barrickmon v. Lyman** (1913), 155 Ky. 710, 160 S. W. 267; **Fidelity Trust Company v. Clerk of Supreme Court** (1900), 65 N. J. L. 495, 47 Atl. 451. However, not every record in a public office is a public record even though it is kept at public expense. **State ex rel. Cook v. Reed** (1905), 36 Wash. 638, 79 Pa. 306, and **Fidelity Trust Company v. Supreme Court**, supra. Whether a particular record constitutes a public record must be left for determination in each case from the specific facts considered.

The right to inspect public records is statutory. At common law the right of inspection of public records is limited to those having an interest sufficient to maintain or defend an action for which the document sought will furnish evidence or information. **The King v. Justice of Stafford** (1837), 6 A. D. & El. 84, 1 Nev. & P. 260; **State ex rel. Ferry v. Williams** (1879), 41 N. J. L. 332, 27 L. R. A. 82.

An early statute in this state covered all records in the offices of the probate court, county auditor, and clerk of the district court. Laws 1887, c. 83; G. S. 1878, vol. 2 (1888 Supp. c. 8, §§ 271, 272); G. S. 1894, §§ 887, 888. In the revision of 1905 the office of the register of deeds was included. R. L. 1905, §§ 614, 615, and these two sections now constitute M. S. A. § 382.16, which reads as follows:

> "The several judges of probate, county auditors, registers of deeds, and clerks of the district court, during the hours when their respective offices are open, or are required by law to be kept open, shall exhibit any papers, files, or records of their office or in their official custody, for the inspection of any person demanding the same, free of charge, except in cases where fees are provided by law, and then upon tender of such fees.
>
> "The several county auditors, judges of probate, and clerks of the district court, during the hours when their respective offices are required by law to be open, shall furnish to any person demanding the same a certified copy of any record, file, or paper in their office or in their official custody upon tender of such fees therefor as are by law allowed to registers of deeds for like services."

This statute, in so far as the records in the office of the clerk of court are concerned, must be examined in light of certain duties imposed upon the clerk under the provisions of § 485.06, which reads as follows:

> "The clerk, upon request of any person, shall make search of the books and records of his office, and ascertain the existence, docketing, or satisfaction of any judgment or other lien, and certify the result of such search under his hand and the seal of said court, giving the name of the party against whom any judgment or lien appears of record, the amount thereof, and the time of its entry; and, if satisfied of its satisfaction, and any other entries requested relative to such judgment. Nothing in this section shall prevent attorneys or others from having access to such books and records at all reasonable times, when no certificate is necessary or required."

The duties of the clerk with respect to filing papers was stated by the court in **Rosenthal v. Davenport**, 38 Minn. 543, 544, 38 N. W. 618:

> "It was the officer's (clerk of court) duty to file each one of the several papers thus delivered to him for that purpose, and to deposit them in a proper place for the keeping of such papers, so that they might be found, and the fact of their having been filed discovered, upon such examination as one interested in the subject, or the officer himself, might be expected to make. If he failed in this duty, he was negligent."

State ex rel. Clay County Abstract Company v. G. D. McCubrey, 84 Minn. 439, 87 N. W. 1126, involved the right to examine and inspect records in the office of the clerk of district court. The statutes there considered by the court are in terms identical with sections 382.16 and 485.06. The opinion is abstracted in the syllabus as follows:

> "G. S. 1894, §§ 861, 862, 887, construed, and held to authorize and permit the examination and inspection of the records and files in the office of the clerk of the district court by any and all citizens, without limitation as to any particular person or class of persons, and are not repugnant to the constitution either as arbitrary, unequal, or class legislation.
>
> "The right to inspect and examine public records by a person having no interest therein does not exist at common law, and the purpose of the statutes aforesaid was to extend that right or privilege to all citizens. It was competent for the legislature to do so, and to surround the privilege thus extended with such restrictions and limitations as that body deemed necessary and proper.
>
> "Such statutes do not authorize an examination or inspection of the records and files in the office of the clerk of the district court by any person when the purpose thereof is to complete and certify to abstracts of title to real estate. When such is the purpose of an examination, the clerk may refuse to permit it to be made. A person desiring an examination or inspection of the records for that purpose is required by the statutes to apply to the clerk therefor; and that officer, as custodian of the records, may determine for what purpose an intended inspection thereof is demanded."

In commenting on the nature of the office and the rights of the clerk in connection with the inspection of his records the court, at page 443, said:

> "The clerk is the representative of the state, the custodian of and responsible for the safekeeping of the records and files in his office, and has the clear right to determine the purpose for which inspection of such records is demanded. That right of determination becomes a duty, and he is bound to exercise it impartially. For any wilful or intentional misuse of the power he would be liable as for any other act of misconduct in office. The statutes clearly limit the right of inspection, and some person other than the person wishing to examine them must be clothed with authority to determine the purpose of an intended inspection. The clerk, as the custodian of the records, is the proper person to perform that duty."

See also **State v. Rachac**, 37 Minn. 372, 35 N. W. 7.

In addition to the right of inspection as provided by section 386.16 the legislature by Laws 1941, c. 553, M. S. A. § 15.17 covered practically the entire field of the right of inspection and examination of public records. The pertinent provisions of this section are as follows:

"Subdivision 1. All officers and agencies of the state, and all officers and agencies of the counties, cities, villages, and towns, shall make and keep all records necessary to a full and accurate knowledge of their official activities. All such public records shall be made on paper of durable quality and with the use of ink, carbon papers, and typewriter ribbons of such quality as to insure permanent records. Every public officer and agency is empowered to record or copy public records by any photographic device, approved by the Minnesota historical society, which clearly and accurately records or copies them.

"Subdivision 4. Every custodian of public records shall keep them in such arrangement and condition as to make them easily accessible for convenient use. Except as otherwise expressly provided by law, he shall permit all public records in his custody to be inspected, examined, abstracted, or copied at reasonable times and under his supervision and regulation by any person; and he shall, upon the demand of any person, furnish certified copies thereof on payment in advance of fees not to exceed the fees prescribed by law."

Under this section every custodian of public records is required to permit all public records in his custody to be inspected, examined, abstracted, or copied at all reasonable times under his supervision and regulation by any person, the only exception being those records which by law are confidential or of a similar nature and by statute are not open to the public generally for examination and inspection. See sections 257.31 and 259.09.

It is for the clerk to determine the manner and the times when the records in his office may be inspected and examined. His requirement in that respect should not be unreasonable nor arbitrary.

We do not believe that section 15.17 should be construed so as to abrogate or nullify the provision of section 485.06 imposing certain duties upon the clerk of the district court, nor the provision of sections 257.31 and 259.09 and statutes of like import which relate to the confidential nature of certain public records.

Other cases and authorities examined in connection herewith are:

United States ex rel. v. Stowell, 19 Fed. R. (2nd) 697. Petition for writ of certiorari denied in 275 U. S. 531;

Cormack v. Walcott, 37 Kan. 391;

Belt v. Prince, 73 Maryland 289, 60 A. L. R. pp. 1367, 1368, and 1369;

State v. Scow, 93 Minn. 11, 100 N. W. 382;

Nixon v. Dispatch Printing Company, 101 Minn. 309, 112 N. W. 258.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Carlton County Attorney.
February 8, 1949. 851-i

18

District — Jury — Compensation — Fees and mileage — Round trip— M. S. A. 357.26, as amended by L. 1949, c. 101.

Facts

M. S. A. 357.26[1] provides, so far as here material, that each "petit juror shall receive $5.00 per day, including Sundays, for attendance in district court, and ten cents for each mile traveled in going to and returning from court." Waseca County is a small county geographically and no juror lives more than approximately 22 miles from the County Seat. Consequently, it is the practice to commute daily from their homes.

Question

Where a juror, attending court on successive days during the week, returns to his place of residence at the end of each daily court session, is such juror entitled to the mileage allowance prescribed by M. S. A. 357.26 for each daily round trip?

Opinion

The question is answered in the negative.

You are referred to Opinion No. 116 of the 1932 Report of the Attorney General for a discussion of the question of the allowance of fees and mileage to petit jurors. That opinion holds, in effect, that, where the court recesses from Friday to Monday of each week during the term, jurors are entitled to their mileage, home and return, each week, in the event no per diem is allowed for the week-end days during which the court is in recess. Where the court recesses or adjourns over the week-end or for a definite period, jurors on the panel are not entitled to the **per diem** compensation for the days during which the court is recessed or adjourned, because such jurors are not "in attendance" in court on those days. See Opinion No. 457, 1912 Report of the Attorney General; Opinion No. 281, 1934 Report of the Attorney General.

From the foregoing cited opinions, it seems clear that the right of a juror to mileage allowance must be considered in connection with, and not separately from, his right to the per diem allowance.

As stated in **Mason v. Culbert**, 41 P. 464, "The per diem provided by the statute is not intended to be in the nature of a salary for the time that he is serving as a juror, or as wages for trying a cause, but rather as a compensation for the time during which he is withdrawn from his ordinary avocation and in actual attendance upon the court."

Where the court recesses or adjourns from Friday to Monday of each week-end, jurors are entitled to their mileage, home and return, each week, because they receive no per diem for the intervening Saturday and Sunday

[1]As amended by L. 1949, c. 101. This amendment merely increases the per diem from $4.00 to $5.00; it does not affect the mileage allowance long prescribed by the statute.

(see Opinion No. 116, 1932 Report of the Attorney General), but, in the situation presented by you, the jurors return to their respective places of residence each successive day during the period while the court is in session, and for each such day the jurors receive their per diem allowance. Under such circumstances, the jurors are not entitled to mileage for their daily trips. Of course, for their week-end trips when the court is recessed or adjourned, the situation is different.

The application of the foregoing general rule will, in most instances, I believe, resolve the question in any particular case. **Illustration:** Daily court sessions are held from Monday through Friday in each of two successive weeks. On the second Friday the jury term ends. Juror A attends each daily session during the entire term and each day returns to his place of residence. Juror A is entitled to mileage for two round trips — one for a trip each way at the beginning and the end of the term, and one for a trip each way for the intervening week-end adjournment. Juror B attends court on Monday and Tuesday of the first week. He is then excused until Friday morning of the first week, at which time he reports back and thereafter until the end of the term is in attendance at each daily session. Juror B is entitled to mileage for three round trips: one for a trip each way at the beginning and end of the term, one for a trip home Tuesday evening of the first week and his return to court on Friday morning of the first week, and one for a trip each way for the intervening week-end adjournment.

If in any particular case the foregoing general rule cannot justifiably be applied, the clerk should refer the peculiar facts of that particular case to the presiding judge for direction.

LOWELL J. GRADY,
Assistant Attorney General.

Waseca County Attorney.
April 4, 1949. 260-A-4

19

Justice — Appeal to district court — Upon dismissal of appeal sentence and judgment of justice court reinstated — Cash bail not authorized upon appeal to district court — Cash bail when accepted by justice should be returned upon filing of a proper appeal bond.

Facts

Defendant was convicted in justice court of the crime of illegal possession of muskrat hides. A fine was imposed, which was not paid, and the defendant was committed to the county jail. Before the sentence imposed had been served, defendant served a notice of appeal and filed a cash appeal bond of $250 with the justice of the peace.

It is now claimed by the defendant that this cash bond was furnished by his father, and did not belong to the defendant. Thereupon, defendant was released and a motion was made in the district court to dismiss the appeal because the appeal was improperly perfected and not paid because no proper appeal bond had been filed. The district court before whom such motion was made permitted the defendant to file a proper appeal bond. At a subsequent term of the district court a motion to dismiss was made by the state for want of prosecution, and the motion was granted. The district court then made an order remanding the case to the justice court.

Question

May the justice of the peace now deduct from the cash bail of $250 the unpaid fine and pay the balance over to the defendant?

Opinion

The statute provides for an appeal bond, with sufficient surety, to be approved by the justice, conditioned that the person appealing shall appear before the district court on the first day of the general term thereof next to be held in and for the same county. M. S. A. § 633.20.

There does not appear to be any statute authorizing a justice of the peace to accept cash in lieu of a bond with sureties, as provided in the above section. See printed opinions No. 273 and 274, Attorney General's Report 1934.

The district court, when the first motion to dismiss was made, permitted the defendant to file a proper appeal bond. When such appeal bond was filed, we believe that the cash bond which had been filed with the justice should have been returned to the defendant. Neither the justice nor the clerk of the district court were authorized to retain the cash deposit bond after a proper appeal bond had been filed.

The district court dismissed the appeal and remanded the case to the justice court. It does not appear that the district court affirmed the judgment of the justice, or that the order of the district court provided for a judgment against the defendant, including the fine which had been assessed, and the costs, as provided by § 633.25. Neither does it appear from the facts submitted that an execution had been issued upon the judgment of conviction in the justice court as authorized by § 633.33. The justice imposed a fine which was not paid, and the defendant was thereupon committed to the county jail. The provisions of § 633.18 in that respect were apparently followed. See **Baker v. U. S.**, 1 Gil. 181; **State ex rel. v. Rice**, 145 Minn. 359, 361, 177 N. W. 348; Dunnell's Digest, § 5349.

In our opinion there is no statute authorizing the justice, upon the facts stated, to seize and appropriate, in whole or in part, the cash bail

money of $250 and apply the same toward the payment of the fine assessed. Such a course of action would be in violation of the due process of law provisions of both the state and federal constitutions.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Aitkin County Attorney.
March 15, 1950. 266-B-11

20

Justices — Jurisdiction — Sentence — A justice of the peace may acquire jurisdiction to impose sentence outside his territorial jurisdiction by consent or waiver of the defendant.

Question

Has the justice of the peace jurisdiction to try a case or accept a plea of guilty in Duluth, Minnesota, which has a municipal court, the crime having been committed in St. Louis County but outside of the city of Duluth?

Opinion

As to the place where a justice of the peace shall hold his court, M. S. A. 530.02 provides as follows:

> "Every justice of the peace shall keep his office in the town, village, city or ward for which he is elected; but he may issue process in any place in the county, and, in his discretion, for the convenience of parties, may make any civil or criminal process issued by him returnable, and may hold his court, at any place which he shall appoint in the town, village, or ward within his county adjoining the town or ward in which he resides, or in any village located within his town."

Under this section, he would have jurisdiction in the case of a crime committed in St. Louis County, but he could not try the case in any other place than that prescribed in Section 530.02 except by consent or waiver.

If the accused should waive his rights to be tried before the justice of the peace in the place prescribed in Section 530.02 and consent to be tried before him in the city of Duluth, I think that he would then have jurisdiction to render a valid judgment in the case.

In the case of **Holmes v. Igo**, 110 Minn. 133, 124 N. W. 974, the trial took place not at the office of the justice of the peace but at another place without his territorial jurisdiction. There was no claim, however, that any objection was made by any party to this proceeding, and the court assumed that the case was heard by the justice with the consent of both parties and for their convenience. The court said:

"Though the statutes require a justice of the peace, to keep his office in the town, village, city, or ward for which he is elected, and to transact all his business therein, the fact that he goes outside his town, village, city, or ward for the convenience of parties, and there hears and determines a case theretofore brought and pending before him, and without objection, is not such a loss of jurisdiction as to invalidate the proceedings. By acquiescing in and taking part in the proceedings outside the territory for which the justice was elected, the parties waive any objection thereto."

Where the court has jurisdiction of the subject matter, jurisdiction of the person may be conferred by consent. **Anderson v. Hanson,** 28 Minn. 400.

In the case of **State ex rel. v. Schulz,** 142 Minn. 112, 171 N. W. 263, our court said:

"In other words, consent cannot create a tribunal nor confer jurisdiction upon a tribunal which, under no circumstances, would have jurisdiction without that consent. But where there is an existing tribunal which, under one state of facts, would have jurisdiction, and under another would not, a party may so act that he will not thereafter be heard to deny that jurisdiction exists."

It is, therefore, my opinion that a justice of the peace could try a case or accept a plea of guilty in the city of Duluth under the circumstances stated where that is done with the consent of the accused person.

Whether such consent would be implied if the case went to trial without objection in the city of Duluth, is a question I do not need to pass upon at this time.

Question

If the crime has been committed in St. Louis County outside of the city of Duluth, and in no city having a municipal court, can the defendant waive the jurisdiction of the justice of the peace and consent to enter a plea in the city of Duluth?

Opinion

I think the defendant could enter a plea before the municipal court in the city of Duluth if that court issues the warrant.

Question

If the defendant enters a plea of guilty under question one in the city of Duluth, would a sentence by the judge be a valid sentence, the time of appeal having expired?

Opinion

If the justice of the peace had acquired jurisdiction to try the case in the city of Duluth by consent or waiver of the defendant, the sentence would be a valid sentence.

RALPH A. STONE,
Assistant Attorney General.

St. Louis County Attorney.
January 19, 1950.

266-B-11

21

Justice — Vacancy — Until a vacancy occurs in the office of justice of the peace, the council has no power to fill a vacancy.

Facts

The village of Spring Valley has two justices of the peace. One is ill and unable to perform his duties. The other is absent from the village temporarily for a month. As a consequence, the village is without the services of a resident justice of the peace. You present this

Question

Does the village council have authority to make a temporary appointment to fill the factual vacancy until both justices are able to again perform their duties as such?

Opinion

The powers of the village council are entirely statutory.

Upon the facts stated, no vacancy exists in the office of justice of the peace. Without a vacancy, the council has no power to fill a vacancy.

CHARLES E. HOUSTON,
Assistant Attorney General.

Village Attorney, Spring Valley.
March 17, 1949. 266-A-12

22

Juvenile — Jurisdiction — Children — Dependent — Neglected — Settlement — Minor committed to Home School for Girls — Illegitimate child born in public institution—M. S. A. 261.07, subd. 2 and 3.

Facts

Prior to 1945 A's mother and father were divorced, and by the divorce decree the custody, care, and control of A was granted to her mother, a resident of B County. In 1945 the Juvenile Court committed A, then 13 years of age, to the custody, control, and guardianship of the Superintendent of the Minnesota Home School for Girls, in Stearns County, which commitment is still in effect. In 1947 A was paroled and worked in R County. Her mother had previously left the state. There is nothing to show that the mother has lost her residence in B County or gained a new residence elsewhere. In 1949 A was returned from R County to the Home School for Girls, where she was delivered of an illegitimate child, who is now at the school. Proceedings are contemplated to place A's child under the guardianship of the Director of Social Welfare.

Question

Does A have a legal domicile in B County?

Opinion

We assume that your reference to domicile implies residence and legal settlement, since the question of the responsibility of the county is involved.

Your first question is answered in the affirmative. M. S. A. 261.07, subd. 3 provides that every unemancipated minor shall have the same settlement as the parent with whom he has resided, which, in this case, is A's mother, a resident of B County.

I have found no case in our Supreme Court on this subject, but the Hennepin County District Court, in **In re Pelton**, Hennepin County District Court No. 416195, followed this statute and held that the order of divorce awarding exclusive control and custody of the child to one spouse fixes the legal settlement of the child as that of the spouse to whom he was awarded. Therefore, A had settlement in B County in 1945, when committed to the Minnesota Home School, and, unless a new settlement has been effected, retains the same. Since the commitment has been in effect since 1945 to the present time and A has not yet reached her majority, she has been precluded from gaining a new settlement by M. S. A. 261.07, subd. 2, which provides that the time under commitment to the guardianship of the Director of Social Welfare cannot be included in gaining a new settlement. There being no showing that A's mother has gained a new settlement, the effect, if any, of such action on her part upon A's status is not considered. It, therefore, appears that A's present settlement is in B County. It may be appropriate to mention at this time that by M. S. A. 261.07, subd. 3, it is provided that every child born in a state institution shall have settlement in the county in which the mother had settlement at the time of her commitment.

G. L. WARE,
Special Assistant Attorney General.

Beltrami County Attorney.
February 2, 1950. 268-H

23

Law Library — Fees Collectible as County Law Library Fees by District Court Clerk—L. 1949, c. 184 (M. S. 1949, §§ 140.34 - 140.46).

Facts

The county law library has been established in Winona County under L. 1949, c. 184 (coded as M. S. 1949, §§ 140.34 - 140.46).

Section 8 of that act (M. S. 1949, § 140.41) reads as follows:

"Subdivision 1. When the law library is established the clerk of the district court shall collect in each civil suit, action, or proceeding filed in such court, as library fees, the sum of $1.00 from the plaintiff or person instituting such suit, action, or proceeding at the time of filing the first paper therein, and the sum of $1.00 from the defendant or other adverse or intervening party at the time his appearance is entered or when the first paper on his part is filed therein."

Question 1

"If there is more than one person instituting such suit, action or proceeding, is $1.00 to be collected from each, even though they collectively join in bringing the suit, action or proceeding?"

Opinion

The question is answered in the negative.

The legislature clearly intended that in each civil suit, action, or proceeding filed in the district court a library fee of only $1.00 should be collected from the plaintiff or person instituting such **suit, action, or proceeding** at the time of filing the first paper therein. The legislature, in enacting this statute with the words "the plaintiff or person instituting" in the singular, presumably did so in recognition of the fact that M. S. 1949, § 645.08, subpar. 2, specifically provides that the singular shall include the plural.

Question 2

"If there is more than one defendant, shall $1.00 be collected from each, either at the time his appearance is entered or when the first paper on his part is filed?"

Opinion

The provision of the statute applicable to this question contemplates a fee not only from a defendant but also from any "other adverse or intervening party" at the time his appearance is entered or when the first paper on his part is filed. If several defendants answer **jointly**, then only a single fee of $1.00 is collectible, at the time specified in the statute, from all such answering defendants. If several defendants answer separately, a fee of $1.00 is collectible from each at the time specified in the statute.

Question 3

"Does the admission of service by the attorney for the defendant on the Notice of Trial or Reply filed by the plaintiff with the Clerk, constitute an appearance under this section?"

Opinion

This question is answered in the negative.

To appear in an action means to come into court as a party to the action. See 1 Dunn. Minn. Dig. 2d, § 475. An admission of service by the attorney

for the defendant on a notice of trial or reply filed by the plaintiff with the clerk does not constitute an appearance of the defendant within the meaning of the statute here considered.

Question 4

"If no Notice of Trial or Reply with admission of service is filed, but a Note of Issue is filed, naming an attorney representing the defendant, does the placing of the name of the attorney for the defendant by plaintiff on such Note of Issue constitute an appearance?"

Opinion

No. See answer to question 3.

You then state these hypothetical

Facts

"Suppose the plaintiff in a civil proceeding files the Complaint, Reply and Notice of Trial and Note of Issue. On the Reply and Notice of Trial appears an admission of service by the attorney for the defendant. On the Note of Issue appears the name of the attorney for the defendant. There is one plaintiff and one defendant in this action. At the time the plaintiff filed the above papers he paid $1.00 library fee"; and you ask

Question 5

"Is the defendant required to pay $1.00 when his attorney's appearance becomes of record by the filing of the Notice of Trial or Note of Issue, even though he has not filed any paper?"

Opinion

No. See answer to question 3.

You then supplement the last stated hypothetical facts with these additional hypothetical

Facts

"Suppose in this instance, after this case was placed on the calendar pursuant to the Note of Issue, the parties got together, settled the case and the action was then stricken from the calendar. The defendant, at no time, filed any paper";

Question 6

"Is the defendant then required to pay the $1.00 library fee?"

Opinion

No. No appearance in the action, within the meaning of the statute here involved, has been made by or on behalf of the defendant, and at no time has any "paper on his part" been "filed therein."

Question 7

"In a case where an action was instituted in County X but by order of the Court, a change of venue was granted to Winona County, are the parties to pay the $1.00 library fee in Winona County?"

Opinion

The question is answered in the affirmative.

The statute imposes upon the clerk of the District Court of Winona County the duty to collect in each civil suit, action, or proceeding **"filed in such court"** the library fees there prescribed. On a change of venue to Winona County the proceeding is then filed in the District Court of Winona County.

The foregoing answers accord, I am advised, with the practical construction placed on comparable statutes by the clerks of the District Courts of Hennepin (M. S. A. 140.03 - 140.18) and Ramsey (M. S. A. 140.19 - 140.25) Counties.

LOWELL J. GRADY,
Assistant Attorney General.

Winona City Attorney.
September 19, 1950. 285-B

24

Law Library — Fees collectible as library fees by Municipal Court Clerk. L. 1949, c. 568, § 2, sd. 2.

Facts

"In some actions the defendant files the first papers in our courts. That is, where the plaintiff neglects or does not put the case on, the defendant has a right to and may serve a note of issue and may file it and his answer first."

Question

Where, in such action, the defendant files the "first paper therein," does Subd. 2, Sec. 2, Ch. 568, L. 1949, require a clerk of the municipal court "to collect from **the defendant** an extra dollar and remit the same to the Library Fund, * * *"?

Opinion

The question is answered in the negative.

Subd. 2, Sec. 2, Ch. 568, L. 1949, so far as here material, provides: "* * * it shall be the duty of the Clerk of any Municipal Court in any such county to collect **in each civil suit, action, or proceeding** filed in

such court, * * * as library fees, the sum of one dollar **from the plaintiff or person instituting** such suit, action, or proceeding at the time of the filing of the first paper therein. * * *"

That language is clear. There is no room for construction. The legislature clearly intended that in each civil action or proceeding filed in the municipal court, a total library fee of only $1.00 should be collected by the clerk. That fee is expressly made collectible from "the **plaintiff** or **person instituting**" the action. It is collectible "at the time of the filing of the first paper therein" by the plaintiff or person instituting the action. If the legislature had intended that a defendant in such action should be required to pay a library fee, it would have said so as it did, in respect of district court actions, in Subd. 1 of said Sec. 2.

To "institute" means to begin; to commence; to initiate; to originate; see 21 Words and Phrases (Perm. Ed.), p. 663. A defendant in a civil action or proceeding does not **institute** that action or proceeding, even though he may in his responsive pleading assert a counterclaim. The independent cause of action thus alleged by him as a counterclaim is asserted in a civil action or proceeding already commenced or instituted.

LOWELL J. GRADY,
Assistant Attorney General.

Minneapolis City Attorney
June 3, 1949. 285-B

25

Municipal Judges—Statute does not authorize disqualification of a municipal court judge by the mere filing of an affidavit of prejudice—M. S. 1949, §§ 488.01 - 488.30.

Questions

1. May an affidavit of prejudice be filed against such a Municipal Judge, and if so, how many days before the trial must the affidavit be filed?
2. In the event there is no other Municipal Court in the county, upon whom falls the duty to appoint an acting judge to take the place of the one against whom such affidavit of prejudice has been filed?

Opinion

Assuming that the court about which you inquire is governed by M. S. 1949, §§ 488.01-488.30, we advise that there is no provision therein authorizing the disqualification of a judge of the municipal court by the mere filing of an affidavit of prejudice. See **State ex rel Burk v. Beaudoin** (1950), 40 N. W. 2d 885. M. S. 1949, § 542.16, relating to the disqualification of judges of the district court by the filing of an affidavit of prejudice, applies only to

district courts and has no application to municipal courts. See **State ex rel Nichols v. Anderson**, 207 Minn. 78, 289 N. W. 883, cited with approval in the Beaudoin case, supra.

In view of our answer to your first inquiry, no response is required to the second question submitted.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Todd County Attorney.
August 28, 1950. 307-B

26

Probate—Clerk—Salary—Clerk hire—L. 1943, c. 411.

Question

What is the maximum sum which the county board may fix as the salary of the Clerk of the Probate Court and what is the sum that the Judge of the Probate Court shall be allowed in addition thereto for clerk hire?

Opinion

L. 1943, C. 411, Sec. 3, fixes the salary of the Clerk of the Probate Court in the counties to which that chapter relates at the sum of $2,100. The county board has nothing to do with the fixing of that salary. It is fixed by law. The Judge of the Probate Court is allowed such additional sum as may be necessary for clerk hire, not exceeding $1,200 annually. The sum cannot exceed $1,200. The necessity is to be determined by the county board, but the authority of the board is limited to the sum named: $1,200.

In applying this law it might be well to read and have in mind **Hamlin v. Ladd**, 217 Minn. 249, 14 N. W. (2d) 396.

CHARLES E. HOUSTON,
Assistant Attorney General.

Winona County Attorney.
February 21, 1949. 348-B

27

Probate—Estate—Special Administrator—Old age assistance furnished the decedent—M. S. A. 525.301.

Facts

"An old age assistance recipient of this county died on December 18, 1945, testate, and left surviving no wife or children. On January 25, 1946, a special administrator was appointed by the Probate Court of

this county, in which said appointment the special administrator was given full powers of a general administrator. An inventory and appraisal was had wherein it shows that the decedent left a homestead appraised at $1100.00 and personal property appraised at $50.00. A claim was filed by the Kanabec County Welfare Board in the amount of $2300.00 for old age assistance furnished decedent after January 1, 1940. This amount was secured by an old age assistance lien against said real estate. In Probate Court there then followed the normal proceedings, wherein the special administrator petitioned for license to sell, an order of license to sell was granted and on March 20, 1946, an order confirming the sale was issued. The final account of the special administrator shows that assets received from the sale of the real estate equaled $1125.00 and from the sale of the personal property—$50.00. After the expenses of administration were paid, the balance of the assets were paid in satisfaction of the old age assistance creditors claim and the lien was released. There is no showing in the probate records of any necessity or expediency."

Questions

1. "Is there any authority for the Court confirming the sale made by the special administrator or for allowing any of these sale proceedings to be conducted by a special administrator?
2. "Did the purchaser at the above mentioned sale acquire a marketable title to the real estate in question insofar as the transfer from the decedent, through the special administrator, to the purchaser is concerned?"

Opinion

The question is whether the probate court had the power to give the special administrator the full powers of a general administrator. The facts state that there is no showing in the records of the probate court of any necessity or expediency which required that the court should grant general powers to the special administrator. M. S. A. 525.301 vests the power in the probate court upon a showing of necessity or expediency to expressly confer upon the special administrator the power to perform any or all acts in the administration of the estate not exceeding the powers conferred by law upon general administrators. So, we see that in a proper case the court had the power to vest that authority in the special administrator which the letters of administration purported to vest in him.

The statement of facts does not show that there was a petition for special administration although it does show that a special administrator was appointed. In **Bombolis v. Minneapolis & St. L. R. Co.**, 128 Minn. 112, 150 N. W. 385, it was held that such petition is jurisdictional, and, without it, the probate court has no jurisdiction to appoint such special administrator, to approve his bond or to issue letters of administration. Such orders are nullities. On the doctrine pronounced in this case, it appears that if there was no petition for special administration in this proceeding, then it may be said that the want of jurisdiction in the probate court appears on the face of

the record. And when the want of jurisdiction appears on the face of the record, the proceedings of the probate court are subject to collateral attack. But, on the other hand, if there was a petition for special administration alleging the necessity and expediency therefor, it would appear that the court had jurisdiction and that the proceedings are not subject to collateral attack.

The Bombolis case, quoting from **Hanson v. Nygaard, 105 Minn. 30,** 117 N. W. 235, stated:

> "The Constitution of the state confers upon the probate courts general and exclusive jurisdiction over the estates of deceased persons. * * * This jurisdiction in the abstract is conferred upon the probate court of the state as a whole; but it can only be exercised by a particular court in a particular instance, and over a particular estate, when it has been invoked in the manner prescribed by the statutes. When thus invoked by a person entitled to take such action, the jurisdiction of that court attaches to the estate for the purpose of supervising, directing and controlling its administration and settlement according to law."

In that case the court held that the probate court had no jurisdiction over the estate in question. It called attention to the statute which provides for initiating a proceeding in the probate court by petition. Without a petition, the machinery of the probate court is not set in motion.

The answers to the questions submitted depend upon whether or not the court had jurisdiction (which cannot be definitely stated upon the facts above related). Of course, if the court was without jurisdiction, the proceeding had in this estate must be disregarded. But if the court did have jurisdiction, we answer your questions on that theory.

If the court had jurisdiction, it had power to confirm the sale.

It appears to me that the second question is one in which the county cannot be involved. Whether the purchaser acquired a marketable title through the sale is a question in which he is interested and one which his attorney will answer.

CHARLES E. HOUSTON,
Assistant Attorney General.

Kanabec County Attorney.
March 21, 1949. 521-P-4

28

Probate—Judge—Hearings—Notices—Where hearings are set by probate court and before time of hearing the judge dies and no successor judge is appointed before time of hearing, the successor judge under inherent powers of court may appoint new time of hearing and order that personal notice of hearing to persons interested be given—M. S. A. 525.83.

Facts

On July 27, 1949, the judge of the probate court died. His successor was appointed and qualified on September 2, 1949. Before the death of the judge petitions had been set for hearing between those two dates. The hearings were not held.

Question

On probate hearings requiring published notice, which were not held because there was no judge to hear them, and where no continuance was ordered, is it necessary to republish notice of hearing before a hearing is held by the present judge?

Opinion

The only question involved is notice. The court has inherent powers. It also has statutory powers.

When the statute refers to notice, it means published notice and notice by mail. M. S. A. 525.83. But the judge is the master of the court. The judge may direct notice to be given otherwise, when the statute is silent on the subject. The statute last cited relates to this situation and this situation only: "Whenever notice of hearing is required by any of the provisions of this act." The provisions of this act do not relate to the situation which we are considering.

It is the failure to give the notice required by the statute that gives rise to the right of appeal. Our problem does not involve failure to follow the statute. The question is: What should be done where the statute does not prescribe the procedure?

In **O'Brien v. Lien,** 160 Minn. 276, 199 N. W. 914, the opinion of the court on page 280 states:

> "The jurisdiction of the probate court over the estates of deceased persons is for the purpose of administering such estates and **includes all matters necessarily pertaining to the proper administration of them.**"

And on page 284, the court said:

> "* * * That court will direct and control the administration of the estate. * * *"

The matter of holding a hearing necessarily pertains to the administration of the estates involved. Since the court has the power to control the administration of the estate, that power involves the power to order a hearing not held because of the circumstances herein stated. The statutory notice has been given. It is my opinion that the court may now in each estate involved make an order setting a new time for hearing on each matter heretofore set for hearing and on which a hearing was not held. This order for hearing is a belated order for a continuance. It is made under the

inherent powers of the court to take care of a situation not provided by statute. No one will suffer thereby.

CHARLES E. HOUSTON,
Assistant Attorney General.

Kittson County Attorney.
September 16, 1949. 347-K

29

Probate—Judge—Retirement—In ascertaining the retirement compensation to be paid to a judge of the probate court, whose salary was determined by M. S. A. 526.124 (c), the amount of his fees collected under Subd. 4 of that section must be added to his salary—M. S. A. 490.11.

Question

When a former judge of the probate court in your county voluntarily retired on December 31, 1948, under authority of M. S. A. 490.11, is he entitled to receive as "compensation allotted to his office" a sum based in part on fees which he collected during 1948 under Sec. 526.124, Subd. 4?

Opinion

You make the point that the word "allotted" means to set apart for the benefit of. You say that at the time that the judge retired there was allotted to his office only his salary and that the fees which he collected during the year were not allotted to his office. You say that nowhere in the statutes is there any provision for an allocation of any money to the judge of probate for fees which he may collect during the year.

It appears to me that the legislature allotted to the judge of the probate court the fees which he collected. Subd. 4, supra, says:

> "Nothing in this section shall limit the right of any judge of probate court to collect and retain any fees, per diem payment, or other payment which he is now authorized by any other provision of law to collect and retain in addition to the stated amount of his annual salary."

The legislature made those fees an emolument of the office of the judge. It allotted those fees to the judge. If it had not been for Subd. 4, the fees collected would have gone to the county. But because of Subd. 4, it became a part of the compensation of the office of judge.

I am of the opinion that in ascertaining the amount of compensation of the judge during retirement, the amount of his fees during the last year that he held office must be taken into consideration.

CHARLES E. HOUSTON,
Assistant Attorney General.

Grant County Attorney.
March 4, 1949. 347-i

CRIMINAL LAW

30

Bench Warrant—Form—For violation of suspended sentence—Extradition after violation of parole.

Facts

H, a young woman, pleaded guilty to the crime of bigamy, and was sentenced to the Women's Reformatory at Shakopee. Sentence was suspended upon conditions. The conditions of the suspension were violated, and the court has ordered the suspension revoked.

K was convicted of knowingly entering into a bigamous marriage, and was sentenced to the State Reformatory at St. Cloud. Sentence was suspended by the court upon conditions. The defendant violated the conditions of his parole, and the order of suspension was revoked.

Question

As to the form of bench warrants in these cases.

Opinion

(Title of the case)

"THE STATE OF MINNESOTA TO THE SHERIFF OR ANY CONSTABLE OF SAID COUNTY:

"An indictment having been filed in said court on the ..... day of ....., 19....., charging the said ..... with the crime of ....., and said ....., having pleaded guilty to said charge and been sentenced to confinement in the State Reformatory at St. Cloud, Minnesota (Women's Reformatory at Shakopee, Minnesota), and said sentence having been suspended upon conditions prescribed by the court, and said defendant having violated said conditions, and the court having ordered said suspension revoked,

"NOW, THEREFORE, you are hereby commanded forthwith to arrest the above named ....., and deliver him (her) into the custody of the jailer of the county jail in the County of Rock in the State of Minnesota, to be there held until he (she) shall have been committed by said court, pursuant to said sentence, or until otherwise ordered by the court.

"WITNESS the Honorable ....., Judge of said Court, and the seal of said court at ....., Minnesota, this ..... day of ....., 19.....

.....

Clerk of the District Court."

Questions

1. As to the extradition of these persons if they shall be apprehended.
2. As to the case of K, he can be extradited from any state, as he was ordered to stay in the State of Minnesota.
3. As to the case of H, she left Minnesota upon the order of the court to go to California, and is, therefore, not a fugitive from justice in the State of California. She could not be extradited from California. She could be extradited from any other state.

Opinion

In preparing the extradition papers, I would suggest that they be prepared in the usual form, with authenticated copy of the complaint and warrant attached. I should then set up in the application for the requisition the fact of conviction, the sentence, the suspension of sentence, the release on parole, the violation of the conditions and the revocation of the parole and the issuance of the bench warrants, attaching a copy of the sentence, the order revoking the suspension and the bench warrant, all duly authenticated. Other changes will have to be made in the printed form of application to correspond with the facts. You will readily perceive what changes are necessary in the form of the application.

RALPH A. STONE,
Assistant Attorney General.

Rock County Attorney.
April 27, 1949. 193-B-24

31

Bribery—Public Officers—Payment of bribe in consummation of agreement with public officer to influence conduct of officer—Payment being within period of statute of limitations—such offer to pay and agreement of officer being beyond the statute of limitations—all transactions constituting one entire crime—is not barred by statute.

Venue—Place of payment of bribe determines county of venue where prosecution is for payment of bribe which constitutes a part of a series of acts resulting in payment—M. S. A. 613.02-613.06.

Question

"Where a person offers a bribe or makes a promise or agreement therefor to and with a public officer, with the intent specified in the statute, which offer, promise or agreement is made more than three years before the indictment (or information) is filed in the district court (see Section 628.26, M. S. A.); but the payment of money in pursuance

thereof is made within such three year period, does the three year limitation run from the date of the offer, promise or agreement; or from the date of the payment of the money?"

Opinion

Consideration has been given to the crime of bribery at common law as discussed in 116 Am. St. R. 38, note, 2 Bishop, New Criminal Law, Sec. 85, People v. Coffey, 161 Cal. 433, 119 P. 901, 39 L. R. A. (ns) 704, 5 Cyc. 1039, 9 C. J. 403.

Consideration has also been given to the doctrine announced by the New Jersey Supreme Court in **State v. Ellis,** 33 N. J. L. 102, 97 Am. Dec. 707; **Commonwealth v. Mannos** (Mass.), 40 N. E. (2d) 291; and **Williams v. State** (Wis.), 189 N. W. 268.

In Minnesota the code abolished all common law offenses and now no act or omission is criminal except as prescribed by statute. **State v. Cantrell,** 220 Minn. 13.

Several sections of our statutes deal with the subject of bribery. It appears that the term "bribery" is descriptive rather than the name of a specific crime. Reference might better be made to the crime as giving or offering a bribe and asking or receiving a bribe. M. S. A. 613.02, 613.03 and 613.04 deal with the crime of giving or offering a bribe. Secs. 613.05, 613.06 and 613.07 deal with asking or receiving a bribe. Thus, we see that in Minnesota the common law crime which embraced both offering and receiving a thing of value as bribery has been divided.

People v. Gibson, 191 N. Y. 227, 83 N. E. 976, followed in **People v. Clougher,** 246 N. Y. 106, with which you are familiar, of all the cases we have read is most nearly in point. In that case it was held that the agreement and the receipt of the bribe together constitute a single crime. In that case the reward was paid within the period of the statute of limitations but the agreement was made within a period beyond the statute of limitations. The payment was directly connected with the promise and the agreement. In that case the statute was held not a bar.

In Minnesota, the Supreme Court has not passed upon this question. But we may assume that our court will give careful consideration to the opinions of the courts of New York and Massachusetts. It would appear that when the county attorney has knowledge of corruption in public office and has evidence available concerning conduct of persons who have been instrumental in inducing such corruption, it is his duty to lay the evidence before the court. Then the problem on the law is for the court. In view of what has been said herein, it appears that the court may well say upon the facts considered, following the precedents mentioned, that the statute of limitations runs from the time that the bribe money was paid.

Question

"A, an officer of Y Corporation, agreed with B, who was a public officer of X County, to pay B a certain sum of money if B would vote favorably on Y Corporation's bid for X County's business; said agree-

ment being made in Z County. As a consequence thereof, B voted favorably. Thereafter, the agreed stipend was paid to B in X County by C, a representative of Y Corporation. The said A was not present in X County at any time involved in the transaction. Does the prosecution lie against A in X County? Does the prosecution lie against C in X County? (See Section 627.01, M. S. A.)"

Opinion

A person accused of crime is entitled to a trial in the county where the crime shall have been committed. Minn. Const. Art. I, Sec. 6.

Every criminal cause shall be tried in the county where the offense was committed except as otherwise provided by law. M. S. A. 627.01.

State v. Heidelberg, 1944, 216 Minn. 383, 12 N. W. (2d) 781, held that the venue of the embezzlement prosecution was properly laid in Hennepin County under evidence of the accused living in Hennepin County and employed in Anoka County, to handle employees' personnel problems, received a check for payment of medical expenses of an employee's child and deposited the proceeds of the check in accused's account in Minneapolis.

The corrupt agreement of A to pay B a sum of money if B would vote favorably on Y's bid was made in Z County and if the prosecution were against A for making such offer, that prosecution would necessarily be in Z County. A offered the bribe in Z County. He did not pay a bribe in Z County but paid it in X County, acting through his agent. But the payment of the money was a reward to B in consummation of the corrupt agreement. Following the reasoning in the first problem, the payment of the reward and the agreement together constitute a single crime. Because the act of payment of the reward was in X County, both A and B may be prosecuted there.

CHARLES E. HOUSTON,
Assistant Attorney General.

Meeker County Attorney.
June 2, 1949. 133-B-13

32

Lotteries—Bowling tournament—Prizes for high score—Entry fee paid—Element of chance absent—M. S. A. 614.01.

Facts

The manager of a bowling alley is conducting a bowling tournament. The entry fee for each bowler is $7.50. $6.00 of this money will be used for prizes. $1.50 of that amount will be used for the first prize. If the entries reach 900, the first prize will be an automobile. If the entries fall below 900,

then the prize will be cash. The first prize will go to the bowler making the highest score. The remaining prize money will be distributed among other bowlers governed by rules promulgated by the manager. There will be no drawing to determine prize winners.

Question

Does the plan, as outlined, constitute a lottery?

Opinion

M. S. A. 614.01 defines lotteries. In my opinion the facts stated do not constitute a lottery. The plan does not involve distributing property by chance but the distribution will be determined by the skill of the bowlers.

CHARLES E. HOUSTON,
Assistant Attorney General.

Watonwan County Attorney.
November 25, 1949. 510-B

33

Lotteries—Gift enterprise—Auction money given by merchant to purchaser of his merchandise—Bicycle given to bidder of the most auction money who buys a ticket and attends theater on auction night—Scheme is not a lottery but an unlawful gift enterprise.

Facts

"A number of merchants in the community buy from the promoter a quantity of what they call auction money. This auction money is distributed by the merchant to his customers. They are entitled to receive this auction money with each purchase in an amount equal to the amount of their purchase. Once every week for eight weeks on a certain night a bicycle is auctioned off to the person in the theater who will bid the most auction money for the bicycle. Admission to the theater is by ticket purchased in the box office. The bicycles are provided for by the person promoting the scheme out of the money paid for the auction coupons or auction money by the merchants. Presumably there is a balance left over for the services of the promoter in connection with carrying out the advertising scheme. There is no drawing of names. The auction money is not transferable although there is no way of checking on anyone to see whether or not it has been transferred."

Question

Is such a scheme unlawful?

Opinion

The first question which occurs is whether or not the plan is a lottery. To constitute a lottery as defined in M. S. A. 614.01, there must be three elements, a prize, a chance, and a consideration paid for the chance. Here there are at least two of the elements of a lottery present. There is a prize and there is a consideration paid for the right to compete, both in making a purchase in order to receive auction money from the merchant and in buying the theatre ticket to be enabled to bid at the auction. The question then is whether or not the winning of the prize is dependent upon chance.

The scheme is somewhat similar to the so-called popularity contest where the merchants give tickets or tokens to the customers for cash purchases, and these are voted for the various contestants, and in the final computation the contestant having the most tickets voted in his favor is the winner. Such a popularity contest was passed upon in the case of **Amlie Strand Hardware Co. v. Moose**, 176 Minn. 598, 224 N. W. 158. There a scheme was under consideration pursuant to which coupons or votes were given for cash purchases as well as upon the payment of overdue accounts. The votes could be cast for any contestant and the one receiving the highest number of votes won the prize—in this instance, an automobile. Our court held that such a vote contest or a popularity contest was not a lottery. The court said:

> "In the plan before us there was no awarding of prizes by lot or by chance. The selection was made by the holders of the votes, who might or might not cast them. * * * We follow the weight of authority and hold that the plan of the plaintiffs was not in violation of the statute."

My conclusion is that under the Minnesota decision above cited the scheme under consideration is not a lottery within the meaning of our lottery statute. However, the question remains as to whether it is an unlawful gift enterprise.

An illegal gift enterprise is defined by M. S. A. 623.25 as follows:

> "When two or more persons enter into any contract, arrangement, or scheme whereby, for the purpose of inducing the public to purchase merchandise or other property of one of the parties to the scheme, any other party thereto, for a valuable consideration and as a part of the scheme, advertises and induces or attempts to induce the public to believe that he will give gifts, premiums, or prizes to persons purchasing such merchandise or other property of such other party to the scheme, and that stamps or tickets will be given by the seller in connection with such sales entitling the purchaser of such property to receive such prizes or gifts from any other party to the scheme, the parties so undertaking and carrying out such scheme shall be deemed to be engaged in a 'gift enterprise,' unless * * * the right of the holder of such stamp or ticket to the prize or gift so offered is absolute, and does not depend on any chance uncertainty or contingency whatever."

This gift enterprise statute was considered in the case of **State ex rel. v. Sperry & Hutchinson Co.**, 110 Minn. 378, 126 N. W. 120. In that case the court said (397):

"Our conclusion is that, in so far as chapter 142, Laws 1909, prohibits companies or parties from issuing and redeeming trading stamps under contracts which in practice depend on chance, **uncertainty, or contingency**, the law is a proper exercise of the police power; * * *"

The court further held that the business as conducted by the S. & H. Company was not attended with elements of chance, uncertainty or contingency, and that the provisions of the law requiring the stamp to have printed thereon its value and character of the article offered for redemption, was invalid.

Nevertheless the main conclusion of the case is to the effect that the act is valid in so far as it prohibits the issuing of trading stamps or tickets to be redeemed in articles of merchandise in any manner which depends on chance, uncertainty, or contingency. In M. S. A. 614.01, the word "chance" is used to designate one of the elements of a lottery. In M. S. A. 623.25 there are used with the word "chance" the words "uncertainty or contingency" in defining an illegal gift enterprise.

Whether the "uncertainty or contingency" in the matter under consideration is of such nature as to render the scheme an unlawful gift enterprise is the real question involved. Here coupons or "auction money" are distributed by a merchant to each customer in an amount equal to the amount of his purchase. This "auction money" may be used in bidding at a theatre where a bicycle is sold at auction to the person bidding therefor the most of the so-called "auction money." Admission to the theatre requires the purchase of a ticket by the bidder of such "auction money."

A scheme of the nature hereinabove described is by the statute above cited declared to be an unlawful gift enterprise unless "the right of the holder of such stamp or ticket (here auction coupons) to the prize or gift (here a bicycle) so offered is absolute, and does not depend on any chance uncertainty or contingency whatever."

The persons entering into a contract to establish the enterprise concerning which you inquire do not agree that the right to the bicycle offered as a prize shall be absolute in the manner provided by law. The right of the customers to a bicycle in the matter in question does not become absolute on possession of coupons, but, in addition, such right depends upon being present at a theatre, bidding the highest amount with the "auction money" at the auction sale therein of the bicycle, and purchasing a ticket to be admitted to the theatre when such auction takes place.

It is my opinion that as the right to the prize offered in an enterprise such as that herein proposed is not absolute on receipt of "auction money," but depends upon the fulfilling of the above mentioned additional requirements, the scheme is one prohibited by M. S. A., § 623.25.

J. A. A. BURNQUIST,
Attorney General.

St. Louis County Attorney.
March 9, 1950. 510-B-5

34

Lotteries—Gift enterprise—Scheme where tickets are given free to anybody who asks for them and prize goes to the person holding the most tickets is not unlawful as a lottery or unlawful gift enterprise.

Facts

"Merchants in the Village of Richfield who desire to secure advertising upon the screen of a local movie theatre work out a plan by the terms of which they agree to pay a promoter who organized the plan an agreed amount each, for a stated number of weeks' advertising on the screen. The promoter furnished the 'trailer film,' to be run at the end of regular movie films, and furnishes each participating merchant with a quantity of tickets to be distributed to persons who request the same at his place of business. The tickets are given free to anyone who asks for them, at the rate of one ticket per person on each call at his place of business. No purchase need be made to obtain a ticket. In addition to the 'trailer film,' the promoter furnishes a number of gifts to be awarded to persons who accumulate and present, at the theater, the largest number of such tickets. The difference between what is paid the promoter and what it costs him to organize the merchants, furnish the 'trailer film,' tickets, gifts and other advertising matter, is his compensation. Persons receiving an award must surrender their tickets. Others may retain theirs and may continue their efforts toward accumulating enough for a gift at future awards."

Question

"Under the facts outlined above, is there any violation of the lottery law or other laws of the State of Minnesota?"

I do not think that the scheme involves a lottery for the reason that the drawing is not made by lot; the prize goes to that person who by his industry has collected the most tickets.

Neither do I think that the scheme is an unlawful gift enterprise under the gift enterprise statute.

An illegal gift enterprise is defined by M. S. 1949, § 623.25, Subd. 2, as follows:

"When two or more persons enter into any contract, arrangement, or scheme whereby, for the purpose of inducing the public to purchase merchandise or other property of one of the parties to the scheme, any other party thereto, for a valuable consideration and as a part of the scheme, advertises and induces or attempts to induce the public to believe that he will give gifts, premiums, or prizes to persons purchasing such merchandise or other property of such other party to the scheme, and that stamps or tickets will be given by the seller in connection with such sales entitling the purchaser of such property to receive such prizes or gifts from any other party to the scheme, the parties so

undertaking and carrying out such scheme shall be deemed to be engaged in a 'gift enterprise,' unless * * * the right of the holder of such stamp or ticket to the prize or gift so offered is absolute, and does not depend on any chance uncertainty or contingency whatever."

Under this statute it is an essential element that a party to the scheme "advertises and induces or attempts to induce the public to believe that he will give gifts, premiums, or prizes to persons purchasing such merchandise or other property of such other party to the scheme, and that stamps or tickets will be given by the seller in connection with such sales entitling the purchaser of such property to receive such prizes or gifts."

In order that the scheme be an unlawful gift enterprise it is necessary that the stamps be given away in connection with sales, and that the prizes go to the person or persons making purchases at the merchant's store.

That feature is absent in the scheme outlined above. The tickets or coupons or stamps are given free to anybody who asks for them, and consequently this element of a gift enterprise is lacking.

I cannot see that the proposed scheme is unlawful as a violation of the lottery law or the gift enterprise law.

RALPH A. STONE,
Assistant Attorney General.

Attorney for Village of Richfield.
July 19, 1950. 510-B-5

35

Prosecution—Highway traffic regulations—Prosecution in name of state on arrest by highway patrol officer—Witness fees—M. S. A. 161.03, Subd. 22. Arrest made by other person, witness fees in municipal court are paid by city under M. S. A. 488.22.

Facts

The municipal court of Stillwater was created by Special Laws 1876, Chapter 200, and continued by Special Laws 1881, Chapter 92. You also refer to Special Laws 1885, Chapter 118.

Question

"In a prosecution for a violation of the Highway Traffic Laws occurring outside the City of Stillwater where the prosecution fails or the case is dismissed, who is liable for the witness fees, the City of Stillwater or the County of Washington, and what procedure should be followed in the payment of such witness fees?"

Opinion

You call attention to M. S. A. 357.32 and 488.22. The first mentioned section applies to the ordinary criminal prosecution by the state when the person convicted does not pay the penalty, and the second refers to the obligation of the city or village to pay witness fees.

M. S. A. 161.03, Subd. 22, provides that all fines and forfeited bail money from traffic and motor vehicle law violations, collected from persons apprehended or arrested by the **state highway patrol,** shall be paid into the state treasury by the justice of the peace, or such other person or officer collecting such fines, forfeited bail money or instalments. The state treasurer credits these moneys to separate funds. Out of this fund (not necessarily out of the money collected from the offender) shall first be paid to **counties** all costs and expenses incurred by the county in the prosecution and punishment of persons so arrested and for which such county has not been reimbursed by the payment of such costs and expenses by the person prosecuted. The state treasurer pays the county upon the verified claim of the county made by the county auditor.

No reimbursement is authorized to be paid to the city or village. Accordingly, it appears to be the intent of the legislature, as shown in this act, that the county will conduct such prosecutions. It, therefore, appears to me that the county should bear the burden and should pay the witness fees when the prosecution in the name of the state fails, or, for any reason, the costs are not collected from the defendant. Then the county is clearly reimbursed under Sec. 161.03, as amended by L. 1947, C. 105.

Sec. 357.32 authorizes the county attorney to issue subpoenas and compel the attendance of witnesses in behalf of the state without payment of fees in advance. The county attorney having the authority to issue the subpoenas, and the person who does issue them, is a person who would logically have the authority to certify the attendance and the fees of the witnesses to the county treasurer who should pay such fees upon such certificate.

A good discussion of the liability of the county for the payment of the costs and expenses of the prosecution of criminal cases is found in **Mathews v. Board,** 90 Minn. 348.

A copy of the opinion of the Attorney General, March 15, 1933, File 199B-4, is enclosed for the help that may be had in reading it.

If the person prosecuted was not apprehended by a member of the state highway patrol, then Sec. 161.03, as amended by L. 1947, C. 105, does not apply. See opinion, January 9, 1942, File 989A-6, printed in the 1942 Attorney General's Report as No. 20. Also see opinion June 11, 1932, same file, copy enclosed.

Now, on the other fork of the question, where the arrest was not made by a member of the state highway patrol, and where Sec. 161.03 does not

apply, then it appears that Sec. 488.22, supra, applies and the witnesses will be paid by the city upon certificate issued by the clerk.

CHARLES E. HOUSTON,
Assistant Attorney General.

Washington County Attorney.
April 1, 1949. 989-A-6

36

Prosecution—Highway traffic regulations—The word "operate" as used in L. 1947, c. 428, § 11, subd. 3, means and includes the act of driving—violation of this section constitutes a misdemeanor under § 169.89, as amended by L. 1947, c. 428, § 34, subd. 1.

Facts

M. S. A. § 169.13, as amended by Laws 1947, c. 428, § 11, subd. 3, reads as follows:

> "No person shall operate or halt any vehicle upon any street or highway carelessly or heedlessly in disregard of the rights or the safety of others, or in a manner so as to endanger, or be likely to endanger, any person or property."

Question

> "Will you kindly advise me whether the word 'operate,' as contained, includes the word 'drive,' and whether this amendment constitutes a charge of careless driving."

Opinion

Scheppmann v. Swennes, 172 Minn. 493, involved in part the meaning and construction of the word "operate" as used in Minnesota Statutes 1927, § 2705, and at page 496 the court said:

> "We agree with the courts which hold that the word 'operate' in the statute means not only cars that are in motion but also those which in the course of operation are parked or left standing on the highway."

citing cases which support and oppose the meaning ascribed to the word "operate."

The word "operate" means and includes the act of driving a car. **Wallace v. Smith,** 265 N. Y. S. 253, 238 App. Div. 599. **Beard v. Clark,** Tex. Civ. App., 83 S. E. 1023, 1025.

We believe that the term "operate * * * any vehicle upon any street or highway" as used in L. 1947, c. 428, § 11, subd. 3, means and includes the

physical act of driving a motor vehicle, and if done contrary to and in violation of this statute the person would be guilty of a misdemeanor as provided by M. S. A., § 169.89, as amended by L. 1947, c. 428, § 34, subd. 1.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Washington County Attorney.
March 30, 1949. 989-A-24

37

Prosecution—Highway traffic regulations—Motor vehicle—Operating while under the influence of intoxicating liquor—Authorities cited holding that starting the motor of a car while intoxicated may be covered by statute prohibiting operation of a car in that condition—M. S. A. 168.39, 169.19.

Facts

"The police of the City of Thief River Falls recently arrested a man who was obviously under the influence of intoxicating liquor.

"When he was arrested he was seated in his car and had the motor running. The car was standing still, but the switch was on and the car was on a highway ready to travel, if it had been put in gear."

In addition to the foregoing facts, you also state that the language of your ordinance is the same as the language contained in M. S. A. 168.39.

Question

Whether this man can be convicted of operating a motor vehicle while under the influence of intoxicating liquor.

Opinion

I cannot give a definite answer to this question because the facts are not specific enough to enable me to do so. I do not know who drove the car to the point where it was found; I do not know how long the accused had been in the car, and I do not know whether he was sitting in the front seat behind the wheel or sitting in another seat in the car. I do not know who started the motor running.

M. S. A. 168.39 provides:

"* * * No person, whether licensed or not, who is an habitual user of narcotics or who is under the influence of intoxicating liquors or narcotics, shall drive any vehicle upon any highway."

Under this statute and under any ordinance containing the same identical language, the accused could be convicted if the evidence would justify a finding that the accused drove the vehicle while in an intoxicated condi-

tion, but under this statute and under any ordinance containing the same identical language there could be no conviction unless the evidence would justify a finding that the accused had driven the car while intoxicated.

There is another section of the statute to which you do not refer found in M. S. A. 169.12, which provides as follows:

> "It is unlawful and punishable as provided in this section for any person * * * who is under the influence of intoxicating liquor * * * to drive **or operate** any vehicle within this state."

You do not ask for any construction of this statute or any opinion upon it, but it might be that you would decide to institute a prosecution under section 169.12. Whether you should do so or not is for you to decide. As stated, I do not have all the facts necessary to a decision of the question. However, I can call your attention to certain authorities which I consider pertinent to the question whether an automobile can be "operated" by the accused even though the car does not move.

I direct your attention to **State v. Webb**, 210 N. W. 751, 49 A. L. R. 1389. It was there held:

> "One who has started the engine of an automobile is operating it within the meaning of a statute providing punishment for one who operates such machine when intoxicated, although the car has not begun to move."

In the case last cited, the defendant testified that he had started the engine and it was running. The court said:

> "* * * This is one of the necessary elements in the operation of a car. In other words, he could not have put his car in motion without having first started the engine, and the starting of the engine therefore is the first step in the operation of a car. We are disposed to hold in line with the Overbay Case that the defendant was 'operating' his car, within the meaning of the statute. The real danger that this statute seeks to protect against is from the possible results from a drunken condition of a driver. * * * the starting of the car was the initial step in carrying out the operation of the car. * * *"

The conviction in the lower court was upheld. This case is annotated in 49 A. L. R. at page 1392.

In the case of **Commonwealth v. Uski** (Mass.), 160 N. E. 305, the Supreme Court of Massachusetts held:

> "* * * A person operates a motor vehicle within the meaning of (the statute) when, in the vehicle, he intentionally does any act or makes use of any mechanical or electrical agency which alone or in sequence will set in motion the motive power of that vehicle. The words of the statute 'whoever upon any way operates a motor vehicle' include the setting in motion of the operative machinery of the vehicle as well as the driving of the vehicle under the power of the motor machinery." (Citing cases.)

I refer you also to the case of **State v. Tacey**, 102 Vt. 439, 150 At. 68, 68 A. L. R. 1353, where it was held that a person steering a car while it was being towed was operating a car while intoxicated; that the purpose of the statute was to protect the public from injury by drunken drivers.

I refer you also to a note on this case in 27 Minn. Law Review, page 473.

Although there are conflicting cases, I think the doctrine of the cases herein cited is sound. You may consider these cases in deciding whether the facts justify a prosecution under § 169.12.

RALPH A. STONE,
Assistant Attorney General.

City Attorney Thief River Falls.
January 25, 1949. 632-B-2

38

Prosecution—Motor vehicle—Unauthorized operation—Automobile operated with permission of owner's agent—M. S. A. 168.49.

Facts

"An agent for an automobile dealer left a Chevrolet automobile on a lot owned by a filling station operator. The keys to the automobile were turned over to the filling station operator. His instructions were that a possible buyer of the car might come in within the next few days to get the car. If that occurred, the filling station operator was to call up the car dealer before turning the keys and the car over to the buyer. The filling station operator had no authority to turn the car over to anyone else.

"It so happened that the conversation regarding the leaving of the car and taking it out again took place between the agent of the dealer and an employee of the filling station operator. The filling station operator gave his consent when his employee asked him if it was all right to have the car left there. A few days later another man came to the filling station at a time when the operator himself was in. The man said, 'I came to get the car that was left here.' The filling station operator, who had not himself understood too clearly the instructions that had been left with his employee, took the keys off the hook and turned them over to the man. According to the filling station operator, the man who came for the car did not specifically represent that he had any connection with the car dealer.

"It developed that the man who got the keys had no permission from the owner to drive the automobile. He did take the car out and drive it, however.

"A question arises whether the man who took out the car had the permission of the owner's 'agent in charge and control thereof,' the man having secured possession by the simple artifice of walking in and saying that he came to get the car."

Question

"Whether or not a prosecution under Section 168.49 would be precluded by the circumstance that the filling station operator gave possession of the car to the man as outlined."

Opinion

M. S. A. 168.49, to which you refer, provides as follows:

"No person shall drive, operate or use a motor vehicle **without the permission of the owner or of his agent in charge and control thereof.** Any person so doing shall be guilty of a felony and punished therefor by imprisonment in the state prison for not more than five years, or by imprisonment in the county jail for not exceeding one year, or by a fine of not more than $500."

From the facts stated by you it appears that the filling station operator was the agent of the owner of the car and that he was in charge and control of the car when he delivered the keys thereto to the person who requested them. From the facts stated it further appears that the person to whom the keys to the car were delivered drove the car with "the permission of * * * his agent in charge and control thereof." Under these circumstances, we feel that, if any prosecution be commenced under this statute, upon the facts stated, a conviction is quite unlikely.

LOWELL J. GRADY,
Assistant Attorney General.

Freeborn County Attorney.
February 24, 1950. 133-B-8

39

Sentence—Habitual offenders—Conviction of for issuing worthless check under M. S. 622.03, or 622.04, with intent to defraud is misdemeanor involving moral turpitude within meaning of § 617.75.

Question

"Can one who is three times convicted on plea of guilty to a gross misdemeanor, viz.: Issuing check without funds or credit, be sentenced for the third such offense under M. S. A. 617.75?"

Opinion

M. S. 1949, § 617.75, Subdivision 1, in its parts here pertinent, provides:

> "Every person who shall hereafter be guilty * * * of any misdemeanor or gross misdemeanor involving moral turpitude, who within the previous period of five years shall have been twice convicted in this state of one or more of the offenses hereinbefore named, shall be guilty of being an habitual offender."

We assume, for the purposes of this opinion, that the three convictions involved in your inquiry were all had in this state and were all had on the basis of violations of either M. S. § 622.03 or § 622.04, and that the first two convictions were had within the five year period preceding the date of the third conviction.

The gist of the offense prescribed by § 622.03 is the obtaining, with **intent to defraud**, the money or property of another by false pretenses; that is, by color or aid of a check or draft which the person charged with the violation of the statute has no reason to believe will be paid.[1]

The gist of the offense defined by § 622.04 is the making or drawing, **with the intent to defraud**, any check, draft or order for payment of money upon any bank when the maker knows at the time that he has not sufficient funds in or credit with such bank for the payment of such check, draft or order.

Under both these statutes **intent to defraud** is an essential element of the crimes therein defined. Implicit in the convictions involved in your inquiry is the admission by the accused that he violated the applicable statute in each case wilfully and **with intent to defraud.**

The words "moral turpitude" have a well understood and legal meaning. "Turpitude" in its ordinary sense involves the idea of inherent baseness, vileness or depravity. It implies something base, depraved or immoral in and of itself, regardless of whether it is or is not prohibited by statute. In its legal sense "turpitude" includes anything knowingly and intentionally done contrary to justice, honesty, modesty or good morals. It is sometimes said that the word "moral," which so often precedes "turpitude," does not add anything to the meaning of the term other than that emphasis which often results from a tautological expression.

See **Holloway v. Holloway**, 126 Ga. 459, 55 S. E. 191, 7 L. R. A. (N. S.) 272.

Tillinghast v. Edmead (CCA 1st), 31 F. (2d) 81.

Words and Phrases (Perm. Ed.), Vol. 27, p. 553 et seq.

In **Fidelity & Casualty Co. of New York v. Christenson**, 183 Minn. 182, at p. 186, 236 N. W. 618, our Supreme Court said:

[1]M. S. § 622.03 in its pertinent parts, provides:
"Every person who shall wilfully, with intent to defraud by color or aid of a check, draft, or order for the payment of money or the delivery of property, when such person knows that the drawer or maker thereof is not entitled to draw on the drawee for the sum specified therein, * * * shall obtain from another any money or property, shall be guilty of stealing the same, and punished accordingly."

"* * * Moral turpitude has reference largely to moral character and state of mind and is difficult to prove. A known and intentional violation of a statute, * * * may or may not show moral turpitude. * * *"

In **Bermann v. Reimer** (CCA 2d), 123 F. 2d 331, the only question involved was whether the relator, an alien, was properly denied entry into the United States under the applicable statute on the ground that he had been convicted of a crime involving moral turpitude. The relator had been a merchant in his native country. He had purchased merchandise for his shop. He had assured his vendor, sometime prior to the transaction, that he was solvent but "he knew these assurances to be false when he made them." For this reason he was declared "guilty of fraud" by a court of competent jurisdiction in his native country. The Circuit Court of Appeals, in affirming an order dismissing the writ of habeas corpus to release relator, said:

"We have no doubt that to obtain goods upon false representation is an offense 'involving moral turpitude'."

In **In re Needham**, 364 Ill. 65, 4 N. E. (2d) 19, the Supreme Court of Illinois said:

"Attempting to obtain the money or property from others by fraud or false pretenses, whether through the use of the mails or otherwise involves moral turpitude."

See also **Ponzi v. Ward**, 7 F. Sup. 736.

Nishimoto v. Nagle (CCA 9th), 44 F. (2d) 304, was a habeas corpus proceeding by an alien who, having entered the United States in 1919, was ordered deported under the provisions of the Immigration Act on the ground that he had been convicted in this country of a "crime involving moral turpitude, committed at any time after entry." It appeared that the alien involved pleaded guilty to a charge of having issued five separate checks with intent to defraud, the issuance of each check constituting a separate felony. The Circuit Court of Appeals affirmed the District Court's order denying the writ. The question whether the offense involved constituted a "crime involving moral turpitude" within the meaning of the Immigration Act does not seem to have been contested in the appellate court. Apparently, the appellant and the government, as well as the Court, assumed without question the application of the statute.

Bearing on your question is **In re Rothrock**, 25 Cal. (2d) 588, 154 Pac. (2d) 392, a disbarment proceeding. The attorney therein involved drew four checks in amounts ranging from $3.00 to $25.07 knowing that he had no account in the bank. The question presented was whether the action of the attorney in so drawing the four worthless checks constituted "moral turpitude" within the meaning of the statute applicable to the proceedings. In holding that it did, the Supreme Court of California said:

"It may be conceded that conceivably a bank account might be innocently overdrawn through mathematical miscalculation and not in the commission of an act of moral turpitude. But this clearly is not such a case. The checks drawn by Rothrock and bank memoranda con-

cerning them appear as exhibits in the record. They show that over a period of several days checks were drawn by Rothrock on a bank in which he had no account, and his acts in obtaining money by such means certainly amount to moral turpitude."

By his convictions upon his pleas of guilty in each of the three instances involved in your inquiry, the violator has **admitted** that in each of the three offenses involved he passed the worthless checks **with intent to defraud.** In these circumstances, I am of the view that the violator involved has been guilty of a "misdemeanor or gross misdemeanor involving moral turpitude" within the meaning of M. S. § 617.75.

Accordingly, your specific inquiry is answered in the affirmative.

LOWELL J. GRADY,
Assistant Attorney General.

Clay County Attorney.
September 27, 1950. 341-i

EDUCATION

SCHOOL DISTRICTS

40

Detachment—Land separated from a school district by the Mississippi River is not adjoining land within the meaning of M. S. A. 122.15.

Facts

Independent School District No. 1 Joint of Sherburne County borders on the east side of the Mississippi River. An owner of real estate on the west side of the river, in another school district, desires to have his land detached from the school district in which it is now situated and attached to District No. 1. I assume that he seeks to avail himself of the benefits of M. S. A. 122.15.

Question

Is the land mentioned adjoining District No. 1 within the meaning of M. S. A. 122.15?

Opinion

The west boundary of Independent School District No. 1 is not stated. You merely say that the district borders the river. In any event, I assume that the boundary is no further west than the middle of the river.

The east boundary of the owner's land is the high-water mark of the river. This is a navigable water. The owner has a qualified ownership to the low-water mark. See Dunnell's Digest, Section 1067, Note 88, and cases there cited. There is a space between the low-water mark and the middle of the river. Accordingly, the owner's land does not adjoin the west boundary of the school district mentioned. The boundaries of the owner's land and of the school district are not contiguous.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.
August 3, 1950. 166-C

41

Dissolution—Annexation—Division of property and apportionment of outstanding obligations—Tax levy—M. S. A., Sec. 122.17.

Facts

On July 14, 1947, Common School District No. 5 of Aitkin County, Minnesota, was dissolved by the County Board and attached to Independent Consolidated School District No. 1. The county board made no special order concerning the property of School District No. 5. Independent School District No. 1 proceeded to treat the property of School District No. 5 as belonging to No. 1 and sold the schoolhouse and site situated within the boundaries of School District No. 1 before it dissolved. The cash assets of District No. 5 at this time were $61.63. At the time of the consolidation District No. 5 was the owner of a schoolhouse and a school site. The cash assets and the school site were turned over to District No. 1 and School District No. 1 has subsequently sold the schoolhouse and has realized therefrom something over $400.00, making total receipts of something over $460.00 from School District No. 5.

It has now developed that at the time of the consolidation School District No. 5 had outstanding a warrant of $254.30. Independent School District No. 1 now admits that it has an obligation to pay the amount of the cash received by it on the warrant in question but insists that it is not bound to pay the balance of School District No. 5's warrant although it has received something over $400.00 from the sale of the District No. 5 property. District No. 1 insists that it is incumbent upon the county auditor to levy a special tax against the old School District No. 5 to pay the balance of the order.

Question

Should a tax be imposed against the taxable property situated in the area of former School District No. 5 sufficient to pay the balance due on the warrant mentioned, and if not, what should be done by the county board?

Opinion

The effect of what the board did was to unite two districts. The territory embraced within former School District No. 5 was annexed to the territory included in Consolidated School District No. 1. When this was accomplished, it was the duty of the county board, acting by authority of M. S. A., Sec. 122.17, to make a division of all money, funds, credits and property belonging to such district and to make an award of such money, funds, credits and property to the district affected by such change. It was the duty of the board under authority of this section to apportion outstanding obligations other than bonded indebtedness. This would include the outstanding warrant because it was not bonded indebtedness. Such apportionment must be such as the county board deems just and equitable. When the board has by resolution made such division, it becomes the duty of the county auditor to divide the money, funds, credits and property evidenced by the records in his office pursuant to and as required by the resolution.

But from the facts stated it appears that the county board did not perform this function imposed upon it by this section.

It would appear to me that the county board still has the duty to perform which it has not performed as required by Sec. 122.17. If the county board shall apportion the property of School District No. 5 to District No. 1 amounting to at least $461.65, it has the power to require School District No. 1 to pay any outstanding warrant of District No. 5 as it shall find to be just and equitable. Although I am not passing upon the facts, it would seem difficult to conclude that out of $461.65 it is not just and equitable to require District No. 1 to pay $254.30 and interest.

The auditor does not levy taxes. The school district levies the taxes and the auditor merely spreads them. But District No. 1 has no power to levy taxes on a part of the territory embraced within the district and if it levies any taxes, taxes will be levied against all of the taxable property in the school district which makes the levy.

CHARLES E. HOUSTON,
Assistant Attorney General.

Aitkin County Attorney.
February 8, 1949. 166-C-3

42

Property — Athletic Field — Detached from school site — Acquisition by purchase of board — No authority by voters required—M. S. A. 125.06, subd. 2; 471.15, 471.16, 471.19.

Facts

School District No. 5 of Worthington has on hand sufficient money available to purchase an athletic field near the schoolhouse site but detached

therefrom, which it wishes to acquire for the use of the school. The board considers it necessary to acquire such ground.

Attention is called to M. S. A. 125.06, subd. 2, which requires authority by the voters before a schoolhouse site be acquired by the district.

Question

May the board make this purchase without being authorized to do so by the voters of the district?

Opinion

When a schoolhouse site is selected, it is done by authority of the voters. What is a schoolhouse site?

> "A 'site,' according to Webster, is a seat or ground plot; and a mill site is a place where a mill stands." **Miller v. Alliance Insurance Co. of Boston,** 7 F. 649, 651; 39 W. & P. 347.
> 38 W. & P. 326:
>
> "The term 'school site,' in its common acceptation, and as commonly understood, refers to a parcel of ground sufficient in size upon which to erect a school building, and a yard surrounding the same to be used as a playground for the children while at school. **Board of Education of Oklahoma City v. Woodworth,** 214 P. 1077, 1083, 89 Okl. 192."

February 5, 1940, an opinion of the Attorney General was rendered (File 622B) wherein was considered the subject of acquisition by eminent domain of ground for an athletic field for a school district. The acquisition was being considered under the law relating to recreational programs conducted by the school district. Therein it was stated that the law did not give the right to exercise the power of eminent domain in acquiring ground for recreational programs, but that the exercise of this power was limited to grounds for a school site. It was concluded in this opinion that the grounds to be acquired for recreational purposes were not a school site and for that reason the power of eminent domain did not exist for its acquisition.

It appears that the reasoning in the first mentioned opinion was correct.

Report of the Attorney General for 1936, opinion No. 188 (File 622-B), states with reference to Mason's St. 1927, Sec. 2815 (1) (M. S. A. 125.06, subd. 2): "While this statutory provision has no direct bearing on the leasing of lands by a school district for athletic purposes, we believe that it states a salutary rule which should be followed in such cases." This was a mere expression of the writer of the opinion as to his philosophy of proper procedure from a policy standpoint, not from a legal standpoint. This opinion concerns the law, not policy.

Opinion dated December 13, 1937 (File 622-B), states that the school board has authority to lease land to be used for athletic purposes even though such contests are not curricular activities. But it states that the question should be submitted to a vote of the people. The reason therefor

is stated: "While this statutory provision has no direct reference to the leasing of lands by a school district for athletic purposes, we believe that it states the rule of law which should be followed in such cases." It is noted that the opinion does not say that the law mentioned applies. It merely says that the writer is of the opinion that it should be followed. Again, it is an expression of opinion on board policy.

Following the thought therein expressed, that the land being detached was not a part of the school site and was not a school site, it appears to me that the limitation in M. S. A. 125.06, subd. 2, requiring the approval of the voters before a school site may be acquired by the board, does not apply to the situation under consideration.

Accordingly, I am of the opinion that the school board may acquire the tract for an athletic field without a vote of the people authorizing the acquisition.

M. S. A. 471.15 is authority to the school district to operate a program of public recreation and playgrounds. It may operate the program independently. Sec. 471.16. The facilities employed must be used primarily for the purpose of conducting the regular school curriculum and related activities. See Sec. 471.19.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.
February 3, 1950. 622-B

43

Property — Building permit — Fee — May pay reasonable fee on application for building permit under terms of city ordinance.

Facts

In Mankato there is an ordinance requiring building permits. A fee is required for a building permit. It is contemplated that the district will construct a school building in Mankato. Before the issuance of the permit, the proper officer of the city has required the payment of the fee required by the ordinance.

Question

May the school district pay a fee for a building permit to be issued?

Opinion

The city may charge a person procuring a building permit a reasonable fee to cover the labor and expense of issuing the permit. The amount of the fee may be graduated according to the estimated cost of the building. **City of St. Paul v. Dow**, 37 Minn. 20, 32 N. W. 860.

If the school district purchased a tract of land upon which to build a building and the land is conveyed by deed, the school district should and would have the deed recorded in the office of register of deeds. A fee would be charged for the recording. Without question, the district would pay the recording fee. When the district acquired such land, it would undoubtedly have the title examined by a competent examiner of titles. The examiner would undoubtedly require a certificate from the register of deeds as to liens filed in his office and as to judgments docketed in the office of the clerk of district court, and as to taxes disclosed by the records in the office of the county auditor and county treasurer. For each of these certificates, a fee would be required and would be paid without question. The district would probably require a certificate by the proper municipal officer concerning liens by reason of special improvements benefiting the land, for which the district would pay a fee. It might be important that the services of the county surveyor be utilized in establishing the corners of the property and the setting of monuments for which the surveyor would charge and the district would pay a fee.

The payment of a fee for a building permit ordinarily involves more service furnished on the part of the city than the mere furnishing of a certificate permitting the erection of a building. It involves the examination of the plans and specifications of the proposed building, the inspection of the building during the course of construction, and upon completion, as stated in **City of St. Paul v. Dow**, supra, it is important that the materials used in a building shall be of suitable strength and manufacture and that the labor employed shall conform to approved practices, all of which is determined by inspection.

If the amount of the fee charged for the permit, under the terms of the ordinance, is reasonable, I see no reason why the school district may not pay such fee, as it may pay fees for other services.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.
June 29, 1949. 59-A-9

44

Property — Eminent domain — Discontinuance of proceedings upon motion of petitioner.

Facts

Independent School District No. 69 of Sibley County commenced condemnation proceedings for the purpose of acquiring certain land adjacent to its school grounds for playground purposes. Commissioners were appointed by the court and they made their report to the court, fixing the amount

of damages to be paid by the school district to the landowners. The school board is of the opinion that the award of the commissioners is excessive in amount.

Question

Has the school board the right to dismiss the proceedings and abandon the taking of the property after the commissioners have made their report and award?

Opinion

Eminent domain proceedings are conducted by authority of M. S. 1949, c. 117. Such proceedings are not a civil action. Civil actions are commenced in district court by service of a summons. M. S. 1949, 543.01. Hence, M. S. 1949, 546.39, relating to dismissal of civil actions, does not apply in eminent domain proceedings.

After the court has acquired jurisdiction, it controls the proceedings. It is my opinion that the petitioner may move the court for an order discontinuing the proceedings upon the ground that the cost of acquisition of the land is excessive. The court cannot compel the petitioner to go forward with the proceedings if the petitioner has not taken possession of the real estate, title to which is sought to be acquired by such proceedings. Title does not pass until the damages are paid. But after possession is taken, the petitioner may not recede from his position.

In circumstances such as these, it seems to me to be proper practice to give notice of motion that the petitioner will move the court for an order discontinuing the proceedings.

CHARLES E. HOUSTON,
Assistant Attorney General.

Independent School District No. 69, Arlington, Minnesota.
September 26, 1950. 817-O

45

Property — Playgrounds — School boards may accept gifts — May install playground equipment, quasi school activities — May not lease grounds needed for school purposes — Liability of school district for damages arising from tort due to negligence—M. S. A. 125.08, subd. 2; 125.06, subd. 15.

Facts

In Walnut Grove there is an unincorporated baseball club. It has been using a baseball diamond on the grounds of Independent School District No. 23. This club is not in any way connected with the school. The members of the club desire to play night games. For this purpose, they wish to erect

bleachers and lights. The installation of lights involves the erection of towers and the expenditure of a considerable sum of money. The ball club proposes to pay about $6,000 to finance the project, which is approximately one-half of the total estimated expenditures. The club proposes to allow the school district to use the equipment so to be installed and it wishes to have a lease at a nominal rental for the use of the club for its practice and games. It proposes that the school have the use of the baseball diamond at other times.

Questions

1. Can the members of the School Board, for the District, accept the money or the property in the form of lights, towers and bleachers?
2. Can the District appropriate moneys to complete the program?
3. If the first two questions are answered affirmatively, to what extent can the School Board lease out the diamond to the ball club and what restrictions are there on its power?
4. May the School Board permit the ball club to build the bleachers on the school property or would it be necessary to have the bleachers built by the School District after bids according to approved plans by architects and/or engineers?
5. What would be the liability of the School District or the individual members of the School Board for injuries to spectators or players in games the local ball club played upon the school owned property?

Opinion

See opinions of the Attorney General, dated July 19, 1949, and April 18, 1949, File 159-B-1.

M. S. A. 125.08 is authority for the board in an independent district to accept gifts for any proper purpose and apply the same to the purpose designated. So, if the donor intends the $6,000 to be a gift to the school district, to be used in the installation of lights, towers and bleachers, here is the authority under which the board may accept the same.

M. S. A. 125.06, subd. 15, authorizes the school board, after a vote by the people of the district authorizing such procedure, to take charge of and control all school and quasi school activities of the teachers and children of the public schools in that district held in the school buildings or held on the school grounds, or under the direction of the school board. To that end it may adopt rules and regulations for the conduct of athletic, oratorical, musical, dramatic and other contests and entertainments in which the schools of the district or any class or pupils therein participate. It is observed that all money received on account of such entertainments or contests goes to the school treasury and is known as the school auxiliary fund, to be disbursed for expenses connected with such entertainments or contests or otherwise by the school board. In my opinion, it follows that the school board may make disbursements necessary to carry on such activities. If the school

district has the funds, and the school board considers it necessary after having entered upon such a program, it is my opinion that the board has the power to appropriate necessary money available for that purpose.

The school board has no express authority to put others in possession of school property by lease to the exclusion of the school where the school has use for the property. Exclusive possession in the lessee is a right of a lessee. It appears to me from the statement of facts and the consideration of the entire problem that a lease is really not desired in this case. What the ball club wants is permission of the school board to use the baseball grounds. This permission may be granted without giving a lease. I see no objection to granting permission to use the ball grounds when the school itself does not have need for it and the board may make regulations concerning the use of the grounds so that the use by the ball club will not prevent the school from using such grounds at reasonable times and will permit the use of such grounds by the ball club at times when the school does not need to use them. The school must have first consideration, of course, because the property belongs to the school district and it is held by the school district primarily for school purposes.

It occurs to me that there is no good reason why a definite and certain contract could not be carefully prepared to provide for the needs both of the school and the ball club. This contract should be made in connection with the gift of $6,000. It should contain all the conditions upon which the gift is made and when the school district accepts those conditions, then the gift is accepted subject to the conditions. The contract is the important thing. I see no reason why someone other than the school district may not do the actual physical work of building these structures contemplated so long as they are built with the approval of the school board. The plans and specifications therefor should be approved by the school board, after which I see no objection to a contract being made by the person making the gift. But so long as the school district is furnishing another $6,000, it might be better that the school district make the contract and in that event the plans and specifications which the school district provides should have the approval of the donors of the $6,000.

I am unacquainted with any theory of law which would impose upon the school district any liability to pay damages incurred by spectators at games in which the school district does not participate. In **Emmons v. City of Virginia**, 152 Minn. 295, 188 N. W. 561, it was held that upon the ground that municipal corporations are not liable for negligence in the performance of governmental functions, a city, which, through its park commission, provided free to its inhabitants instrumentalities for diversion or exercise in a public park, is not liable to persons injured while using such instrumentalities because defective or out of repair due to negligence of the city, its servants or agents.

In the opinion in that case, the Supreme Court said:

> "In the discharge of duties placed on municipal corporations by law they and their servants are regarded as governmental agencies, and

not answerable for negligence at the suit of a private party. Especially is this true of quasi municipal corporations."

The opinion cites the case of **Snider v. City of St. Paul,** 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151, and said in that case the city was held:

"* * * not liable to the one injured because of the negligence of the city's servants in operating an elevator in its city hall. The liability of such a corporation for negligence in the care of its streets is there stated to be an exception to the rule which might be rested upon certain special considerations of public policy or upon the doctrine of stare decisis."

And again the court said:

"Cities, through park and school boards, have of late provided playgrounds equipped with various instrumentalities for exercise and amusement. Where this is done for the public good and gratuitously, the cities and their servants are to be regarded as agencies of the government, and are not acting in a proprietary character. The weight of authority and the better reasoning is to that effect, as will be found upon examination of the opinions above cited."

Again, the court quoting from **Bolster v. City of Lawrence,** 225 Mass. 387, 389, 114 N. E. 722, L. R. A. 1917B, 1285, said:

"The municipality, in the absence of special statute imposing liability is not liable for the tortious acts of its officers and servants in connection with the gratuitous performance of strictly public functions, imposed by the mandate of the Legislature or undertaken voluntarily by its permission, from which is derived no special corporate advantage, no pecuniary profit, and no enforced contribution from individuals particularly benefited by way of compensation for use or assessment for betterments."

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.
October 27, 1949. 159-B-1

46

Property — Schoolhouse — Construction — Bids — Contract must be let on lowest responsible bid — M. S. A. 125.18.

Amendment of bid — Withdrawal of bid — Modification of contract during progress of work on incidentals.

Facts

A common school district, after necessary preliminary proceedings, advertised for bids for the construction of a new schoolhouse. Two sealed bids were submitted and upon being opened, one was found to be for $9,598

and the other $11,592. The school board thereupon accepted the lower bid. The bids were in writing and the school board made written minutes of its acceptance of the low bid.

After the low bid was accepted, the low bidder discovered that he had made an error of $872, which reduced his bid in that sum less than he intended it to be. The bidder is responsible. The board considers the season too far advanced to readvertise for bids. In fact, it has not yet released the bidder.

Questions

1. May the school board rescind its acceptance of the low bid and permit the low bidder to withdraw his bid, and then accept the high bid?
2. May the school board permit the low bidder to amend his bid so as to add $872 to the bid price, making it $10,470?
3. May the school board have additional work over the contract done on the school in excess of $500 without advertising for bids?
4. May additional work be done over and above the contract on the new school without a vote of the people of the district?

Opinion

The school board may not rescind its acceptance of the low bid, permit the withdrawal of the low bid and accept the high bid. When the low bid was accepted, the bidder who made the high bid was released from his bid and you do not say that he is willing to enter into a contract upon the basis of his bid. The only ground upon which the board would be authorized to accept the high bid would be that it considered the low bidder irresponsible. I understand that he is considered responsible.

See L. 1949, c. 105, M. S. A. 125.18.

Permitting the bidder to amend his bid is in effect permitting a bidder to bid without advertising. He has had the benefit of competitive bids before he makes his amended bid. The only bid that he made pursuant to the invitation was the sealed bid filed.

I do not consider your third and fourth questions as pertaining to the fact situation which you submit. But I may add if the school board discovers during the progress of the construction of the schoolhouse, that some incidental work should be done which is not contemplated by the original contract and the need for which was not known when the original contract was made, the contract might be amended in such particular if provision therefor is made in the specifications upon which other bidders had the opportunity of bidding, otherwise not.

This additional work must be incidental to the work contemplated when the building was built. For example, if the contract called for a three-room schoolhouse, it would not be incidental to the execution of that contract to increase the size of the building and make it a four-room schoolhouse. If

the contract and specifications required one coat of paint on the woodwork and walls and the board subsequently decided to add another coat of paint because of the discovery of some fact not known when the original contract was made, I would say that the original contract might be amended in that respect.

CHARLES E. HOUSTON,
Assistant Attorney General.

Mower County Attorney.
November 4, 1949. 707-A-12

47

Property — Schoolhouse — Sites — Authority to school board to acquire a site for a schoolhouse must identify the land to be acquired on the ballot. Opinion of May 26, 1939, File 622i-2, disapproved—M. S. 1949, 125.06, subd. 2.

Facts

Independent School District No. 24 of Hennepin County held an election last month. The questions submitted were by ballot which reads as follows:

"OFFICIAL BALLOT
Tuesday, May 16, 1950

INDEPENDENT SCHOOL DISTRICT NO. 24
of Hennepin County, Minnesota

'Shall the School Board of School District No. 24, Hennepin County, State of Minnesota, be authorized to acquire from available funds additional land for school building sites to-wit:

(1) 8 to 10 acres, more or less, in the neighborhood of 48th and Forest, Village of Crystal?

(2) 8 to 10 acres, more or less, in the neighborhood of 26th Avenue and Noble, Village of Golden Valley?

INSTRUCTIONS TO VOTERS: If you wish to vote in favor of purchasing said properties mark a cross (X) in the square opposite the word 'YES.' If you wish to vote against purchasing said properties, mark a cross (X) in the square opposite the word 'NO.'

YES - - - - - - - ☐
NO - - - - - - - ☐"

The result of the ballot was 920 yes votes and 203 no votes.

Questions

1. Does the description as presented on the ballot permit purchase without additional permission by the voters?
2. If an additional vote is necessary, would each school site need to be more fully described as listed on the ballot? Must they also be voted upon singly, each as a separate site?

Opinion

M. S. 1949, 125.06, subd. 2, provides that:

"When authorized by the voters at a regular meeting or election or at a special meeting or election called for that purpose, it (the school board) may acquire necessary sites for school houses, or enlargements or additions to existing school house sites * * *."

What did the voters authorize by this ballot? A favorable vote informed the board that it was authorized to acquire 8 to 10 acres in the neighborhood of 48th and Forest, Village of Crystal and 8 to 10 acres in the neighborhood of 26th Avenue and Noble, Village of Golden Valley. If the present owner of 8 to 10 acres of land in the neighborhood of 48th and Forest, Village of Crystal, should make a deed to the school district, using that exact description, what would the school district acquire by the deed? And if the second supposed description were contained in a deed by the owner of 8 to 10 acres in the neighborhood of 26th Avenue and Noble, Village of Golden Valley, what would the school district acquire? The statute says that the board may acquire necessary sites for schoolhouses when authorized by the voters. Neither one of these supposed descriptions describes any site. They just make general reference to a neighborhood. The area is not mentioned. The boundaries are not mentioned. No corners are described. No monuments are stated. No courses and distances are even suggested. Without the description of a site, I fail to see how the voters have authorized that a site be acquired. For these reasons, my answer to the first question is "no."

In the event of another election, I suggest that a description be incorporated in the ballot for each tract intended to be acquired. If it is the intention that both sites be acquired, as appears from the ballot, there is no objection to including both sites in the ballot. If only one is to be acquired, that intent should be plainly indicated.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.
June 2, 1950.

622-i-2

47-A

Property — Schoolhouse — Sites — Buildings — Sale — Granting easement for street — Election — "Authorized by voters at" construed— M. S. 1949, Sec. 125.06, Subd. 2.

Facts

"The School Board of Independent School District No. 39, of Eveleth, Minnesota, is submitting two special questions to the voters of the District at the annual school election on May 16.

"One question is for authorization to the Board to dismantle and sell a vacant school building, and the other question is for authorization to the School Board to grant an easement for a strip of school land for public street purposes."

Question

"Is the result of the election to be declared on the basis of a majority of the total vote cast at the election, or may the result be based on the basis of a majority of the voters voting on each particular question?"

Opinion

The language with which we are here concerned is that portion of Minnesota Statutes 1949, Section 125.06, Subd. 2, which reads as follows:

"When authorized by the voters at a regular meeting or election or at a special meeting or election called for that purpose, it may * * * sell or exchange school houses or sites and execute deeds of conveyance thereof."

The lack of more specific language in the foregoing provision creates the doubt which has caused the submission of your question. There is a marked divergence of opinion among the courts of the several states upon the question before us. We deem it proper to follow the rule of the Supreme Court of Minnesota as laid down in **Dayton v. City of St. Paul**, 22 Minn. 400, 64 N. W. 20, which is the only case which we have found in this state that appears to be controlling in the question before us.

We must start with the premise that the language quoted above means when authorized by a majority of the voters at a regular meeting or election or a special meeting or election called for that purpose. This leaves unanswered the question what constitutes a majority of the voters. In **Dayton v. City of St. Paul**, supra, on page 402, the court said:

"The precise meaning of the words, 'that a majority of the voters present and voting shall have ratified such alterations or amendments,' is not very clear. The doubt is as to what is intended by the words, 'voters present and voting.' Do they mean the voters present and voting upon the proposed amendment, or do they mean, in case the amendment

shall be submitted (as the legislature may submit it) at an election for other purposes, the voters who may be present and take part in the election for such other purposes?"

The court then said:

"* * * that the words refer to the voters who are present and vote upon the proposition submitted to the electors, without respect to those who may be present and vote for other purposes at any election which may be held at the same time and place at which the proposition may, for reasons of convenience or other reasons, be submitted; * * *."

On page 403 the court laid down "the general rule, in affairs of government, that an election, or a voting, whenever called for, is to be determined by the votes of those who vote to fill the office which is to be filled, or for or against the proposition which is to be adopted or rejected, and not by counting, on either side, those who do not vote at all. To take a case out of this general rule requires a clearly manifested intention to apply a different one, * * *."

In the language of Sec. 125.06, Subd. 2, quoted above, we find no language which clearly manifests the intention of the legislature to apply a different rule than the general rule stated by the court in **Dayton v. City of St. Paul,** supra.

In our opinion the result of the election upon each of the questions submitted to the voters at the general election is to be determined by the votes for or against the specific proposition by the voters voting thereon, and not by counting, on either side, those who do not vote at all.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Eveleth School Attorney.
May 10, 1950. 622-i-8

48

Property — Schoolhouse — Sites — Title — Additional land for may not be acquired subject to life interest—M. S. A. 125.06, Subd. 2.

Question

May a school district under authority of M. S. A. 125.06 purchase real estate in Albert Lea adjoining the present schoolhouse site when such acquisition would make such site contain one block of land, the land to be acquired being subject to the life estate of the present owners?

Opinion

The right of a school district to acquire land for a schoolhouse site, either by purchase or condemnation, is based upon necessity. If it is not necessary, public money should not be expended to acquire it. If it is necessary, it is because the public immediately needs it. In the case under consideration, the present owners are of advanced age. The remaining span of their lives may not be long. But nevertheless the question contemplates purchase subject to life estates. The purchase does not contemplate a fee simple interest.

In my opinion when the public acquires land for a schoolhouse site, whether by purchase or condemnation, the law contemplates the absolute ownership by the public, free from the claim of any other person of any right thereto or interest therein.

It is therefore my conclusion that the school district may not acquire such land subject to such life interests.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.
June 29, 1949. 622-i-1

49

Pupils — Physical examinations — Medical treatment — Districts not liable for expense of physical examination and medical treatment for athletes nor for damages sustained by athletes in taking part in athletics. Opinion of Aug. 7, 1931, File 159-B-7, followed.

Facts

An opinion of the Attorney General, File 159-B-7, dated August 7, 1931, stated that a school district has no liability for the payment of the expense of physical examination of pupils taking part in athletics, is not liable for medical treatment in case of injury to persons taking part in school athletics, and is not liable for damages resulting from personal injuries received by a pupil taking part in athletics. That opinion states that school districts are organized to discharge governmental functions. It states that the funds of the district are derived from taxation and may only be expended for school district purposes.

Question

Whether that opinion is the present opinion of the Attorney General.

Opinion

I consider the opinion to be sound and that it should be followed.

In **Berman v. Minnesota State Agricultural Society,** 93 Minn. 125, 100 N. W. 732, we read:

"* * * The state may and must commit the discharge of its sovereign political functions to agencies selected by it for that purpose. Such agencies, while engaged exclusively in the discharge of such public duties, do not act in any private capacity, but stand in the place of the state, and exercise its political authority. Therefore, when the state creates public corporations solely for governmental purposes, such corporations, while engaged in the discharge of the duties imposed upon them for the sole benefit of the public, are clothed with the immunities and privileges of the state; and no private action, in the absence of an express statute to that effect, can be maintained against them for negligence in the discharge of such duties. Lane v. Minnesota State Agric. Soc., 62 Minn. 175, 64 N. W. 382."

CHARLES E. HOUSTON,
Assistant Attorney General.

Public Examiner.
May 17, 1950. 159-B-7

50

Reorganization—Election—Expenses of election should be paid by county under M. S. A. 122.54—Payment when proposed district includes territory in more than one county discussed—Opinion dated May 10, 1949, as to payment of expenses by county reversed.

Facts

"Pursuant to M. S. A., Sec. 122.52, the final report of a county school survey committee, recommended reorganization and the county superintendent called an election and the same was conducted. Included in the districts participating in the election were seven in one adjoining county and four in another adjoining county but the major portion of the territory was within X County, the county whose superintendent called the eelction. Expenses were incurred for forms for notices of election, ballots, etc. * * *"

Questions

"Are those expenses a valid claim against X County by the superintendent of schools? May X County in turn collect from the other counties the proportionate share for the seven districts and four districts in those adjoining counties? If not, how are those election expenses to be paid?"

Opinion

You are advised that the proper and necessary expenses of the election should be paid by the county in accordance with the provisions of M. S. A. 122.54 and the part thereof which provides:

> "The county board shall, and is hereby authorized to levy sufficient taxes in excess of any existing limitations to defray the necessary expenses incurred under the provisions of this act by the county superintendent and the county survey committee including travel expenses, sustenance or clerical assistance, forms, reports, publications and other expense in connection with the conduct of the survey."

Under M. S. A. 122.52, as amended, a vote on a final report must be held and the election is called by the county superintendent of the county in which the district or territory, or major portion thereof, is located. The election is to be held and the vote canvassed and reported in accordance with M. S. A. 122.21. This section relates to elections held on proposed consolidations.

It is further provided under Sec. 122.52, subd. 2, as amended, that the county superintendent, with the approval of the county survey committee, shall determine the date of the election. This subdivision further directs the county superintendent, with the approval of the committee, to appoint three election judges who shall be school board members, if available, for each polling place. They act as the clerks of the election, canvass the ballots and submit them to the county superintendent and survey committee.

A reading of the entire school reorganization act indicates clearly to us that expenses incurred in holding the election are expenses incurred under the provisions of the act and are a type of expense that the legislature intended should be paid as part of the responsibilities of the county superintendent and the survey committee in the performance of their acts. The legislature chose to place the responsibility for calling and holding the election on the county superintendent and it appears that it was intended that the county should pay the cost.

You have further inquired as to the right of County X to collect proportionate shares of the expenses from adjoining counties which contain certain of the districts included in the report of the survey committee. We believe that this question is one of practicability. If the other districts had survey committees and their county board or boards elect to pay a proportionate share, we feel that it would be within their right to do so. If, however, such other counties did not have a survey committee, or, if having a survey committee, the county board or boards declined to pay the same, it is our opinion that the expenses should be paid by X County.

Opinion dated May 10, 1949, File 166E-4, as to payment of expenses by county, reversed.

J. A. A. BURNQUIST,
Attorney General.

Wadena County Attorney.
February 17, 1950. 166-E-4

51

Reorganization—Election—Vote—L. 1947, c. 421, as amended by L. 1949, c. 666; M. S. A. 122.52, 122.21, 122.40, 131.01, 645.08 (2), 645.16.

Facts

"The Hennepin County Survey Committee in its final report recommended that School District 'A,' District 'B,' District 'C,' and District 'D,' be united through reorganization into a single school district.

"Districts 'A' and 'B' are each 'Urban School Districts' in that District 'A' maintains a high school and District 'B' maintains a graded elementary school. Each of Districts 'C' and 'D' maintains an ungraded elementary school and are designated 'Rural School Districts.' (See Laws 1947, Chap. 421, Sec. 1, subds. 4 and 5; M. S. A., Sec. 131.01.)

"The County Superintendent of Schools with the approval of said survey committee is about to submit to the voters residing in the proposed school district the question of reorganizing said existing districts in accordance with the recommendations contained in said final report.

"Laws 1947, Chapter 421, Sec. 13, as amended by Laws 1949, Chapter 666, Sec. 8, definitely provide that the rural school districts included in any such reorganization, vote as a single unit, but a question has been raised as to the manner of taking and counting the vote where the reorganization includes more than one urban district."

Question

"Do the two 'Urban School Districts' vote as one unit and is the vote counted as such unit? Or does each Urban District vote as a single unit and is the vote cast in each urban district counted separately? Stating it differently: To carry, must the proposition to reorganize receive a majority vote in each of the urban school districts 'A' and 'B,' counted separately, plus a majority of the vote cast in the territory (voting as a unit) outside of said urban districts?"

Opinion

Sec. 8, supra, amended M. S. A. 122.52. We consider Subd. 1 thereof. This relates to the election held on the adoption of the report of the survey committee.

It is there provided that notice shall be given, the question submitted, the election held and the vote canvassed and reported in accordance with the provisions of M. S. 122.21, except that the filing of the petition shall not be required and the ballot shall read "For Reorganization" and "Against Reorganization."

Now consider M. S. 122.21. It requires that the county superintendent cause posted notice of election to be given in each district or portion of district affected. Published notice is also required in some cases. The notice

specifies the time and place of an election or special meeting to vote on the question of consolidation. The duties of the county superintendent at the meeting are specified. The vote taken at the meeting is by ballot. The officers certify the result to the county superintendent. It further provides that in case of consolidation of one or more rural districts, or parts of districts, with a school district in which there is maintained a state high or graded elementary school, election on consolidation shall be effected by a vote of the rural school districts only, in the manner provided by this section, and by the approval of such consolidation by the school board of the district in which is maintained a state graded or high school.

Then this 1949 law goes on to provide that in any school district maintaining a graded elementary or high school, or both, which is located within the proposed reorganized district, one or more voting precincts shall be established wholly within the limits of such urban school district. It is further provided that within that part of the district or territory proposed to be reorganized lying outside the limits of such urban school district, one or more voting precincts shall be established. It provides that the proposition to reorganize such school district **shall not be deemed to have received a majority of the votes cast upon the proposition** or to carry unless a majority of the votes cast **within** such urban school district and a majority cast in such territory **outside** of such urban school district **each** are in favor of establishing such school district. In so far as these enactments are inconsistent, we give force to the 1949 law.

You state:

> "We take the view that in this reorganization, there are three district voting units, namely: (1) Urban District 'A'; (2) Urban District 'B,' and (3) the combined Rural Districts 'C' and 'D'; and that to effect the reorganization, the proposition must receive a majority vote in each of said three units, counted separately."

A suit is now pending in Hennepin County, **Charter v. Scott,** et al., involving this law. In conference with one of the attorneys for the plaintiff, he has outlined his views on the law, which have been of assistance in consideration of the problem.

It appears that while you relate that two of the districts are urban and two are rural, it is claimed by the attorney in the Charter case that all four districts involved in the election are urban. This is mentioned although that fact, if true, does not change the conclusion here reached.

Some reference has been made to an opinion of the Attorney General, File 166E-4, dated May 7, 1948. That opinion was written before the 1949 enactment. The law has been changed since the opinion was written and we may properly disregard it in the consideration of the problem.

An urban school district, according to M. S. A. 122.40, L. 1947, C. 421, Sec. 1, Subd. 5, is one which maintains a graded elementary or secondary school as defined in M. S. A. 131.01, Subd. 2 (1), (3), (4), (5), (6), (7) and (8).

A rural school district was defined by the same section in Subd. 4 to be a school district which maintains an ungraded elementary school as defined in M. S. A. 131.01, Subd. 2 (2).

We have seen that M. S. A. 122.52, as amended by L. 1949, C. 666, Sec. 8, requires that in an urban district a voting precinct or precincts shall be established. That is to say, at least one such precinct shall be in each urban district. It is further provided that the proposition submitted at the election shall not be deemed to have carried unless it carried in **such** urban district. What does "such" mean? It must mean in **any** urban district — in **every** urban district.

In construing this statute we are justified in considering that in the use of the singular (school district), the legislature included the plural (school districts). This is consistent with the manifest intent of the legislature. It is not repugnant to the context of the statute. M. S. A. 645.08 (2). The object of all interpretation is to effectuate the intention of the legislature. M. S. A. 645.16. We must consider the object to be attained, and the consequences of a particular interpretation.

As we read the 1947 and the 1949 acts, it appears that the legislature did not intend that one urban district more populous than another urban district should in the election on that account have a greater voice than the smaller community. It appears that when both the large and the smaller districts desire to unite, such end will be accomplished. But the mere carrying the proposition in the larger urban district shall not override the vote in the smaller urban district which votes separately and in which the votes are counted separately. This appearing to be the spirit of the law, it should be so read and so executed.

Accordingly, it is my view that the law now requires that in each urban district (whether one or several) the people vote and their vote is separately counted. In the territory outside the urban districts, the people vote as a unit, separate *from* urban districts. In order that the proposition carry, the majority of the votes cast must favor the proposition counting separately the votes cast in each urban district and in the area outside the urban districts.

CHARLES E. HOUSTON,
Assistant Attorney General.

Hennepin County Attorney.
November 10, 1949. 166-E-4

52

Reorganization—Name—For reorganized district M. S. 1949, Secs. 122.40-122.57, should conform to Sec. 122.01.

Facts

By authority of M. S. 1949, Secs. 122.40-122.57, the proceedings there outlined have been had with the object of reorganizing several school districts embracing territory in Carver and Hennepin counties with the ultimate

purpose of making one district out of the entire area. After the election was held, the county superintendent made an order as required by Sec. 122.52 (4). The order specified that the name of the newly reorganized district should be No. 7. One of the former districts included in the newly reorganized district was named Minnetonka Independent School District No. 7 of Hennepin County, Minnesota.

Question

What is the correct name of the new district?

Opinion

M. S. 1949, Sec. 122.01, Subd. 1, requires that all school districts shall be numbered **consecutively** in each county and shall each be known as ..... School District No. ..... of ..... County. A district, when situated in two or more counties, shall be known as Joint ..... District No. ..... of ..... County and No. ..... of ..... County.

The newly created district is a new entity. Since the statutes require consecutive numbering, it is my opinion that it should not bear the number of a former existing school district but should have the next number higher than the highest number of any school district in Hennepin County at the time that it came into being. The same number selection should apply in Carver County. Upon the facts stated, it is my opinion that the name of the new school district should be Joint **Independent School** District No. ..... of Hennepin County and No. ..... of Carver County.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.
May 11, 1950. 166-E-4

53

Reorganization—Officers—Election after organization complete—Nominations for office—M. S. A. 124.05, 122.55.

Facts

The county superintendent of Pine County has called your attention to M. S. A. 122.55, L. 1949, C. 666, Sec. 10, amending L. 1947, C. 421. Subd. 1 of this section reads:

> "Upon reorganization, candidates for school board may be nominated in the manner provided in Minnesota Statutes, Section 124.05, the superintendent of the county who issued the order of reorganization performing the duties therein specified to be performed by the clerk."

Questions

1. "Does the section permit discretion in whether or not Minnesota Statutes 1945, Section 124.05, shall be used in proceeding to election of school board members, or

2. "Is some other sort of discretion applied?

3. "In case candidates file for election to the school board under Section 122.55, must the provision be followed as specified in Minnesota Statutes 1945, Section 124.05?"

Opinion

The first question is answered "no." In my opinion, Subd. 1 means that, when school districts are reorganized under the authority of this law, when and if nominations are made before election of members of the school board, such nominations shall be made as provided in Sec. 124.05 of the statutes. In case such nominations are so made, the superintendent of schools who issued the order of reorganization will perform the duties specified in Sec. 124.05 to be performed by the clerk of the district.

There is no choice of methods of nominations. When nominations are made, they are made as so specified. The rules laid down in Sec. 124.05 as modified by Sec. 122.55, Subd. 1, must be followed. There is no option.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.
January 13, 1950. 166-E-4

54

School Board—Meetings—Executive sessions—Public entitled to admission to board meetings when board is not in executive session.

Questions

"Is a regular or special monthly session or meeting of a school board of an independent school district a public meeting so that non-members, just citizens of the community, would be entitled to be present at this meeting?

"Is it permissible for the school board of an independent school district to exclude persons from attending their regular or special called meetings?

"May the school board of an independent school district exclude private citizens from their meetings where they are in the so-called executive sessions for the purpose of considering such things as setting salaries and letting contracts?"

Opinion

The public is entitled to attend meetings of a school board except when it goes into executive session.

When a board is in executive session, it has the power to exclude persons not members of the board. This is discretionary with the board and cannot be controlled by any outside authority. Of course, it goes without saying that all sessions cannot be executive. The public is entitled to admission at board meetings when the board is not in executive session.

CHARLES E. HOUSTON,
Assistant Attorney General.

Waseca County Attorney.
November 16, 1949. 161-A-16-b

55

School Board—Powers—Kindergarten—Common school district may maintain—M. S. A. 125.06, Subds. 1, 9; 125.08, Subd. 1; 128.081, Subd. 1; 131.01, Subds. 1, 2; 128.081, Subd. 1.

Opinion of April 9, 1941, file 169K, superseded.

Question

May a common school district maintain a kindergarten?

Opinion

On April 9, 1941 (169K), an opinion was rendered wherein it was stated that a common school district "has no legal authority for maintaining a kindergarten." Upon reconsideration, it appears that that opinion would have been more nearly correct if it had stated that there is no express statutory statement that a common school district is authorized to maintain a kindergarten.

M. S. A. 125.06, Subd. 1, states: "The school board shall have the general charge of the business of the district * * * and of the interests of the schools thereof." Subd. 9 of that section states: "It shall superintend and manage the schools of the district; adopt, modify, or repeal rules for their organization, government, and instruction * * *; prescribe textbooks and courses of study; * * *."

Sec. 125.08, Subd. 1, states: "The school board of any independent school district may establish and maintain one or more kindergartens * * *."

I consider the last section cited declaratory of the law and not a grant of power. It appears to me that before the enactment of that section the

independent districts had the power which the law there declares. It is merely an example of much legislation declaring what the law is rather than the creation of a new right.

We see that under Sec. 125.06, pursuant to the broad authority of the board, which has charge of the business of the district, it may determine what shall be taught in the school, with the exception of those things which the law forbids. For example, it may not teach the distinctive doctrines or creeds of a religious sect. Opinion of Attorney General (172K), March 10, 1943. But it has charge of the interests of the schools. If the board is of the opinion that the interests of the schools require that a kindergarten be maintained, then it is within the discretionary powers of the board to establish and maintain one. The board manages the schools. It organizes them. It governs them. It provides the courses of instruction. The law does not say that Spanish, Greek, French or the Scandinavian languages may be taught. But if the board should decide that one or more of such languages should be taught in the school it has the power to establish and maintain such a course.

The main distinctions between a common and independent district are that the common district has three directors; while the independent district has six. In the common district the electors levy the taxes at the annual meeting; while in the independent district the board levies the taxes. The distinction is principally in the organization of the districts. In the main, the powers are the same. The statutes in defining the powers, in most instances, make no distinction between common and independent districts. No good reason for a distinction appears upon the question under consideration.

All public schools are classified either as elementary or secondary. Sec. 131.01, Subd. 1. An elementary school includes all schools below the grade of a high school. Subd. 2.

The legislature in the laws relating to special state aid has established rules under which such aid is computed. M. S. A., Sec. 128.081, deals with computation of basic aid. The term "pupil unit" is defined. In Subd. 1 we read: "In an elementary school, for kindergarten pupils attending half-day sessions throughout the school year, one-quarter pupil unit and other elementary pupils, one pupil unit." This language does not indicate that the legislature made a distinction between common and independent school districts in respect to their respective rights to maintain a kindergarten. On the other hand, it does indicate that a kindergarten is included within an elementary school and that kindergarten pupils are elementary pupils.

In **Sinnot v. Colombet**, 107 Calif. 187, 40 P. 329, 28 L. R. A. 594, it is stated that the charter of the school district declared that the board of education shall have power "to make, establish, and enforce all necessary and proper rules and regulations, not contrary to law, for the government and management of the public schools within said city, and for carrying into effect laws relating to education, * * * and to determine the course of study and mode of instruction to be pursued in said schools."

Sec. 1666 of the Political Code reads:

> "Other studies may be authorized by the board of education of any county, city, or city and county; but no such studies shall be pursued to the neglect or exclusion of the studies in the preceding sections specified."

In considering whether such schools had power to maintain a kindergarten, the court, having reviewed the origin of the kindergarten system, said:

> "Since the 'kindergarten system' has for its object the purposes above briefly indicated, and as those purposes seem appropriate for pursuit in the primary schools, and as the law evidently contemplates that such system, when adopted, shall be regarded 'as part of the public primary schools,' we consider that the kindergarten classes mentioned in the resolution of the board of education become, when organized, classes in the primary schools of the district. The mere fact that such classes were instructed in separate buildings, and that the special study mentioned in the resolution was 'solely taught' in those classes, does not render such course obnoxious to the restrictive clause of section 1666, Pol. Code, as supposed by counsel for appellant."

State statutes of Nebraska, Iowa, and Ohio, which prohibited the teaching of any modern language but English to any pupil who had not successfully passed the eighth grade, have been held unconstitutional by the Supreme Court of the United States, reversing the decisions of the Supreme Courts of those states. 56 C. J. 843, Note 34.

Our statute is silent in so far as it gives specific power to a common school district to maintain a kindergarten, although it does grant power to an independent school district to maintain a kindergarten. The general terms of the statute authorize the school boards to select courses of study and when a kindergarten course is provided in a common school district and is not prohibited by law except by the inference, if any, that it is not specially authorized it would seem that there is some analogy to these statutes relating to foreign languages.

The power of the legislature to impose a system of public school education upon local communities is not limited to the common branches. If the legislature sees fit to require public education of boys in that which pertains to successful agriculture, and of girls in that which pertains to successful housekeeping, it has the power to do so.

Such legislation does not violate the constitutional requirement of the quality of taxation so long as the law operates alike on all persons and property similarly situated. For similar reasons, it does not violate the requirement of a "uniform system of public schools." **Associated Schools v. School District No. 83**, 122 Minn. 254, 142 N. W. 325.

In the case last cited, the syllabus states that the State Constitution provides that it shall be the duty of the legislature to establish a general and uniform system of public schools and that the legislature shall make such provision, by taxation or otherwise, as will secure a thorough and efficient

system of public schools in each township in the state. These provisions were inserted, not as a grant of power, but as a mandate to the legislature, prescribing as a duty the exercise of an inherent power.

It seems that this means that the power resides in the legislature independent of the Constitution to establish a general and uniform system of public schools and the Constitution commands that the legislature provide an efficient system of schools throughout the state. It would likewise seem that the power having been granted by the legislature to select courses of study and training, which power is vested in the school board, that board is not limited in its power of selection of those subjects and branches which the legislature may thereafter specifically enumerate, but if the school board shall determine in the exercise of its discretion that in its district a kindergarten shall be maintained, under its broad general powers, it acts under the scope of its authority.

Taking all these things into consideration leads me to the opinion that a common school district is authorized to maintain a kindergarten. The opinion of the Attorney General aforesaid, dated April 9, 1941, is accordingly superseded.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.
October 21, 1949. 170-D

56

School Board—Powers—Outdoor education project—Teachers—Minneapolis School Board no authority to provide for outdoor education project beyond geographical limits of district comprised by city—Many Point Camp near Itasca Park—Short trips outside district incidental to teaching within city within discretion of board.

Facts

"Our plans call for taking a group of tenth grade students to Many Point Camp near Itasca State Park for a period of about ten days during the latter part of the current school year. Four regular teachers would accompany the students and would be in charge of the planned program of study and activities of the Camp. The cost to the Board of Education would be the salaries of the teachers for the period of the project plus a small sum for instructional supplies and miscellaneous operating expenses."

Question

"Does the Minneapolis Board of Education have the authority to pay the salaries of the four regularly employed teachers for approximately eight working days for performing instructional services with Minneapolis students at Many Point Camp?"

Opinion

The Charter of the City of Minneapolis provides that its Board of Education "shall have the entire control and management of all common schools within the City of Minneapolis and said city shall constitute one single school district." By the adoption of the city charter establishing Minneapolis as a school district and vesting the school board as a corporation with the above quoted powers within that district, it would appear that the electorate intended that the educational facilities to be given to pupils of the city should be furnished them within Minneapolis, and not elsewhere.

Courts have held that members of a school board have no powers other than those conferred by legislative act, either expressly or by necessary implication, and doubtful claims of power are resolved against them. 47 Am. Jur. 324.

Neither the provisions of the Minneapolis City Charter nor the statutes of the State of Minnesota expressly confer upon the members of the School Board of Minneapolis the right to provide for an outdoor education project beyond the geographical limits of the city. If such authority exists, it must be one necessarily implied from the power conferred upon the school board to control and manage all common schools within the city.

In the control and management of the schools, the members of the board of education have a wide discretion, and, if, in their judgment, it is advisable that, as an incident to the teaching in the public schools within the city, a group of pupils studying, for example, the state government, should, with their teachers, be permitted to spend a day or a part thereof in going to the State Capitol to witness directly the operation of governmental offices, the permission by the board of such incidental trip to be made within such a short time could not, I believe, be considered an abuse of discretion.

However, it is my opinion that, neither from the statutes of the state nor from the provisions of the city charter, can it be reasonably implied that the School Board of Minneapolis has authority to establish for a group of Minneapolis students such a project as the one in question, where it is intended to direct four teachers to be in charge of an outdoor education program for ten days at a camp approximately 200 miles from the city and thereby require such teachers to perform services outside the school district, and use school funds for such purpose and other expenses incidental thereto when such funds are, in effect, impressed with an educational trust to be used in payment of services and proper expenses within the district.

Until our statutes or the provisions of the Minneapolis City Charter are so amended as to authorize expressly the board to make contracts with teachers in which they shall agree to perform, when required, duties outside of their school district, and the statutory and charter provisions so amended provide for establishing, leasing, or occupying educational camps for students a long distance from the city limits and the authority to pay for teachers' services in such camps and other expenses in connection therewith, it would appear that the Attorney General is not justified in ruling that the

authority to make the expenditures proposed in your communication and hereinabove referred to can be necessarily implied from the general powers conferred upon the board.

J. A. A. BURNQUIST,
Attorney General.

Commissioner of Education.
May 26, 1950. 170-H

57

School Board—Powers—Recreational program, joint—Accounting.

Facts

"In International Falls a recreational program is operating under the sponsorship of two cooperating government bodies, the Board of Education and the City Council, with the operating power delegated to a board called the Recreational Commission. * * * At the beginning of each fiscal year the Recreational Commission presents a proposed budget to the City Council and the Board of Education for their acceptance. With agreement on the budget, the City Council and the Board of Education each agree to pay one-half of the accepted budget."

Question

"May these two cooperating governmental bodies balance their financial accounts at the end of the fiscal year and the accounts be made even by a payment from one to the other?"

Opinion

Since the school district and the city each have power to contract as they did, they have power to execute the contract when made. If the execution of the contract requires the direct payment of money from one body to the other because of the fact that one contracting party has paid more than it agreed and the other has paid less than it agreed, then such payment should be made directly from one to the other.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.
March 24, 1949. 159-B-1

58

State Aid — Payment — Statutory provision for payment of state aid in October is directory, not mandatory. When money for payment is available in August, it may then be paid—M. S. A. 128.085.

Facts

The financial condition of the special school district in Minneapolis discloses that it has obligations to be met in the near future without present cash resources sufficient for the purpose. It estimates that it will receive from the state about $3,250,000 as state aid. If it can now receive $2,500,000 without waiting for the October distribution, it will be able to meet these obligations. It has requested that the state make an advance of the last named sum now.

You estimate that the amount to be paid to this district in October is in excess of the amount now requested to be paid. The funds therefor are available.

Question

May the state board of education make an advance disbursement of state aid before the October disbursement?

Opinion

M. S. A. 128.085 reads:

> "Special state aid shall be paid to school districts in October and March based upon information available. In August a final distribution for the previous school year shall be made based upon accurate information."

M. S. A. 128.02 directs payment of apportionment of the income on endowment funds in March and October.

Kipp v. Dawson, 31 Minn. 373, 17 N. W. 961, subsequently approved by our Supreme Court in subsequent decisions, held:

> "* * * The rule generally adopted (and we think the correct one) is that a statutory provision intended merely for the guidance of the conduct of officers in the conduct of public business, so as to insure the orderly and prompt performance of public duties, and a disregard of which cannot injuriously affect the rights of parties interested, will be deemed merely directory. * * *"

Accordingly, it is my opinion that the provision that the payment be made in October is directory and does not prevent the payment being made now, when the money therefor is now available and can be used for no other purpose.

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.
July 29, 1949. 168

59

Teachers — Salary — Sick leave — Accumulated — Unused sick leave may not be paid for by a school district in addition to salary paid. Such payment would be a gratuity.

Facts

A teacher was employed by the school board to teach in the Winona public schools. You do not submit the contract under which she was employed to teach so it is necessary to make some assumptions.

It is assumed that the teacher was employed under a contract such as is authorized in M. S. A. 130.18. The contract was executed and contemplated the employment of the teacher during a school year previous to that which began in September, 1949. Since it was a continuing contract, it was in force at the beginning of the school year September, 1949. It is assumed that such rules as were adopted by the school board previous to the beginning of the present school year were in force at the beginning of the present school year. In such rules it was provided that "sick leave in Winona Public Schools is allowed not exceeding ten days per school year and the total accumulated leave may not exceed thirty days."

At the beginning of the present school year, this teacher had eight days accumulated sick leave. By conference with you, I understand that this so-called accumulated sick leave means that the teacher took off, because of illness, two days out of ten days possible sick leave. She has since died. A claim is now made against the school district for compensation for eight days because of the unused eight days' sick leave.

Question

Can the estate of the deceased teacher claim with success the payment of eight days' salary because of the accumulated eight days' sick leave, the teacher having been paid for the full period of time that she taught.

Opinion

Before answering this question we must understand what sick leave is. The school board said to this teacher, in substance, when it made its contract with her: If during the period of this contract you are prevented from performing your part of it because of unavoidable illness, the school district will pay you for a period of not exceeding ten days in one school year when you are unable to teach because of such sickness. But she was able to teach. She did teach except for two days and for these two days she was paid. She was also paid for the days she taught.

The contract did not state, either in words or in effect, that if she was ill for a period not more than ten days in one school year, she would be paid for the time that she was ill and unable to teach, or if she was well and able to teach that it would pay her a bonus, equal to her salary for the number of days of accumulated sick leave that she did not use. That would

merely be an increase in salary and any increase that the board wished to make in salary could be made by simply increasing the salary and using less words.

Plainly, the contract did not contemplate the payment of a bonus to the teacher for accumulated sick leave at the time her contract was terminated. If the board should pay the representative of her estate therefor, it would be purely a gratuity, which, in my opinion, is unauthorized by law. Gratuities are not to be paid from public funds. **Nollet v. Hoffmann, 210 Minn. 88, 297 N. W. 164.**

CHARLES E. HOUSTON,
Assistant Attorney General.

Commissioner of Education.
December 23, 1949. 174-A

ELECTIONS

BALLOTS

60

Candidates — Name — Counting votes — When name is written on ballot and there are two persons in the Township by the same name, parol evidence may be considered in determining intention of voter—M. S. A. 206.16 (3), 206.50 (5).

Facts

At a town election held in Pope County on March 8 there was a vacancy in the office of assessor; A, the incumbent, and B filed under the ballot system, and their names were printed on the ballot. At the election A received 14 votes, and B received 12 votes. There was written in for the office of assessor on 20 of the ballots the name "Orrin Peterson"; there are two Orrin Petersons in town, one being S. Orrin Peterson, sometimes written Orrin S. Peterson, and the other, Orrin K. Peterson; both of the Petersons are legal voters of the township and qualified for the office; S. Orrin Peterson is willing to accept if declared elected, but Orrin K. Peterson declines to accept or qualify; there was nothing on the ballots themselves to indicate which Orrin Peterson the voters intended to vote for, but you state that it is well known in the township that the voters who wrote in the name "Orrin Peterson" intended to vote for S. Orrin Peterson.

Question

Is S. Orrin Peterson entitled to be declared elected to the office of assessor and qualified for the same?

Opinion

In the facts you submit you state that it is well known in the township that the voters who wrote in the name of "Orrin Peterson" intended to vote for S. Orrin Peterson. If that conclusion can be substantiated by extrinsic evidence, it is the opinion of this department that S. Orrin Peterson is entitled to the office.

In this election the voters were entitled to write in the name or names of candidates. M. S. A. 206.16 (3). In M. S. A. 206.50 (5), it provides:

> "The judges shall disregard misspelling or abbreviations of the names of candidates, if it can be clearly ascertained from the ballot for whom it was intended."

It is true that the quoted statute refers to ascertainment "from the ballot." The courts are in conflict as between a strict or liberal rule in ascertaining the intention of the voter. We do not find any direct authority on this question in the opinions of the Minnesota courts. In respect to marking on ballots, our Supreme Court has been liberal in ascertaining the intention of the voters. Dunnell's Digest 2d, Sup., Elections, 2947.

In 18 Am. Jur., Elections, Section 195, page 311, it states:

> "Furthermore, where there are two persons in the same district with the same name, one of them a candidate, and the other not, and there are ballots which do not designate which of these persons is voted for thereon, parol evidence may be received to show for whom the votes were intended. On the other hand, extrinsic evidence may not be received to contradict an unambiguous ballot, as where there are two persons of the same surname, but different given names, and the name of the one not a candidate is used by the voters."

It will be noted that the last sentence quoted declares that an ambiguity must exist before reference is made to extrinsic evidence. The distinction is shown in the case of **State ex rel. Cremer v. Steinborn**, 92 Wisc. 605, 66 N. W. 798, 53 Am. St. Rep. 938. In that case C. H. Cremer, Sr., was a regular candidate. Seven votes were cast for C. H. Cremer, Jr., a cousin of the regular candidate. A court held that the parol rule could not be invoked as there was no ambiguity. In the instant case, however, you state that one of the Petersons was known as S. Orrin Peterson and also as Orrin S. Peterson, while the other was known as Orrin K. Peterson. This fact does raise an ambiguity which justifies invoking the rule above quoted from 18 Am. Jur.

> "Where the intention of the voter is clearly ascertainable from the ballot, with the aid of extrinsic facts of a public nature connected with the election, the law requires his vote to be counted." (Paine, on Elections, c. 550, p. 446.)

See also McCrary on Elections, 4th Edition, Sections 529, 530. In **Wills v. State Board of Canvassers**, 50 Kans., 144-147, the rule is stated, "The ballot indicated the will of the voter, and when, in the light of all surrounding

circumstances, the purpose of the voter can be ascertained with reasonable certainty, effect should be given to it." See also **Thomas Blair Skeels v. Clifford Paulus** (1945), 32 Ohio Opinions 324, 44 Ohio L. Abs. 529.

It is true that the authorities cited relate to cases where the courts applied the parol or evidence aliunde rule in reviewing election contests. In the case you present, it is our opinion that it is very significant that there is involved a township election, limited as it was to the voters in a small community. It is significant that forty-three per cent of those voters who cast their ballots voted for "Orrin Peterson." This indicates that a large plurality of the voters who cast their ballots must have intended to cast them for one individual. It seems very likely that there must have been some organized effort prior to the election, and that organized and apparently coordinated effort must have been only in behalf of one of the Petersons. Accordingly, if it can be reasonably determined that S. Orrin Peterson is the person these voters intended to vote for and elect to office, we believe that he can properly be declared to be the elected candidate.

DONALD C. ROGERS,
Assistant Attorney General.

Pope County Attorney.
March 22, 1949. 28-A-3

61

Candidates — Name — Identifying words "Widowed home-maker, St. Paul" come within purview of Minnesota Statutes 1949, § 205.70.

Facts

"One of the candidates for county commissioner in district #3, which comprises the City of Saint Paul, has asked that the words 'Widowed home-maker, St. Paul' be placed on the ballot by reason of the fact that there is another candidate for another office having the same surname as hers, such descriptive words being permitted pursuant to Minnesota Statutes 205.70."

Inquiry

"Will you please advise at the earliest possible moment whether the said words could properly be placed on the ballot following the name of this candidate."

Opinion

Your question is answered in the affirmative.

Minnesota Statutes 1949, Section 205.70 provides that when the surnames of two or more candidates for the same or different offices appear on

the same ballot at any election, each such candidate shall have added thereto not to exceed three words, "indicating his occupation and residence, * * *."

The term "occupation" is defined:

"That which principally takes up one's time, thought, and energies; * * *."

Funk and Wagnall's New Standard Dictionary, page 1706. **Darrell v. Norida Land and Timber Co.**, 27 P. 2d 960, 55 Idaho 195.

The object of the statute is to avoid confusion that may arise from the appearance on the ballot of identical surnames. 29 C. J. S., Elections, Section 161, page 238. **Ladin v. Holm**, 203 Minn. 434, 281 N. W. 762. The statute is of a remedial nature and should be liberally construed.

It is our opinion that the proposed words of identification come within the purview of Section 205.70.

DONALD C. ROGERS,
Assistant Attorney General.

Ramsey County Attorney.
August 11, 1950. 28-B-2

62

Voting machines: Manual ballots may be used in certain districts and machines in others; M. S. A. 209.01 - 209.05. Manual ballots may not be used in districts where machines are furnished merely because of crowded conditions—M. S. A. 209.19.

Facts

"For about ten years the City of Duluth has been using automatic voting machines on municipal, state and national election days. During the state and national election of 1948, some of the precincts turned out a vote so heavy that, according to reports, large numbers of voters stood in line for periods of time ranging from thirty minutes to an hour before getting at voting machines to cast their votes.

"It is not quite clear to me that under the last paragraph of M. S. A., Section 209.19, election judges would be permitted to consider a voting machine as having broken down, thereby permitting the use of paper ballots or sample ballots merely because there are not a sufficient number of voting machines in the precinct to take care of an unusually large or extraordinary number of voters.

"Nor is it quite clear to me that under Section 209.05, permitting the governing body of a city to use voting machines in some voting precincts and paper ballots in other precincts, that the governing body of such a city would be permitted to authorize the use, contempora-

neously, of both voting machines and paper ballots in the same precinct merely because an unusually large or extraordinary number of voters created congestion in such a precinct."

Questions

1. Would it be proper for the City of Duluth to authorize the use of manual ballots in certain specified precincts and the use of voting machines in the remainder of the precincts within the City of Duluth?
2. Would it be proper for the City of Duluth to authorize the use of manual ballots in any precinct within the City of Duluth when it was found that individuals in the precinct were required to wait an unreasonable length of time before being able to cast their ballot?
3. Would you consider it unreasonable to compel a voter to wait in line for more than one-half hour for his turn to vote in a precinct where voting machines only were available?

Opinion

Question 1 is answered in the affirmative. M. S. A. 209.01 provides for "* * * the use of voting machines in any one or more districts thereof, at all elections to be held therein. * * *"

M. S. A. 209.05 provides in part:

"The governing body of any municipal corporation in this state may provide for the use of voting machines in all or one or more districts thereof. * * *"

Question 2 is answered in the negative. M. S. A. 209.19 provides in part:

"If any voting machine being used in any election shall become out of order during such election it shall be repaired if possible or another machine substituted as promptly as possible. In case such substitution or repair cannot be made, paper ballots printed or written, and of any suitable form may be used for the taking of votes and for such purpose voting machine sample ballots may be used."

That provision of the statute authorizes the use of paper ballots only in case substitution or repair cannot be made after a voting machine has become out of order. Merely overcrowding of a precinct cannot be construed as constituting a determination that the machines were out of order.

We do not consider Question 3 one upon which a legal opinion could be rendered.

Undoubtedly, problems which now face you could be remedied or the situation improved by using manual ballots in districts which cast a light vote and releasing the machines used in such districts for use in precincts where a heavier vote is cast.

DONALD C. ROGERS,
Assistant Attorney General.

Duluth City Attorney.
January 24, 1950. 28-A-9

CORRUPT PRACTICES ACT

63

Violation — Promise to public to appoint a certain individual as superintendent of police by candidate for mayor does not violate M. S. 1945, § 211.23.

Question

"Is it a violation of M. S. A. 211.23 for the incumbent Acting Mayor of the City of Minneapolis, who is a candidate for election as Mayor at the general municipal election to be held June 13, 1949, to promise that, if elected, he will appoint a certain individual as Chief of Police?"

Facts

"By Section 1, Chapter VI, of the city charter, it is provided:

" 'He (the Mayor) shall, by and with the consent of the City Council, appoint some suitable person as Superintendent of Police, subject to removal at the pleasure of the Mayor, or for cause by a two-thirds' vote of the City Council.'

"A suggestion has been made that because the appointment by the Mayor of a Chief of Police does not become effective until the City Council has consented thereto, a candidate for Mayor may, without violating the above section of the Corrupt Practices Act, state his preference for a Chief of Police. You will note the language, 'nor prevent a candidate, for any office in which the person elected will be charged with the duty of participating in the election or the nomination of any person as a candidate for any office, from publicly stating or pledging his preference for or support of any person for such office or nomination.' "

Opinion

Minnesota Statutes 1945, Section 211.23, provides:

"No person shall, in order to aid or promote his nomination or election, directly or indirectly, himself, or through any other person, appoint or promise to appoint any person, or secure or promise to secure or aid in securing the appointment, nomination, or election of any person to any public or private position or employment, or to any position of honor, trust, or emolument. **Nothing herein contained shall** prevent a candidate from stating publicly his preference for or support of any other candidate for any office to be voted for at the same primary or election; nor **prevent a candidate, for any office in which the person elected will be charged with the duty of participating in the election or the nomination of any person as a candidate for any office, from publicly stating or pledging his preference for or support of any person for such office or nomination.**" (Emphasis ours.)

The first sentence quoted above would, if standing alone, categorically prohibit a promise by a candidate for office to appoint a certain individual as chief (superintendent) of police. However, the first sentence is qualified by a second sentence which contains an exception to the prohibition contained in the first. The purpose in inserting this qualification, it appears to us, was to recognize the distinction between promising jobs for the purpose of purchasing support or votes and mere expressions of a policy which the candidate will pursue as mayor, if elected to that office.

Under the provision of Section I, Chapter VI, of the city charter quoted above, the mayor is empowered to appoint a superintendent of police but such appointment to be effective must have the approval of the city council. This, in our opinion, is in effect nominating a person as superintendent of police within the language of the exception quoted above. It is our conclusion that the promise publicly made by a candidate for mayor to appoint, if elected, a certain person as superintendent of police does not violate Minnesota Statutes 1945, Section 211.23, provided that the promise was made to the public as a declaration of principle by the candidate and not to the person who would be appointed superintendent of police if the candidate is elected to the office of mayor.

We are confirmed in our conclusion by the decision in **Fordham v. Stearns**, 122 Or. 311, 258 P. 822, which is the only case directly in point found in our search for authorities. In that case, the court considered whether a statement made in a school election violated the section of the Oregon Corrupt Practices Act, which is substantially similar to Section 211.23, quoted above. One of the candidates made the following statement:

> "I was a member of the school board which brought Mr. and Mrs. Howard here as teachers, and I believe we have had the best school we ever had, and I want to see them remain in the school. If you want Mr. and Mrs. Howard to teach this next year, then you should vote for me; if you don't want them, vote for Frank Bogue."

His opponent then took the floor and said:

> "I have been asked by several people to run for this office, and I will say that if I am elected there will be a change of teachers."

The court pointed out:

> "Section 4131 denounces as unlawful the making of a promise to appoint another person to any public or private position or employment for the purpose of promoting the election of the nominee. But that section further provides that such candidate 'may publicly announce or define what is his choice or purpose in relation to any election in which he may be called to take part if elected.' "

The court then stated:

> "From the foregoing statements, we see the real issue between the candidates. Each declared his principle. Neither was engaged in unlawful electioneering. This was not a violation of the Corrupt Practice Act, but was clearly within the privilege of the candidate as defined

by Section 4131, Or. L. The Corrupt Practice Act was designed to prevent corruption and to guarantee purity in elections, and not for the purpose of preventing a man from properly defining his principles. It is not in the interest of the public welfare for a candidate for any office to keep his constituents in ignorance of his views.

"The complaint in this case must be considered in the light of Section 8, Article I, Or. Const., reading:

" 'No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.' "

This provision is similar to Section 3 of Article 1 of the Constitution of Minnesota.

J. A. A. BURNQUIST,
Attorney General.

Minneapolis City Attorney.
June 8, 1949. 627-M

PRIMARY

64

Judge — Eligibility — Town board member may not sit as judge of election in the primary to be held in September, 1950, when he is a candidate for county commissioner, even though his name does not appear on the primary ballot.

Facts

"The question has arisen as to the eligibility of one of the members of the town board of one of the townships in this county to act as an election judge in the forthcoming primary election to be held on September 12, 1950. This individual is a candidate for election to the County Board for the district in which the township in which he resides is situated. There is one other candidate for the office of County Commissioner in this district and there being no contest in the primary the names will not, of course, appear on the primary election ballot."

Question

May a member of the town board sit as an election judge in the primary election to be held in September, 1950, while he is a candidate for the office of county commissioner, but when his name will not appear on the primary election ballot?

Opinion

I think the answer to this question is found in M. S. 1949, § 205.47, which reads:

> "* * * no person shall be eligible as judge or clerk unless he can read, write, and speak the English language understandingly, nor if he be a candidate for any office. * * *"

As long as the town board member in question is a candidate for an office, he is ineligible as judge of election at the primary election to be held in September, even though his name does not appear on the primary election ballot.

The language quoted is found in Mason's Minnesota Statutes 1927, § 306. This language was construed in former opinions of this office. See opinion No. 153, 1932 report, dated May 28, 1932, file 183-J.

In said opinion the question was answered whether a town clerk who had filed for county commissioner could act as one of the judges of election when he had filed for the office of county commissioner, there being no contest at the primary. The question was answered that a town clerk who was a candidate for county commissioner was not eligible to act as a judge either at the primary or general election even though there was no contest at the primary.

Accordingly, following the wording of the statute your question is answered in the negative.

RALPH A. STONE,
Assistant Attorney General.

Sibley County Attorney.
August 31, 1950. 183-J

LIQUOR

INTOXICATING

65

Election day — Deliveries — Statute prohibiting retail sale of intoxicating liquor on election day does not prevent deliveries by breweries and wholesalers of intoxicating liquor in wholesale quantities to retailers on election day.

Question

Whether it is illegal for a brewery and wholesalers to make delivery of intoxicating liquor on an election day in the city of Minneapolis.

Opinion

M. S. A. 340.14, Subdivision 1, provides:

"No sale of intoxicating liquor shall be made * * * before eight o'clock p. m. on any Election Day, in the district in which such election shall be held * * *."

This provision is contained in a section of the statute which relates to regulating the retail sale of intoxicating liquor. Even if the deliveries to which you refer could be construed to be sales, they are not retail sales and, hence, the statute quoted is not applicable to such deliveries.

It is my opinion that such deliveries may be made on election days in Minneapolis unless there is some municipal ordinance to the contrary.

RALPH A. STONE,
Assistant Attorney General.

Hennepin County Attorney.
March 8th, 1949. 218-J-4

66

Liquor Control Commissioner—Authority of to approve or disapprove transfer of location of off sale retail liquor store—M. S. 1949, Sec. 340.11, Subds. 1 and 3, 340.42, 340.43, 340.57.

Question

"* * * whether the Liquor Control Commissioner has authority to approve or disapprove the transfer of location of an 'off sale' retail liquor store in the city of Minneapolis, as an incident to the general responsibility for approving the 'off sale' retail liquor licenses."

Opinion

Among the rules which you legally adopted is Regulation No. 12, Section 7, which reads as follows:

"The location of business of a retail liquor licensee may be changed subject to the approval of the municipal council **and the Commissioner in cases of 'off sale' licenses.** Application for change in location shall be in writing, accompanied by a written statement from the bonding company consenting to the change in location."

In accordance with Minnesota Statutes 1949, Section 15.042, Subd. 3, the above quoted rule has the force and effect of law. Under this regulation you have the authority to approve or disapprove the transfer of location of an off sale retail liquor store in the City of Minneapolis or elsewhere.

Minn. St. 1949, Sec. 340.57, to which you refer in your communication, in so far as here material, provides that the City Council of the City of Minneapolis "is hereby authorized and empowered, by a three-fifths vote of the governing body thereof, to grant licenses to sell intoxicating liquors" in certain prohibited territory "provided that no greater number of licenses shall be issued therein than has been heretofore issued in such territory under authority granted by sections 340.42 and 340.43, notwithstanding any provisions to the contrary in any city charter or laws of this state; * * *."

The requirement of a three-fifths vote of the governing body of the City of Minneapolis for the granting of licenses in such territory is different from the usual requirement of a majority vote, but there is nothing in the section in question which repeals or limits the authority of the state liquor control commissioner to approve or disapprove the licenses issued by a three-fifths vote. Repeals by implication are not favored. It would therefore appear that, if it was the intention by that section to deprive the liquor control commissioner of the power to approve or disapprove a license issued by a three-fifths vote, such intention should have been expressly stated in the provision. Sec. 340.11, Subd. 1 and Subd. 3, providing that all off sale licenses shall be subject to the approval of the liquor control commissioner, are sufficiently broad to include all "off sale" licenses issued by any municipality regardless of the vote required for the issuance of the license and under your rule hereinabove quoted the liquor control commissioner may approve or disapprove the transfer of the business location of an off sale licensee.

Opinions of this office since October, 1938, and prior to your adoption of the rule under consideration, have construed the liquor statutes of the state as requiring the approval by the liquor control commissioner of the transfer of the location of an off sale retail liquor store. The ruling dated October 18, 1938, file 218g-10, was issued on the assumption that such commissioner had the authority and was required to approve a change of location of a licensed "off sale" liquor business, as well as to disapprove or approve the original license.

An opinion dated July 6, 1940, No. 156, 1940 report, file 218g-10, holds that in the matter of transferring a license from one licensee to another "any off sale liquor license may be transferred by the governing body subject to the approval of the liquor control commissioner and that such transfer shall not become effective until approved by him."

In an opinion dated May 19, 1944, file 218g-10, it was held, in answer to the question as to "whether an intoxicating liquor license during its lifetime may be transferred from one building to another" that "in the case of an off sale license, the liquor control commissioner should also consent."

By reason of your adoption of Regulation No. 12, Section 7, and the former rulings of this office hereinabove referred to, I am of the opinion that a transfer of the business location named in an unexpired "off sale" retail liquor license to another location in the City of Minneapolis or elsewhere is subject to the approval of the liquor control commissioner of the State of Minnesota.

However, as decided in **State ex rel. Minnehaha Liquor Store, Inc. v. Arundel,** 200 Minn. 305, 273 N. W. 817, in determining the question of such approval or disapproval, the commissioner must exercise sound discretion. His action, if arbitrary or unreasonable, would not be valid.

J. A. A. BURNQUIST,
Attorney General.

Liquor Control Commissioner.
May 5, 1950. 218-G-10

67

Liquor store — Private — License — May not be issued in a municipality which has established municipal liquor stores — The law does not limit the number of liquor stores which may be issued by a municipality authorized to do so.

Question 1

"May private licenses for the sale of liquor be issued in a municipality which has established a municipal liquor store?"

Answer

No private licenses may be issued in a municipality which has established a municipal liquor store. The only exception is in the case of clubs, as provided in M. S. 1949, Sec. 340.11, Subd. 6. This is in accordance with former opinions of this office.

Question 2

"Is a municipality limited to but one municipal liquor store?"

Answer

M. S. 1949, Sec. 340.11, Subd. 10, under which municipal liquor stores are authorized, contains the following provision:

> "* * * Such licenses may be issued in cities of the fourth class, and other villages and boroughs for such sale of intoxicating liquor in hotels, clubs or exclusive liquor stores, which exclusive liquor stores the governing body of such municipalities may establish or permit to be established for dispensation of liquor either 'On sale' or 'Off sale,' or both. * * *"

Neither this nor any other provision limits the number of municipal liquor stores in municipalities where such stores are authorized. It is the

governing body of the municipality that has the authority to determine the number of such stores. There are a number of communities which now operate more than one municipal liquor store.

IRVING M. FRISCH,
Special Assistant Attorney General.

Kenyon Village Attorney.
April 28, 1950. 218-G-13

68

Sale — Hours — On evenings preceding holidays enumerated in M. S. A. 340.14, subd. 1, not changed by L. 1949, c. 654, Sec. 3.

Question

Hours for the "off sale" of liquor in cities of the first class on the evenings preceding certain holidays.

Opinion

Prior to the enactment of this law, M. S. A. 340.14, subd. 1, contained the following provisions pertaining to the "off sale" of intoxicating liquor:

> "* * * No 'off sale' shall be made before eight o'clock a. m. or after eight o'clock p. m. of any day except Saturday, on which day 'off sale' may be made until ten o'clock p. m. No 'off sale' shall be made on New Year's Day, January 1; Memorial Day, May 30; Independence Day, July 4; Thanksgiving Day; or Christmas Day, December 25; but on the evenings preceding such days, if the sale of liquor is not otherwise prohibited on such evenings, 'off sales' may be made until ten o'clock p. m., except that no 'off sale' shall be made on December 24 after eight o'clock p. m. * * *"

Under the above quoted provision, "off sale" of intoxicating liquor was permitted until ten p. m. on the evenings preceding the holidays enumerated above except the evening of December 24th and unless "otherwise prohibited on such evenings."

M. S. A. 340.14, subd. 1 was amended by L. 1949, c. 654, Sec. 3, and, in so far as is here material, now reads as follows:

> "* * * No 'off sale' shall be made before eight o'clock a. m. or after ten o'clock p. m. of any day. **However, in cities of the first class and in all cities, villages, and boroughs located within a radius of 15 miles of cities of the first class, 'off-sale' may be made only until eight o'clock p. m. of any day except Saturday, on which day 'off-sale' may be made until ten o'clock p. m.** No 'off sale' shall be made on New Year's Day, January 1; Memorial Day, May 30; Independence Day, July 4; Thanks-

giving Day; or Christmas Day, December 25; but on the evenings preceding such days, if the sale of liquor is not otherwise prohibited on such evenings, 'off sales' may be made until ten o'clock p. m., except no 'off sale' shall be made on December 24 after eight o'clock p. m. * * *"

The part of the above quoted provision which is emphasized in bold face constitutes so much of the amendment as is involved in your question. It should be noted that the amendment makes no change in the language of the provision relating to the "off sale" of liquor on the evenings preceding holidays. Prior to the enactment of the 1949 amendment, the first sentence of the provision above quoted read:

"* * * No 'off sale' shall be made before eight o'clock a. m. or after eight o'clock p. m. of any day except Saturday, * * *."

Notwithstanding that sentence, the unamended part of the provision in question has, since its enactment in 1941, been construed to permit "off sale" of liquor up to ten p. m. on evenings preceding the holidays enumerated in the section, except on Christmas Eve and unless otherwise prohibited.

In considering the history of the legislation, it is obvious that the clause "if the sale of liquor is not otherwise prohibited" was not intended to apply to the above quoted sentence of the act which required closing for all "off sales" at eight p. m. except on Saturdays. The 1949 amendment permits "off sale" up to ten p. m., except in cities of the first class and in municipalities within a radius of 15 miles thereof, where "off sales" may be made up to eight p. m. on any day except Saturday and on Saturday up to ten p. m. The closing hours previously designated for the last mentioned cities and municipalities were not changed by the amendment.

In adopting the amendment under consideration, it is clear that the legislature did not intend to change the former law as to sales on evenings preceding the holidays enumerated in Sec. 340.14, subd. 1.

It is, therefore, my opinion that the "off sale" of liquor is now permitted on the evenings preceding holidays mentioned in M. S. A. 340.14 during the same hours as it was permitted prior to the amendment by L. 1949, c. 654, Sec. 3, as the amendment in question makes no change as to the hours for "off sales" on evenings preceding the designated holidays in cities of the first class and surrounding communities or elsewhere. The clause "if the sale of liquor is not otherwise prohibited on such evenings" refers, I believe, only to those situations where "off sale" is otherwise prohibited on the evenings in question; for example, where an evening preceding a holiday is a Sunday evening or where local ordinances prohibit "off sales" on such evenings.

J. A. A. BURNQUIST,
Attorney General.

Duluth City Attorney.
April 15, 1950.

218-J-6

69

Sale — Hours — Off sale — Word "radius" as used in the amendment of 1949, means "distance" — Distance should be measured in a straight line to the nearest point in the boundary of the city—Laws 1949, c. 654, M. S. A. 340.14, subd. 1.

Facts

Laws 1949, Chapter 654, amends M. S. A. 340.14, Subd. 1, and reads as follows:

> "However, in cities of the first class and in all cities, villages, and boroughs located within a radius of 15 miles of cities of the first class, 'off-sale' may be made only until eight o'clock p. m. of any day except Saturday, on which day 'off sale' may be made until ten o'clock p. m."

Question

How the 15 miles is to be measured.

Opinion

It is the interpretation of this office that the law is applicable in any area or any place which lies within 15 miles of the boundary of any city of the first class. It is my opinion that the word "radius," as used in this law, should be construed as if it read "distance."

There is no way to determine a central point in a city from which a radius of 15 miles should be run. Unless the word "radius" be construed to mean "distance," the statute as amended is in this respect of such uncertain meaning that it is void.

In determining whether a certain place is within a distance of 15 miles of a city of the first class, the measurement should be by straight line from the place involved to the nearest point in the boundary of the city.

RALPH A. STONE,
Assistant Attorney General.

Anoka City Attorney.
May 18, 1949. 218-J-8

NON-INTOXICATING

70

License — Cities — Issuance — Requirement that no license be issued if applicant within five years has been convicted of violating any law relating to sale of non-intoxicating malt liquor or of intoxicating liquor applies in all cities—M. S. A. 340.01, Laws 1945, c. 589, Laws 1949, c. 700.

Opinion

Minnesota Statutes 1941, Sec. 340.01, provided:

"There is hereby conferred upon the governing body of each county, city, village, and borough in the state, the authority to license and regulate the business of vendors at retail or wholesale of non-intoxicating malt liquors within their respective jurisdictions, to impose a license fee therefor and to provide for the punishment of any violation of any such regulations according to the provisions of law; provided, that no such business may be licensed by the county board to be located in any town, unless the consent of the governing body of such town, if organized, is filed with the application for such license."

This statute was amended by Laws 1945, c. 589. The amendment consisted in adding the following:

"No license shall be issued or renewed by the county board after application has been made therefor until said county board shall have secured the written recommendation of the sheriff and of the county attorney. Said recommendation shall be accompanied by a statement attesting that to the best of their knowledge the applicant has not, within a period of five years prior to the date of such application, violated any law relating to the sale of non-intoxicating malt liquor or of intoxicating liquor and that in their judgment the applicant will comply with the laws and regulations relating to the conduct of said business in the event said license is issued or renewed. Before issuing or renewing any license, the County Board shall consider the recommendation of the sheriff and the county attorney, the character and reputation of the applicant, the nature of the business to be conducted and the type of premises and propriety of the location of said business.

"Persons holding licenses **issued by the County Board** shall not permit any minor to loiter or remain in the room where non-intoxicating malt liquor is being sold or served unless accompanied by his parent or legal guardian. No license shall be issued or renewed if the applicant within a period of five years prior to the date of such application has been convicted of violating any law relating to the sale of non-intoxicating malt liquor or of intoxicating liquor."

The question was then presented to this office as to whether the last sentence above quoted applied in a first class city.

The Attorney General gave an opinion upon this question June 19, 1945, file 217b-8, in which he held:

"The evident purpose of the amendment was to procure greater precaution in the issuance of licenses by the boards of county commissioners in towns where there is usually less police protection than in the more populated communities.

"It is therefore my opinion that the prohibition under consideration is limited in its application to licenses issued by county commissioners." However, since that opinion was rendered, the statute has been again

amended by Laws 1949, c. 700, coded as M. S. A. 340.01. The amendment consisted in striking out from the statute last above quoted the words "issued by the county board." So as now worded the law reads:

> "Persons holding licenses shall not permit any minor to loiter or remain in the room where non-intoxicating malt liquor is being sold or served unless accompanied by his parent or legal guardian. No license shall be issued or renewed if the applicant within a period of five years prior to the date of such application has been convicted of violating any law relating to the sale of non-intoxicating malt liquor or of intoxicating liquor."

By striking out the words **"issued by the county board"** from the last sentence of the statute just quoted, it was intended that the last paragraph should apply to all licenses and not only to those issued by a county board. That was the purpose and the effect of the amendment.

No reason occurs to me why the holder of a license in the city should be entitled to violate the law and still have a license when the holder of a rural license is denied the same privilege or immunity. I think that as now worded, the quoted provision of the law under consideration applies equally to all 3.2 beer licenses issued.

The opinion of June 19, 1945, was correct when it was rendered. The legislature has since amended the law so as to make the language in question applicable to all licenses issued, and consequently the said opinion is no longer the law.

RALPH A. STONE,
Assistant Attorney General.

Minneapolis City Attorney.
January 23, 1950. 217-B-8

71

License — Fee — Towns — 3.2 beer license in towns — Town board is not entitled to charge a fee for approving application for license in addition to one-half of the fee paid to the county board which it is entitled to receive under Laws 1949, Chapter 581—M. S. A. 340.013.

Facts

A certain town board charges an applicant for a beer license a fee of $20.00 before it will approve such an application. The money so collected is paid into the town revenue fund.

Question

Whether the board has the right to exact such a fee as a consideration for the approval of the application.

Opinion

In my opinion the question should be answered in the negative.

The town board has no right to charge a fee as a consideration or condition of its approval of the application for a beer license made to the county board.

Laws 1949, Chapter 581, Section 1, being M. S. A. 340.013, provides:

> "One-half of the fee received by the county for license to sell non-intoxicating malt liquors, at wholesale or retail, in any town in the county shall be paid to the town board where such business is located."

The town is thus given one-half of the fee charged by the county for the issuance of the 3.2 beer license. It is not entitled to charge a fee in addition thereto.

RALPH A. STONE,
Assistant Attorney General.

Todd County Attorney.
November 5, 1949. 217-D-8

72

License — Fee — Villages — Brewers and wholesalers of 3.2 beer may be licensed by village for fee of $10 per annum—L. 1949, c. 700.

Question

As to the licensing of brewers and wholesalers of non-intoxicating malt liquor by the village of Hibbing.

Opinion

The 1949 Legislature adopted Laws 1949, Chapter 700, amending M. S. A. 340.01 and 340.02.

M. S. A. 340.01 confers upon the governing body of the village the authority to license and regulate the business of vendors at wholesale of non-intoxicating malt liquors. M. S. A. 340.02, as amended by Laws 1949, c. 700, provides that there shall be **three types** of licenses; previously the law provided for only two kinds of licenses.

M. S. A. 340.02, Subd. 3, was amended by adding this language:

> "Wholesale licenses shall permit the licensee to sell non-intoxicating malt beverages to holders of on or off sale retail licenses and the license fee therefor shall be $10.00 per annum."

Therefore, answering your inquiry I would say that under the law as amended the village of Hibbing may issue a wholesale license to a brewer or wholesaler of 3.2 beer upon payment of a license fee of $10 per annum.

RALPH A. STONE,
Assistant Attorney General.

Hibbing Village Attorney.
April 28, 1949. 217-H

73

License — Revocation — Power of County Board.

Question

Whether the county board may revoke a license where no statutory authority is found specifically granting that right.

Opinion

The power to issue a license involves the power to revoke it. It also involves the power to suspend it. A license is not a right but a privilege.

Opinion dated April 24, 1935, File 217-B-9, expresses the view that the board is without power to revoke the license without cause. This does not mean that it does not have the right to revoke the license for cause.

It appears to me that where the violation of law is clear, the board has the power to suspend the license pending a hearing and that a time and place for considering the question of revocation may be set by the board, notice given to the licensee, and an opportunity given to be heard on the question of revocation. Upon such hearing, if the evidence shows that the licensee has violated the law relating to the dispensing of non-intoxicating malt liquor and that such a violation was wilful on the part of the licensee, the board has ample authority to revoke the license.

CHARLES E. HOUSTON,
Assistant Attorney General.

Lake County Attorney.
April 7, 1949. 217-B-9

74

Sale — Indians — Retail on sale dealers — Sale to persons of Indian blood — Regulation prohibiting sale to persons of Indian blood of 3.2 beer not advised — Regulation may be adopted prohibiting sale to spendthrifts and improvident persons among the Indians.

Facts

"Several years ago our Board of County Commissioners adopted 'Rules in Connection with Sale of Non-Intoxicating Malt Liquors' and which rules have been adopted from time to time as licenses for the sale of non-intoxicating liquors have been issued by the Board. Among these rules there is one as follows, 'that non-intoxicating malt liquors shall not be sold at any time to persons of Indian blood.' I am told that these rules and regulations were first suggested to our county among other counties by the Liquor Control Commission.

"We have about four hundred Indians in Mille Lacs County who reside mostly on the west side of Mille Lacs Lake. These Indians present a serious problem in law enforcement and in financial relief from the county. Undoubtedly the Board has felt that these problems would be less serious if the sale of non-intoxicating liquors to the Indians would be at least decreased.

"In view of the provisions of Section 327.09 and also considering that the sale of intoxicating liquor to Indians with certain exceptions became legal with the passage of Chapter 87 of 1947 Session Laws, a serious question has arisen whether or not the above rule adopted by the County Board is a reasonable regulation. The members of our Board of County Commissioners are somewhat concerned that they may be guilty of violating the provisions of Section 327.09 in making the above rule."

Question

Whether a regulation prohibiting a retail on sale licensee from selling 3.2 beer to persons of Indian blood is valid.

Opinion

Prior to 1947, it was a felony to sell liquor to any person of Indian blood. In 1947 the legislature adopted Laws 1947, Ch. 87, which amended the former statute and made it unlawful to sell malt liquors in any quantity "to any person of Indian blood who has not adopted the language, customs and habits of civilization."

I think the purpose of this statute was to make it lawful to sell malt liquors to a person of Indian blood who has adopted the language, customs and habits of civilization.

I think that a rule would be valid which prohibited an on sale licensee of 3.2 beer from selling such beer to any person of Indian blood who has not adopted the language, customs and habits of civilization. I think that to go further than that and make a rule which would prohibit the sale to any person of Indian blood would be unreasonable. No doubt there are many persons of Indian blood in Mille Lacs County who have adopted the customs and habits of civilization to whom the sale of 3.2 beer would be no more injurious and harmful than the sale to a person not of Indian blood.

As you point out, if the tavern keeper should refuse to sell to a person of Indian blood who has adopted the language, customs and habits of civilization, he might run counter to the provisions of M. S. A. 327.09, which is the statute prohibiting discrimination on account of race in places of refreshment.

It must be that the spendthrifts, habitual drunkards and improvident persons among the Indians are well known to the officers and to the welfare board. M. S. A. 340.73 makes it unlawful to sell any malt liquor to any such person within one year after written notice by any peace officer, employer, relative and others forbidding the sale of such liquor to such a person. The county board would have authority to adopt a regulation to the same effect and prohibiting the licensee from selling to any such persons after notice. This would tend to stop the dispensation of 3.2 beer to those Indians who should not be allowed to get it.

RALPH A. STONE,
Assistant Attorney General.

Mille Lacs County Attorney.
June 14, 1949. 217-F-3

75

Sale — Minor — Malt liquors — Consumed by minor on licensed premises without knowledge of licensee or employees is not consuming with permission of licensee against M. S. A. 340.03 (1).

Facts

M. S. A. 340.03 (1) makes it unlawful for any licensee (licensed to sell non-intoxicating malt liquor), or his employee, to sell or serve non-intoxicating malt liquor to any minor. It also prohibits such licensee from **permitting** any minor to consume non-intoxicating malt liquor on the licensed premises unless accompanied by his parent or his legal guardian.

A person whose identity is not revealed purchased beer which he furnished to a minor and which the minor consumed on the licensed premises. There is no evidence that the licensee, or any of his employees, was aware of the fact that the minor was drinking beer on the property.

Question

Do these facts show a violation of the statute mentioned when there is no showing of actual knowledge on the part of the licensee, or his employees, that the minor was drinking beer on the premises?

Opinion

Perhaps another way of stating the question is: Do these facts show permission? About fourteen pages of Words and Phrases, permanent edi-

tion, are devoted to definitions of "permit" and "permission." I think it may be said that the word in its general sense means to grant leave. It means to suffer or allow — consent. Sometimes it means not to prohibit.

But here we are considering a penal law.

State of Minnesota v. Robinson, 55 Minn. 169, 56 N. W. 594, was a prosecution against a druggist under a statute forbidding a registered pharmacist from permitting the compounding or dispensing of prescriptions or the vending of drugs, medicines or poisons in his place of business except under the supervision of a registered pharmacist or by a registered assistant. An employee in the store, who was not a registered pharmacist or assistant, sold drugs during the absence of the pharmacist and without his knowledge or authority. The court held that the owner was not liable. The court said that the word "permit" includes the element of assent.

> "* * * When used in a statute to describe an action made penal it must be held to include that element, unless there be something in the context clearly indicating the contrary."

It is well to consider **State v. Sobelman,** 199 Minn. 232, 271 N. W. 484. In the opinion in that case it is said:

> "* * * It seems clear that the presence of this young girl under the circumstances here disclosed was one that defendant's servants could not have overlooked, although they deny having seen her on this occasion. * * * Her presence in defendant's tavern was forbidden. He, acting through his servants, violated the law by permitting her to be there. * * *"

The charge in that case was contributing to the delinquency of a minor. Further, the court said:

> "* * * We do not choose to lend our aid to that kind of business by adopting forced or narrow construction of enactments having for their purpose and objective the curbing of evils necessarily flowing therefrom. * * *"

We thus see the line of thinking that the Supreme Court is doing these days.

The conclusion herein reached is limited to the particular statute considered, Sec. 340.03 (1). Since the legislature used the word "permit," as it did in defining this crime, it is my opinion that it meant knowingly permit. It seems to me that the language compels this conclusion.

We have another statute, 617.60, which covers among other places where a minor shall not be permitted in a place where intoxicating liquors are sold or given away. In that connection an opinion of the Attorney General has been rendered, File 218j-12, dated March 8, 1948, copy enclosed, where the writer stated the conclusion that this statute requires the keeper of any place where intoxicating liquors are sold to exclude minors from his place of business whether or not accompanied by a parent or guardian.

I do not attempt to pass upon the evidence that might be produced on the trial of the case. I consider the facts only as stated.

CHARLES E. HOUSTON,
Assistant Attorney General.

McLeod County Attorney.
May 2, 1949. 217-F-3

76

Sale — Wholesaler and Brewer — Cash beer law discussed — Laws 1949, Chapter 475.

Facts

"For many years it has been the policy in the beer industry for the brewers to charge returnable cases and bottles to wholesale dealers at a rate of approximately 60c a case of bottles. The money was held on ordinary account or collected together with the charge for the beverage itself. In turn the charge for cases was passed on by the wholesale dealer to the retail dealer and by the retail dealer to the consumer. In each instance the price of the beverage and case and bottles were collected together. About 30% of the beer sold in this state is sold in kegs or barrels of various sizes and a charge of approximately $6 to $10 was placed against the wholesale dealers and in turn against the retail dealers. The sum was carried on account and empty kegs were returned for credit. Likewise, the wholesale dealers may charge kegs to the retail dealer and the sum for the keg was collected at the same time the beverage was paid for unless empty kegs were returned in kind.

"It appears that in going on a cash basis a number of municipalities in this state, some of whom operate municipal liquor stores and some who buy beer for refectories in parks, etc., are in the practice of paying for their merchandise of this kind thirty days after delivery upon a verified claim approved by the governing body. It also appears that a number of private firms which own business houses, taverns, or hotels in this state with beer licenses pay their account for beer by issuing a check from headquarters at a distance away from the premises where delivery is made. The questions which must be propounded are as follows:

Question 1

"Must the wholesale dealer or brewer who sells and delivers cases and bottles of beer to a retail dealer collect both for the beer and the containers?"

Answer

Yes; the payment can be made not only in money, but also by the return of empty cases and bottles.

Question 2

"Must a wholesale dealer or brewer collect cash for the beer and kegs sold and delivered to retail dealers when the sales invoice carries a money charge for the container?"

Answer

Payment must be made either in cash or partly in cash and partly by the return of kegs or other containers.

Question 3

"Must the wholesale dealer or brewer collect cash for beer and kegs sold and delivered to a retail dealer if no money charge is made for the container and a notation on the sales invoice stated that the keg remains the sole property of the brewer or wholesale dealer?"

Answer

I think that if the wholesale dealer or brewer does not charge the retail dealer for the kegs or other containers but retains title thereto in himself, then the retail dealer should not be required to pay therefor.

Question 4

"Does the cash law affect sales to municipalities in this state so that they must pay cash for beer in containers sold and delivered to the municipal liquor stores or its refectories?"

Answer

M. S. A. 645.27 provides:

"The state is not bound by the passage of a law unless named therein, or unless the words of the act are so plain, clear and unmistakable as to leave no doubt as to the intention of the legislature."

Within this rule, I think that it should be held that a municipality operating a municipal store does not come within the application of the law. The purpose of the law was to prevent a wholesaler or broker from getting control of the retailer. That danger does not exist where a municipality is the retailer. I think it should be held that the cash beer law does not affect sales to municipalities.

Question 5

"Does the cash law apply to private dealers where their business headquarters is at a distance from the licensed store in such a manner that they can buy only for cash and if so may they maintain a deposit with the wholesale dealer against which sales are charged or must they actually give a check or cash at the time of sale and delivery of beer to them?"

Answer

The cash law does apply to private retail dealers where their business headquarters is at a distance from the licensed store. They can only buy for cash, but they may maintain a deposit with the wholesale dealer against which sales may be charged. In case such a deposit is maintained, the retailer need not actually give a check or cash at the time of the sale and delivery of the beer to him.

Question 6

"Would you confirm our instruction to the beer industry that when they pay credit accounts incurred by the effective date of the Act they are not affected by this law and may be collected in the regular course of business but now all sales are subject to the new law?"

Answer

Sales made on credit prior to the effective date of the cash beer law, April 18, 1949, are not affected by that law and may be collected in the regular course of business as theretofore. However, hereafter all new sales made from said date are subject to the new law.

Since the foregoing was written, you have asked

Question 7

"Whether the cash beer law, Laws 1949, Chapter 475, applies to railroad companies."

Answer

In my opinion it does, and it is my further opinion that the answer given to Question 5 would be applicable in the case of railroad companies.

RALPH A. STONE,
Assistant Attorney General.

Liquor Control Commissioner.
May 5, 1949. 217-H

77

Sale — Wholesalers and Brewers may sell 3.2 beer to on sale and off sale dealers and to consumers in quantities of not less than two gallons — Holders of wholesale licenses may sell only to off sale and on sale retail dealers.

"That part of Laws 1949, Chapter 700, which amends M. S. A., Section 340.02, Subdivision 3, reads as follows:

" 'Subd. 3. **Retail** "off sale" licenses shall permit the licensee to sell non-intoxicating malt liquors in original packages for consumption off the premises only, and the license fee therefor shall be $5.00 per

annum. **Wholesale licenses shall permit the licensee to sell non-intoxicating malt beverages to holders of on or off sale retail licenses and the license fee therefor shall be $10 per annum.**

" 'Subd. 5. A manufacturer of non-intoxicating malt liquor may, without license, sell such liquor to licensed dealers holding either "on sale" or "off sale" licenses, and may sell and deliver the same in quantities of not less than two gallons, direct to consumers at their homes'."

Questions

"Question No. 1: Has Subdivision 5, above, been modified, amended, or in any way repealed by Subdivision 3, above?"

Opinion

I think this question should be answered in the negative. A manufacturer of non-intoxicating malt liquor may without a license sell such liquor to licensed dealers holding either on sale or off sale licenses and may sell and deliver the same in quantities of not less than two gallons direct to consumers at their homes.

Question 2

"In view of the language as underscored in Subdivision 3, above, would a municipal governing body have the authority by ordinance to forbid the holder of a 'wholesale' non-intoxicating malt liquor license to sell and deliver such liquor in any quantity whatever or to any person whatever except to persons holding either 'on sale' or 'off sale' non-intoxicating malt liquor licenses issued by authority of such governing body?"

Opinion

The holder of a wholesale license is permitted only to sell to holders of on sale or off sale retail beer licenses. What the statute forbids the municipality may by ordinance forbid.

The municipality could not by ordinance forbid the holder of a wholesale license from selling to on sale or off sale beer dealers who are duly licensed as off sale or on sale dealers by the governing body of municipalities other than in Duluth.

RALPH A. STONE,
Assistant Attorney General.

Duluth City Attorney.
February 24, 1950. 217-H

MUNICIPALITIES

BIDS AND CONTRACTS

78

Bids — Competitive bidding — Bid submitted by telegram is valid and may be considered by a council when other bids which have been received are opened in accord with the advertisement for bids.

Facts

"At the regular meeting of the City Council held last evening, December 4th, bids were received for the erection of a new lighting system for the City. Notice had been given that bids would be received up to 8 o'clock last evening. A large number of bids were received. One of the bidders who apparently intended to be present with his bid was delayed enroute, and prior to 8 o'clock a bid was received by telegram, which telegram also stated that a certified check in the requisite amount was in the mail directed to the City Clerk by registered mail. The registered letter with the check enclosed has been received showing the same to have been postmarked prior to 8 o'clock last night. This bid submitted by telegram was the lowest bid received.

"The telegram containing the bid was received sealed and opened at the time of the other bids."

Question

Was the bid submitted by telegram a valid bid?

Opinion

We have not been advised as to the substance of the advertisement for bids. We assume that it was in substance and effect that at a stated time and place sealed bids would be received for the erection of a new lighting plant.

Sections 54 and 55 of the city charter relating to the advertising for bids and awarding a contract therefor to the lowest responsible bidder contain no express language which would preclude the submission of a proposal therefor by telegram.

Bids for municipal contracts must substantially comply with all requirements relating thereto, the charter provisions, and the advertisement therefor. The bid must be in such form that upon its acceptance a valid obligation will be placed upon the bidder to enter into a formal contract for the work contemplated, and for which such bid was submitted. See McQuillin Municipal Corporations, 2d Ed. Revised Vol. 3, Section 1322.

In our opinion the council may consider the bid which was submitted by telegram as a valid bid and accept the same if in its judgment such bidder

is the lowest responsible bidder, and upon acceptance thereof by the council a valid obligation will be placed upon such bidder to enter into a formal contract for the work contemplated by the advertisement for bids. It is assumed that no favoritism or advantage has resulted to the person who submitted his bid by telegram.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Montevideo City Attorney.
December 7, 1950. 707-A-4

79

Bids — Opening — At adjourned meeting — Where unusual storm prevented county board from meeting and receiving bids pursuant to advertisement therefor and auditor continued hearing until following week, no bids being opened in the meantime, bidders prevented from reaching meeting because of storm may submit bids before time to which hearing adjourned and such bids may be considered by board if it so decides— M. S. A. 375.21.

Facts

McLeod County advertised under authority of M. S. A. 375.21 that on March 31, 1949, at ten o'clock in the forenoon it would award a contract on a drainage ditch and invited bids from contractors to be then considered. An unusual storm made roads impassable due to snow. About two-thirds of the interested bidders were unable to be present. Five sealed proposals were filed with the auditor before the time advertised when the bids would be opened. Before the time arrived for opening the bids as stated in the advertisement, several telephone calls were received by the auditor from interested bidders who stated that they were unable to file their bids because of their inability to reach Glencoe. The chairman of the board was unable to reach the auditor's office where the bids were advertised to be opened, because of impassable roads. The bids were not opened. The auditor announced that the letting of the contract was continued until April 5, 1949, at ten o'clock A.M. The auditor retained all bids filed.

Questions

1. "Was the continuation of the letting on the part of the Auditor proper?
2. "May other bids be accepted up to ten o'clock A.M. Tuesday, April 5th, the continued date for the letting?"

Opinion

M. S. A. 375.21 requires that counties in the class of McLeod let certain contracts after advertising for bids. The statute requires the notice of bids

to specify "the time and place of awarding the contract." It is certain that such contract cannot be awarded before the time stated. But, may it be awarded thereafter?

Why was this statute enacted? In the construction of statutes, the object is to ascertain and effectuate the intent of the legislaure. Every law shall be construed, if possible, to give effect to all its provisions. We should consider the occasion and necessity for the law; the mischief to be remedied; the object to be attained; the consequences of a particular interpretation. M. S. A. 645.16.

We will bear in mind the rules which we read in Sec. 645.17. We will especially bear in mind the rule found in that section that the legislature intended to favor the public's interest as against any private interest.

> "* * * In the absence of fraud a determination by the public authorities of whether a bidder has complied with the conditions imposed by the advertisement for bids is final and conclusive and cannot be reviewed by the courts, * * *." 43 Am. Jur., p. 783, § 41.

This statute, which we are considering, was apparently enacted for the purpose of securing competitive bidding on the part of intending contractors and to prevent favoritism, collusion, and fraud in the letting of such contracts to the detriment of the public. See 43 Am. Jur., Public Works and Contracts, p. 764, § 23.

The act of the auditor in announcing that the meeting of the board would continue until April 5 could not defeat such purpose. It did not foster favoritism, collusion or fraud in the letting to the detriment of the public. It would appear that the public is favored rather than damaged by what has been done. If the board should decide to consider bids received after the advertised time but before any bids were opened, that is, if it should conclude to receive bids submitted before April 5 and no bids had been opened before that time, who is damaged? Is the public favored or is it hurt?

Having taken all these things into consideration, it appears to me that the act of the auditor was proper and if the board concludes on April 5 to consider bids submitted until that time, no bids having been opened in the meantime, its decision should not be questioned.

CHARLES E. HOUSTON,
Assistant Attorney General.

McLeod County Attorney.
April 4, 1949. 707-A-7

80

Contract — Road Repair — Equipment — Labor claims — Counties with population of less than 75,000 may construct, improve and repair public roads by day labor and pay labor claims and claims for use of equipment without first being audited and allowed by county board — M. S. 1949,

§ 162.18. No contract for work or labor, or for construction or repair of roads where the estimated cost exceeds $1,000, may be made without first advertising for bids as provided for in § 375.21, subd. 1.

Facts

"Winona County is engaged in the construction, improvement, maintenance and repair of public roads by the employment of labor therefor, as well as hiring certain types of equipment used in the performance of such road work.

"Section 162, M. S. A., as amended by Laws 1947, Chapter 203, Section 1, and Laws 1949, Chapter 653, Section 1, provides for the payment of claims of persons who have performed labor or who have furnished certain designated equipment in the performance of such road work, either by time check or through a pay-roll system.

"X furnished a bull-dozer to Winona County, used with the regular County road crews in the performance of road work, upon an hourly rate. X is employed by said County to operate said equipment upon an hourly rate. The claims of X for the use of said equipment, based on the hourly rate, together with his labor time, exceeds the sum of $1,000.00.

"At the time of hiring X and his bull-dozer to be used with said County road crews in the performance of public road work, there was no accurate way to anticipate or determine how long said equipment would be used in the performance of the particular jobs."

Question

"Is it permissible to pay said claim, though it exceeds the sum of $1,000.00, under Section 162.18, M. S. A., as amended, or does Section 375.21, M. S. A., as amended by Laws 1947, Chapter 138, Section 1, apply, requiring an advertising for bids?"

Opinion

It is not possible to specifically answer this question for the reason that we are not advised as to the nature of the contract with X for his labor services, and for the use of the bull-dozer. If only one contract was made with X, which included his labor, and the use of the bull-dozer and the estimated cost or the value thereof when the contract was made exceeded $1,000, then the county board should have advertised for bids as required by M. S. 375.21, subd. 1. See opinion of Attorney General dated April 8, 1940, file 707-A-7.

M. S. 1949, § 162.18, provides for constructing, repairing and maintaining of public roads by the use of day labor and the rental of road equipment for such purposes. The employment of X and the use of the bull-dozer is authorized by this statute.

The failure to advertise for bids does not preclude payment for the work performed by X and for the use of the bull-dozer if the contract therefor was made without fraud and in good faith.

The general principle of law in such case is stated in Dunnell's Digest, Vol. 4, § 6717, as follows:

> "Where a municipality receives money or property of another under and pursuant to a contract upon a subject within its corporate powers, which contract was entered into in good faith and without purpose to violate or evade the law, but for the failure to comply with the requirements of statutes made essential to a valid contract was illegal and void, and the money or property so received is retained and subsequently devoted to legitimate municipal purposes, the municipality is liable therefor, and recovery may be had against it as upon an implied contract." (page 907 and cases cited.)

See also **First National Bank of Goodhue v. Village of Goodhue**, 120 Minn. 362, 139 N. W. 599, and **Wakely v. County of St. Louis**, 184 Minn. 613, page 616, 240 N. W. 103.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Winona County Attorney.
July 27, 1950. 707-A-7

81

Contract—Void—Contract by county board for purchase of truck made pursuant to bribe arrangement between vendor and three members of board is void under M. S. A. 375.09 and county may not pay purchase price of truck based on void contract.

Facts

"On or about November 10, 1948, A, agent of B Company, offered to give County Commissioners X, Y, and Z $650.00 if they would get the County Board to advertise for bids for a used truck and to use their efforts so that the County would purchase a used truck from B Company. County Commissioners X, Y, and Z agreed to accept $650.00 and agreed to use their efforts to get the County Board to advertise for bids for a used truck and to vote for the offer of B Company. An inspection of the truck was made in St. Paul by County Commissioners Z and W, during the December, 1948, meeting of the County Board. During said meeting the County Auditor was instructed to advertise for bids for a used truck. Bids were received on January 5, 1949, and only one bid, that of B Company, was received. Since only one bid was received, the bid was rejected and the County Auditor was authorized to readvertise. In the

meantime, X's term had expired and he was succeeded by Commissioner V, who allegedly had told A that if his vote in favor of B Company's bid was to be had, he had to be paid.

"Several bids were received by the County Board at its February 8, 1949, meeting, including that of B Company. Said County Board voted to purchase the truck of B Company for $6500.00, said truck to be delivered immediately.

"The truck was delivered to the County on or about February 15, 1949. However, after careful inspection, it was not as represented, because of several defects making it inoperative.

"Since said date the truck has been put in usable condition by B Company, but the County has not paid the purchase price of the truck, nor has the agreed bribe been paid by A or B Company to any of the Commissioners.

"X, Y, and Z have been convicted of receiving a bribe; however, not the bribe involved in the above recited facts. V has been charged with asking for a bribe, one not involved in the above facts. His case is still pending. X, Y, and Z have allegedly admitted the facts above recited."

Question

May the county legally pay for the truck in view of M. S. A. 375.09, assuming that the county board wishes to pay for the truck, being of the opinion that it is worth the contract price?

Opinion

The answer is "no." There is no basis for payment. This contract, in view of M. S. A. 375.09, is void. There is no contract. The county is in possession of a truck which is owned by the B Company. The county board has no authority to authorize the payment.

CHARLES E. HOUSTON,
Assistant Attorney General.

Winona County Attorney.
September 17, 1949. 125-A-17

BOARDS AND COMMISSIONS

82

Charter commission — Members — Number — Majority — Amendments to charter — Should be proposed by a charter commission having its full complement of 15 members or a majority of the commission having a full complement of 15 members.

Facts

"The Charter Commission of the City of Owatonna has prepared an amendment which it wishes to present to the voters at the next election.

"However, six members have resigned from the Charter Commission and it consists only of nine members. Eight of the nine members have voted to present the amendment to the voters."

Question

"Is it necessary that a Charter Commission have its full complement of fifteen before it can legally propose a Charter amendment?"

Opinion

The question is answered in the affirmative.

Art. 4, § 36 of the Constitution, authorizes the legislature to provide "* * * for a board of fifteen freeholders who shall be and for the past five years shall have been qualified voters thereof, to be appointed by the district judges of the judicial district in which the city or village is situated, * * *"

for a term within the limit therein prescribed.

This constitutional provision further directs that the board:
"shall be permanent, and all the vacancies * * * shall be filled by appointment in the same manner as the original board was created, **and said board shall always contain its full complement of members.** * * *"

Another portion of Art. 4, § 36 of the Constitution, applicable to your inquiry provides:

"* * * Such charter so deposited may be amended by proposal therefor made by a board **of fifteen commissioners** aforesaid, * * *"

The board of fifteen freeholders authorized by Const. Art. 4, § 36, is provided by the legislature in M. S., § 410.05. The board is commonly called the Charter Commission.

M. S., § 410.12, Subd. 1, provides that the
"* * * board of freeholders may propose amendments to such charter, and shall do so upon the petition of five per cent of the voters of the city. * * *"

Subd. 4 of that section prescribes that

"Amendments shall be submitted to the qualified voters * * * as in the case of the original charter. * * *"

Both the Constitution (Const. Art. 4, § 36) and the statute (M. S., § 410.07) provide that the original proposed charter shall be delivered or

submitted to the chief executive of the municipality signed by the members of the board of freeholders **or a majority of its members.** "Majority of its members" means a majority of its full complement of fifteen members.

The constitutional provision here involved, as well as the statute enacted in pursuance thereof, provides a simple and expeditious method for filling any vacancies which may, from time to time, exist in the full complement of the board's membership.[1]

The mandate of the Constitution that the "board shall always contain its full complement of members" is clear and unequivocal. It is not lightly to be brushed aside. Equally clear and almost as emphatic is the constitutional direction that amendments to the charter may be initiated by proposal "made by a board of fifteen commissioners." Substantial considerations underlie these constitutional requirements. One of these reasons is, unquestionably, to provide assurance that any charter or amendment thereto proposed would evolve, before submission to the chief executive officer of the municipality, out of the studied consideration, discussion, debate and deliberate judgment of **fifteen** resident freeholders of the municipality. While both the constitution and the statute authorize a **majority** of the members of **a board of fifteen** to propose, it does not follow that eight or more members of a board having less than the full complement of fifteen members are possessed of that power or authority simply because the number eight or more is a mathematical "majority" of the number fifteen. To so hold would, in my opinion, be tantamount to saying that the mandatory provisions of the Constitution here considered are wholly meaningless. Nor have I overlooked the circumstance that even if the Charter Commission of the city of Owatonna did have presently its full complement of fifteen members, **eight** of its present membership of **nine** "have voted to present the amendment to the voters." But that factor is not a controlling one on the legal question involved. The question is one of **legal authority.** To be sure, if six additional resident freeholders should now be appointed so that the Commission did have "its full complement of members" those six might, conceivably, in their considerations and discussions of the proposed amendment involved, agree with the ninth present member who has not voted to present the amendment; and, also conceivably, they might, in that process, convince one of the eight remaining members that the amendment should not be proposed.

If your inquiry presented a situation where an amendment to the charter had been proposed by eight or more members of the Charter Commission not having at the time thereof "its full complement of members" and the proposal so submitted had been duly adopted and ratified by the electors, a different question would be presented. But that is not the situation here considered. The proceedings involved in your question are still in their preliminary stages. In these circumstances we are of the view that full effect should be given to the constitutional requirements that the "board

[1]Vacancies therein shall be filled by appointment for the unexpired term or terms by the district judges of the judicial district in which the municipality is situated. Const. Art. 4, § 36; M. S. 1949, § 410.05.

shall always contain its full complement of members" and that the proposal to amend should be "made by a board of fifteen members" or "a majority thereof," and not by a board of nine members.

LOWELL J. GRADY,
Assistant Attorney General.

Steele County Attorney.
September 28, 1950. 58-G

83

Equalization — Council members are not entitled, for their services on board, to extra compensation over that prescribed by § 412.181, M. S. 1949 — M. S. 1949, §§ 274.01, 412.181, subd. 9.

Facts

M. S. 1949, § 412.181, prescribes the schedule of salaries of the mayor and trustees in villages of this state.

Subd. 9 of that section prescribes that in any village to which that subdivision is applicable "the salary of the mayor is fixed at $2 per day or meeting for each day's service necessarily rendered or meeting attended, with a maximum of $30 per year, and the salary of each trustee is fixed at $1.50 per day or meeting for each day's service necessarily rendered or council meeting attended, with a maximum of $20 per year." We gather from the tenor of your inquiry that subd. 9 of § 412.181 is applicable to the Village of Albany.

Question

"May members of the village council be paid for services rendered on the board of review under M. S. A., Sec. 274.01?"

Opinion

M. S. 1949, § 274.01, provides that the governing body of each village shall be a board of review.

The members of the village council, acting as a board of review under § 274.01, are not entitled to any compensation other than that which they are entitled to receive under § 412.181 for their services as village officers. In other words, for their services on the board of review they are not entitled to extra compensation over and above that prescribed by § 412.181.

LOWELL J. GRADY,
Assistant Attorney General.

Albany Village Attorney.
December 29, 1950. 406-E

84

Housing and redevelopment — Terms — Vacancy in office of commissioner where commissioner removes from city; special tax levy by authority — Interpretation of phrase "first two consecutive levy-making periods" — M. S. A. 462.425, subds. 5, 6, 7; M. S. A. 462.421, subd. 8; M. S. A. 351.02; M. S. A. 462.545, subd. 6.

Facts

"Albert Lea Housing and Redevelopment Authority was duly set up under Sec. 462.425 in June, 1947. The commissioners were duly appointed and qualified. The men appointed for the one and two year terms have just held over without reappointment but now the city feels that successors should be appointed."

Question

"In appointing successors for the one and two year term men, when should the terms begin and end?"

Answer

M. S. A. 462.425, subd. 6, as far as here material, provides as follows:

"The commissioners constituting an authority shall be appointed by the mayor, with the approval of the governing body. Those initially appointed shall be appointed for terms of one, two, three, four, and five years, respectively. Thereafter all commissioners shall be appointed for five-year terms. * * *"

It is clear from the foregoing quoted portion of the statute that the legislature intended that each year one of the five terms should expire.

Accordingly, to accomplish that legislative purpose, the appointment of the successors to the two commissioners whose terms have heretofore expired should be for a term of five years, commencing, respectively, as of the dates of the expiration of the one-year term and of the two-year term. If the term for which the commissioner who was appointed for one year expired on July 1, 1948, the appointment of his successor should be for a term of five years commencing as of that date; and, if the term of the commissioner who was appointed for two years expired on July 1, 1949, the five-year term of his successor should commence as of that date. If both were now to be appointed for a term of five years commencing as of the date of their appointment, their respective terms would expire simultaneously, contrary to the legislative intention expressed in the above quoted portion of the statute.

Term of office must be distinguished from tenure of office. The term of an office relates to the office, and not to the incumbent. It is not to be confused with tenure of office, and it is not affected by the holding over of an incumbent beyond the expiration of the term. In a term of office there may be several tenures, but the term of the office remains the same. See **Holbrook v. Board of Directors of Imperial Irr. Dist.**, 8 Cal. (2d) 158, 64 P. (2d) 430.

At the expiration of the one-year term of the first commissioner or the expiration of the two-year term of the two-year commissioner, their respective offices did not become vacant because M. S. A. 462.425, subd. 7, expressly provides that:

"Commissioners shall hold office until their successors have been appointed and qualified. * * *"

New terms of office of five years each commenced on the expiration of the one-year and two-year terms.

You state these additional

Facts

"One of the commissioners has moved from the city of Albert Lea and now resides outside the city limits."

You ask this further

Question

"Is there an automatic vacancy resulting by this commissioner's ceasing to be an inhabitant of the City of Albert Lea?"

Answer

Assuming that the commissioner has established a new permanent residence outside of the city, the question is answered in the affirmative.

M. S. A. 462.425, subd. 5, so far as here material, specifically provides that:

"An authority shall consist of five commissioners, **who shall be residents of the area of operation of the authority** * * *."

M. S. A. 462.421, subd. 8, provides:

" 'Area of operation' means, in the case of an authority created in and for a city, village, or borough, the area within the territorial boundaries of that municipality."

M. S. A. 351.02, so far as here material, provides as follows:

"Every office shall become vacant on the happening of either of the following events, before the expiration of the term of such office:

"(1) * * *

"(2) * * *

"(3) * * *

"(4) His ceasing to be an inhabitant of the state, or, if the office is local, of the district, county, city, or village for which he was elected or appointed, or within which the duties of his office are required to be discharged; * * *."

You state these additional

Facts

"Subd. 6 of Sec. 462.545 provides for the levy of taxes. The Authority levied no tax in 1947. It did levy a tax in 1948 payable this year. The subdivision provides a maximum of ten cents on each $100.00 for the first two consecutive levy-making periods and not over five cents after the first two years. The Authority seeks to levy the maximum of ten cents this fall to be payable in 1950."

You ask this further

Question

"Is not the authority 'restricted to the five cent limit at this time'?"

Answer

This question is answered in the negative.

M. S. A. 462.545, subd. 6, provides for the levy of a special tax upon all property, both real and personal, within the taxing district for the purposes of the authority. The pertinent portion of subd. 6 of M. S. A. 462.545 reads as follows:

> "The amount of such special tax levy **for the first two consecutive levy-making periods after the organization of the authority** shall be an amount approved by the governing body of the municipality, but shall not exceed ten cents on each $100 of taxable valuation in the area of operation. The authority shall each year formulate and file a budget in accordance with the budget procedure of the municipality in the same manner as required of executive departments of the municipality or, if no budgets are required to be filed, on or before August first, and the amount of the tax levy for the following year shall be based on that budget and shall be approved by the governing body, but shall not after the first two years exceed five cents on each $100 of taxable valuation in the area of operation."

The phrase underscored in the above quoted portion of the statute, so far as I have been able to ascertain, has not been the subject of any judicial opinion or of opinion of the Attorney General.

You will note that the authority is required annually to formulate and file a budget in accordance with the budget procedure of the municipality in the same manner as required of the executive departments of the municipality, or, if no budgets are required to be filed by such executive departments, the authority must formulate and file its budget on or before August 1st. Your city charter provides for the preparation of an annual budget (§ 59) and prescribes that the budget shall be the principal item of business at the regular monthly meeting of the council in August (§ 60). From your statement of facts it appears that the Albert Lea authority was "set up" in June, 1947. I assume that by the phrase "set up" you mean that in June, 1947, a proper resolution determining the need for a housing and redevelopment authority to function in Albert Lea became effective under § 462.425. Even assuming that the commissioners were appointed at that time, it would

require some time after their appointment for the commissioners to formulate policies, make necessary investigations and studies and generally to become organized and effective as an authority; in any event, the time elapsing between June, 1947, and the regular meeting of the council in August of 1947 would afford no ample opportunity or time for the commissioners intelligently to prepare a budget for the needs of the newly created authority for action by the council at its August, 1947, meeting. Unquestionably that was the reason why the authority levied no tax in 1947. I believe the legislature intended the phrase "levy-making periods" to mean periods in which a levy was made by the authority. Accordingly, I am of the view that, since the first levy was made by the authority in 1948, the year 1949 is within the operation of the phrase "first two consecutive levy-making periods" and that the amount of the special tax levy for the Albert Lea authority to be made in 1949, for collection in 1950, shall be an amount approved by the governing body of the City of Albert Lea but shall not exceed ten cents on each $100 of taxable valuation of the city.

LOWELL J. GRADY,
Assistant Attorney General.

Albert Lea City Attorney.
August 17, 1949. 430

85

Housing and redevelopment — Commissioners — Term — Where length of term and appointing authority is designated by statute but no date is fixed for the beginning of the term, term commences on date of appointment and not on date appointee qualifies — Laws 1947, Ch. 487, § 4, M. S. A. 462.425.

Facts

"The Housing and Redevelopment Authorities of Minnesota are using different bases for determining the beginning and expiration dates of the terms of office of their commissioners.

"The Housing and Redevelopment Authorities, except one, have been fixing the terms of office of the commissioners from the date upon which the appointment of the original commissioners was made by the Mayor and approved by the governing body of the municipality. The form of certificate of appointment of the original members of the respective housing authorities contains a provision by the Mayor that the members shall serve for the appropriate term of years from the date of such appointment. In general, the appointment by the Mayor and the action by the City Council takes place on the same date.

"For example, with respect to these authorities, if the date of the appointment is January 1, 1950, and the term one year, the term expires January 1, 1951, even though the particular incumbent did not take the oath of office until February 1, 1950.

"In the case of the one authority, the authority is proceeding on the basis that the term of office of any one commissioner is dated from the date he takes the oath of office and otherwise qualifies to enter upon his duties.

"For example, if the appointment was dated January 1, 1950, and the oath of office was not taken until February 1, 1950, the term of the appointment, as well as the authority of the commissioner to enter on his duties and transact business, would be dated from February 1, 1950, to February 1, 1951."

Question

Does the term of a commissioner appointed under the Municipal Housing and Redevelopment Act commence on the date of his appointment or on the date he qualifies for the office?

Opinion

The Municipal Housing and Redevelopment Act is Laws of 1947, Chapter 487, coded as M. S. A. 462.411 to 462.711. References herein are to the sections of said Act.

Section 4, Subdivision 5, as far as here material, reads as follows:

"An authority shall consist of five commissioners, * * *"

Section 4, Subdivision 6, as far as here material, reads as follows:

"The commissioners constituting an authority shall be appointed by the mayor, with the approval of the governing body. Those initially appointed shall be appointed for terms of one, two, three, four, and five years, respectively. Thereafter all commissioners shall be appointed for five-year terms. * * *"

Section 4, Subdivision 7, so far as here material, reads in part as follows:

"Commissioners shall hold office until their successors have been appointed and qualified. A certificate of appointment of each commissioner shall be filed with the clerk and a certified copy thereof shall be transmitted to the state housing commission. * * *"

From the quoted portions of the statute, the legislature intended that there should be five commissioners, that their terms should be staggered, that the term of one commissioner would expire every year and that a new commissioner would be appointed for a five year term at the expiration of each previous term. Opinion dated August 17, 1949 (file 430).

The term of the commissioners is fixed by statute. After the initial appointments of one, two, three, four and five years respectively, the term of each commissioner is for a period of five years. The connotation of "term," as applied to an office, is that of a fixed and definite period. 43 Am. Jur. 149. The term is distinct from the tenure of an officer. 43 Am. Jur. 149. The term of an office relates to the office and not to the incumbent. In a

term of office there may be several tenures, but the term of the office remains the same. See **Holbrook v. Board of Directors of Imperial Irrigation District,** 8 Cal. (2d) 158, 64 P. (2d) 430.

The above statutory provisions fix the term of the office of commissioner. The statutory provisions, however, do not fix the date of the commencement of the term of each commissioner. They are appointed by the mayor, with the approval of the governing body. Where no time is fixed by law for the commencement of an official term, the general rule is that it begins to run from the date of the appointment. See 43 Am. Jur. 155. Although there is some authority to the effect that the term commences with the officer's qualification, this view has been disapproved upon the ground that under such a rule the beginning of an official term would depend on the will of the appointee instead of the appointing power. The applicable rule to the facts submitted is stated in 43 Am. Jur. 155 as follows:

> "Where the law prescribes the length of the term and designates the person in whom is vested the power to fill a public office by appointment, but no date is fixed for the beginning or ending of the term, it has been held that the appointive power has the right to fix the commencement of the term; and when the same is fixed by the appointment first made, all subsequent terms of office necessarily have reference to such initial period, and each term commences at the end of the preceding term."

Applying the foregoing to your inquiry, it is our opinion that the term of a commissioner appointed under the municipal housing and redevelopment act commences on the date of his appointment and not on the date he qualifies for the office.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Commissioner of Administration.
March 16, 1950. 430

CONDEMNATION PROCEEDINGS

86

Airport—Acquisition of lands—When possession may be had—Right of possession thereto—M. S. A. 360.032.

Superseding opinions of Sept. 18, 1942 (234b), to Mankato City Attorney and July 30, 1943 (234b and No. 1, 1944, Rep.), to Worthington City Attorney.

Facts

The City of Mankato is engaged in acquiring land for a municipal airport situated outside the corporate limits of the city. It may be necessary

for the city to condemn in order to acquire said lands. Section 142 of Part III, Sub-chapter I of Chapter XIV of the city charter, under the subject of "Eminent Domain," reads in part:

> "* * * before entering upon possession of said land or property, the city shall pay the amount of such award with interest thereon at the rate of six per cent per annum from the date of the final award or confirmation thereof or judgment of the court, as the case may be."

M. S. 1945, § 360.032, authorizes a municipality to acquire property for the purposes of an airport either within or without its territorial limits. Subd. 2 thereof authorizes the condemnation of such property by the municipality, and, if the city charter prescribes a method of acquiring the property by condemnation, the proceedings shall be pursuant to said charter. Said subd. 2 reads in part as follows:

> "For the purpose of making surveys and examinations relative to any condemnation proceedings, it shall be lawful to enter upon any land, doing no unnecessary damage. Notwithstanding the provisions of this or any other statute or the provisions of any charter, the municipality may take possession of any such property so to be acquired at any time after the filing of the petition describing the same in condemnation proceedings."

Questions

In the event the city determines to condemn the lands needed for its airport, may it take possession thereof in accordance with Minnesota Statutes 1945, § 360.032?

If possession may be taken in accordance with provisions of said statute, when in the course of the proceedings under the charter may said possession be taken?

Opinion

Minnesota Statutes 1945, § 360.032, was enacted as a part of the Revised Uniform Airports Act by Laws 1945, Chapter 303, and is contained in § 11 thereof. It takes the place of the provision relating to the same subject matter and contained in Laws 1943, Chapter 653, § 9, which was specifically repealed by the enactment of Laws 1945, Chapter 303. The 1943 act, however, did not in any way authorize a municipality to take possession of condemned property upon the filing of the condemnation petition.

Minnesota Statutes 1945, § 360.032, authorizing municipalities to acquire airports, in our opinion, is a general law relating to the affairs of cities, and the provisions thereof, in so far as they may cover the same subject matter as contained in the city charter of Mankato, are paramount to the charter provisions. Therefore, the above quoted provision from Minnesota Statutes 1945, § 360.032, authorizing the city to take possession of property for an airport, is in conformity with Article IV, Section 36, of the Constitution and takes the place of § 142 of the city charter in so far as that section restricts the taking of possession of property condemned for an airport. See **Rice v. City of St. Paul**, 208 Minn. 509, 295 N. W. 529, for the applica-

tion of a general law pertaining to cities construed to be paramount while in force to the provisions relating to the same matter included in a local charter.

In response to an inquiry from the City Attorney of Mankato, this office, on September 18, 1942 (our file 234b) advised that, under the terms of the city charter (§ 142), the city could not take possession of land being acquired for an airport site prior to the payment of the award. That opinion was written prior to the enactment of Minnesota Statutes 1945, § 360.032 (Laws 1945, Chapter 303). In view of the enactment of this 1945 act, our opinion to the City Attorney of Mankato of September 18, 1942, is hereby superseded. On July 30, 1943, this office advised the City Attorney of Worthington, Minnesota, in response to a similar inquiry (our file 234b — printed in the 1944 Report of the Attorney General as opinion No. 1). There the municipality was concerned in acquiring an airport site pursuant to Laws 1943, Chapter 653, which contained no provision with reference to the time for taking possession. There it was the opinion of this office that possession could be taken after the date of filing the report of the commissioners. In so far as Minnesota Statutes 1945, § 360.032, prescribes a time in which possession may be taken, our opinion of that date to the City Attorney of Worthington, Minnesota, is also hereby superseded.

The legislature, in enacting the part of Minnesota Statutes 1945, § 360.032, relating to the time of possession, used the language of Minnesota Statutes 1945, Chapter 117 (eminent domain). Sections 117.05, 117.06, and 117.20, as amended by Laws 1947, Chapter 312, indicate that a condemnation proceeding under Chapter 117 is commenced by filing a petition. The legislature then, in our opinion, in using the words "the municipality may take possession of any such property so to be acquired at any time after the filing of the petition" in 360.032, supra, was, in effect, saying that the municipality may take possession of such property so to be acquired at any time after the commencement of the condemnation proceedings.

In order to answer your second inquiry, it is then necessary to determine when the condemnation proceeding is commenced under your city charter. Chapter XIV of the Mankato City Charter relates to eminent domain. Section 116 under Part I of Sub-chapter I thereof authorizes the city to condemn for public purposes. Section 117 thereof reads:

> "The necessity for the taking of any property shall be determined by resolution of the Council, which resolution shall in a general way describe the property so needed, and order its condemnation."

Section 141 of Part III thereof relates to the procedure when there is to be no assessment of benefits and states:

> "* * * all the proceedings required to be had under Part II of this sub-chapter, shall be had under Part III hereof where there can be no assessment for benefits, except that the Council in the latter case shall in no event make any assessment of benefits. And all the provisions of said Part II of this Chapter shall so far as applicable apply to and be in force hereunder in Part III hereof to condemn property where there can be no assessment for benefits."

We are assuming that the city does not propose to assess benefits resulting from the construction of the airport and the acquisition of real estate therefor. Section 122 under Part II reads:

> "When the Council shall, by resolution declare that for public improvement it is necessary to take, damage, injure or destroy any private property, or property devoted to a public use, it shall determine by resolution in a general way the nature and extent of the proposed improvement";

and Section 123 thereof directs the city council to notify the city engineer of its determination, and the city engineer then surveys and prepares a plat of the improvement, ascertains the property to be affected by it, and the names of the owners thereof, and presents said information to the council. Section 124 thereof reads in part:

> **"When such plat and survey shall finally describe the proposed improvement to the satisfaction of the council, it shall by resolution adopt the same and order the making of the improvement. * * *"**

The portion of Section 124 not quoted relates to the procedure required to be followed in giving notice of a meeting of the city council to award damages. The remaining sections of Part II in Sub-chapter II of Chapter XIV relate to the machinery for determining damages in the condemnation proceedings under the charter.

The resolution of the city council determining necessity under Sections 117 and 122 is, in our opinion, a preliminary step which establishes public authority and is the legislative determination of the necessity of the acquisition. It is not, however, the commencement of condemnation proceedings under the city charter. It is similar to the order of the commissioner of highways designating the route of a trunk highway. See **State v. Appleton,** 208 Minn. 436, 294 N. W. 418, wherein the Minnesota Court, in discussing the nature of the commissioner's order, said:

> "The appellant contends that the filing of the width order amounted to a taking of her property. We have held that the mere filing of the commissioner's order designating the route of a highway does not amount to a taking of the land over which the route extends. It is merely the preliminary step which establishes public authority and is the legislative determination of the necessity of the acquisition. State, by Benson, v. Erickson, 185 Minn. 60, 239 N. W. 908. That case was later overruled on its holding that persons not included in the state's petition could intervene, by State, by Benson, v. Stanley, 188 Minn. 390, 395, 247 N. W. 509. However, except insofar as it has been overruled, it still is the law. It is the filing of the petition in condemnation, not the filing of the commissioner's order, that authorizes the state at its option to enter upon and take possession of the land sought to be condemned."

The resolution of the city council determining public use and necessity authorized by Sections 117 and 122 of the charter is not, in itself, a step toward the acquisition of any property. Until the city engineer has made a survey and prepared a plat covering the proposed improvement in accord-

ance with Section 123 of the charter, there is no way of knowing whether the project is feasible or not; nor is there any way of determining, in most instances, the actual land which may be required or which will be affected by the proposed improvement. When the city engineer, however, has reported back to the council pursuant to said Section 123, the council then is in a position for the first time to start condemnation proceedings. It is our opinion that such proceedings are then commenced when the city council enacts the resolution authorized in Section 124.

From the foregoing it is our opinion that the City Council of Mankato, if it proceeds to acquire lands for an airport outside the territorial limits of Mankato pursuant to the procedure prescribed by its charter, may take possession of such lands at any time after it has enacted the resolution prescribed in the city charter by Section 124 of Part II of Sub-chapter I, Chapter XIV, thereof.

J. A. A. BURNQUIST,
Attorney General.

Mankato City Attorney.
February 17, 1949. 234-B

87

Award—Appeal—When possession of property may be taken by condemning municipality — Extension of a road — M. S. A. 117.09; 117.13; 117.17; 117.20, subds. 2, 3, and 4. (Opinion 186, 1936 report, reversed.)

Facts

"The Village of Brooklyn Center some time ago initiated the condemnation proceedings for the extension of a road within the village limits. Awards have been duly made and filed and some of the parties have served notice of appeal from these awards. The village has been proceeding under Section 117.20, considering itself as a political subdivision of the State."

Question

"May the Village now proceed to take possession of the condemned land in order to construct a road although the appeals are still pending, and in view of the requirements of Section 117.20 (4) which requires that a certificate be filed in which the fact of payment must be recited?"

Opinion

The question is answered in the affirmative.

M. S. A. 117.20 prescribes the procedure in eminent domain proceedings instituted by the state or by any of its agencies or political subdivisions. Subd. (3) of that section specifically provides:

"(3) Payment of the damages awarded may be made or tendered at any time after the filing of the report; **and the duty of the public officials to pay the amount of any award or final judgment upon appeal shall, for all purposes, be held and construed to be full and just compensation to the respective owners or the persons interested in the lands;** * * *."

In **Ford Motor Company v. City of Minneapolis**, 147 Minn. 211, at p. 215, 179 N. W. 907, it is stated:

"* * * That the severance of ownership and the taking must be regarded as accomplished at the date when the original award is made and filed, must be taken as settled in this state."

" 'The filing of the award of the commissioners is to be deemed a constructive entering upon and taking. The rights of the parties are to be determined as of that time.' And that remains true, though the award and successive awards be set aside, and even though the title does not pass, as in fact it does not, until the final award is fully paid."

That opinion apparently holds that, if the taken property is actually occupied by the former owner between the date of the filing of the first award and the payment of damages, the rental value thereof may be offset against the award. See also **Ford Motor Company v. City of Minneapolis**, 143 Minn. 392, 173 N. W. 713.

The appeal is only "from any award of damages embraced in the report, or from any omission to award damages." M. S. A. 117.20 (2). The duty of public officials to pay the amount of any award or final judgment upon appeal, under the express provisions of subd. (3) of M. S. A. 117.20, is "full and just compensation to the respective owners or the persons interested in the lands." When the amount of the award or the final judgment is actually paid, then the title to the property passes, and that title relates back to the date of the filing of the commissioners' award. 2 Dunnell's Minn. Digest, § 3016, and Supps.

Where eminent domain proceedings are instituted by the state or by any of its agencies or political subdivisions, then the notice of filing of report provided for in M. S. A. 117.09 is dispensed with; as is also the final decree provided for in M. S. A. 117.17, if the attorney for the petitioner makes a certificate reciting the facts specified in M. S. A. 117.20 (4). M. S. A. 117.20 (4) merely provides a different method, applicable only in eminent domain proceedings instituted by the state, its agencies and political subdivisions, for perfecting the record of the proceedings. Compare M. S. A. 117.17.

I am authorized to say that the former opinion of this office, to the extent that it may be inconsistent herewith, is hereby superseded. (Opinion No. 183, 1936 report, file 817-F.)

Question

"If the village can take possession of this land, what procedure must they follow with regard to posting a bond and making tender of payment?"

Opinion

For the reasons stated in the Attorney General's opinion dated July 1, 1941 (file 817-F), I am of the view that the bond provisions of M. S. A. 117.13 do not apply to a village when, as a political subdivision of the state, it is lawfully exercising its power of eminent domain.

I am not certain what you mean by what procedure you should follow in "making tender of payment." As to the nonappealing parties interested in the proceedings, the following language of the statute seems applicable:

> "Payment of the damages awarded may be made or tendered at any time after the filing of the report; * * *." (M. S. A. 117.20 (3).)

As to the appealing parties, so long as their appeals are pending, a tender of payment would be unavailing.

J. A. A. BURNQUIST,
Attorney General.

Attorney for Village of Brooklyn Center.
August 17, 1949. 817-F

88

Public square—City cannot condemn property already dedicated for use as a public square and thereby acquire the right to use it as a high school athletic field—Headley v. City of Northfield, 227 Minn. 458, 35 N. W. 2d 606.

Facts

Within the plat of the town of Northfield there is a rectangular area designated as a public square which was dedicated as such by the proprietors who made and filed the plat. This public square is known as Central Park. It was the subject of an opinion of our Supreme Court in the case of **Headley v. City of Northfield**, 227 Minn. 458, 35 N. W. 2d 606. That opinion is hereby referred to for a further statement of facts and the law pertaining to the title to this public square. It was proposed by the city of Northfield and the school district to divert the use of the public square to the purposes of a high school athletic field and playground. As stated by the Supreme Court in the case cited, this would be a use of the property for a public use, "but one not only different in kind from uses of a public square but positively inconsistent therewith and destructive thereof, and consequently unlawful."

In the case cited, the Supreme Court directed the issuance of a temporary injunction against the city of Northfield and other defendants enjoining them from consummating the plan of converting the major portion of the public square into a high school athletic field and playground.

It is now proposed that the city of Northfield condemn the public square (already dedicated to a public use) so as to accomplish the purpose of converting it into an athletic field and playground.

Question

Can the city of Northfield under the power of eminent domain condemn property already dedicated as a public square and acquire the right to devote it to other purposes, including its use as an athletic field and playground?

Opinion

I believe it to be the law that unless specific authority is given either by statute or the city charter to condemn property already devoted and dedicated to use as a public square, such power does not exist, and the city has no power to condemn the public square for other city purposes, and thereby avoid the trust created by its dedication as a public square.

An examination of the city charter in Chapter X does not disclose any specific authority to condemn property already devoted to a public use. The charter in Chap. X, § 1, gives authority to condemn any property that may be required for any of the purposes of the city, but it does not contain specific authority to acquire land under the power of eminent domain which is already devoted to a public use.

The following quotation is taken from 18 Am. Jur., title Eminent Domain, § 93, p. 719:

> "* * * in the absence of express statutory authority, authority to condemn for school purposes has been denied where the land was already devoted to another public use, such as a poorhouse, public square, or public highway. * * *" The text cites 48 L. R. A. (N. S.) 489.

A portion of the annotation in 48 L. R. A. (N. S.) 489, just referred to, reads as follows:

> "The board of education of a city has no power to take a part of a public square for a high school site, where the purposes for which the public squares may be used are defined by positive law, and do not include the erection of schoolhouses. McCullough v. Board of Education, 51 Cal. 418 (holding also that the board of supervisors could not authorize such taking).
>
> "In Davis v. Nichols, 39 Ill. App. 610, the court, in holding that a school district cannot locate and condemn as a site for a schoolhouse part of the public square of a village, said: 'The public square of the village of Tremont is held in trust for the public use, and it cannot be appropriated to any other use inconsistent with or destructive of the first; that the building of a schoolhouse upon the public square of a village, whether such square be left open for public travel across it, or enclosed and used as a park, would be inconsistent with the original use, cannot be doubted. Suppose the voters of a school district were to select, as a site for a new schoolhouse, the middle of a public street or the courthouse of the county; would it seriously be contended that such site could be enforced?' "

Minnesota Power & Light Co. v. State, 177 Minn. 343, 225 N. W. 164, is the case in which our court considered the right of a public utility company to condemn an easement for the construction and maintenance of an electric power carrying line through and across Jay Cooke State Park over land owned, dedicated, and used by the state for public park purposes. The court in that case said:

> "When we come to land dedicated by the state, **or one of its governmental agencies**, for a specific public use and actually in use for the specified purpose, the rule is that general authority to condemn state-owned lands is not sufficient. In such case there must be legislative authority, expressly given or clearly implied, to take lands so dedicated and used. 'The presumption is that authorized public uses are not to be interfered with under mere general terms of federal or state legislation'."

I hold that the city of Northfield, having no express or specific authority to condemn land already dedicated to the public for a public square, cannot by the exercise of the power of eminent domain acquire the right to use such property for other inconsistent purposes such as an athletic field.

There is another fundamental reason why the city should be denied the power to take the public square by the exercise of the power of eminent domain.

The city of Northfield is a trustee for the benefit of the public of the public square, and is held to the duties and accountability of a trustee. As such trustee, it has no right to undertake actions inconsistent with its trust duties. It has no right to seek to destroy the trust under which it is acting as trustee. It cannot place itself in the inconsistent position of seeking to destroy what it is its duty to maintain. The law would not countenance the city's taking such a position.

For the reasons stated, it is my opinion that the city of Northfield cannot avoid its duty as trustee of the public square and cannot exercise the power of eminent domain for that purpose.

This opinion is directed only to the question of the power of the city. I do not pass upon the power of the school district to condemn the public square for the purposes of a school athletic field. That question will be dealt with when and if it is presented by the Commissioner of Education. The authorities cited, however, may be pertinent in answering that inquiry if it is presented.

RALPH A. STONE,
Assistant Attorney General.

Northfield City Attorney.
April 27, 1949. 59-A-14

FINANCES

89

Appropriation — Health — Tuberculosis field X-ray survey — County board is authorized to appropriate money out of general revenue fund to pay expenses of tuberculosis field X-ray survey in county — Cost of tuberculosis X-ray survey in county if not payable out of county welfare funds — M. S. 1949, §§ 376.50, 393.01, 393.07.

Facts

"A representative group, including our County Nurse, appeared before our Carlton County Welfare Board at its regular meeting held Friday, September 8th, and indicated the advisability of conducting a tuberculosis field X-ray survey in Carlton County next spring. The approximate cost to Carlton County of such a survey would be $4500.00. A similar survey was conducted in 1947 at no expense to the County.

"Section 376.50, M. S. A., provides that the 'county boards of the several counties of this state may appropriate money out of the general revenue fund of the county * * * for the purpose of paying for the services of visiting nurses **or other medical attention or advice in preventing the spread of tuberculosis in such county,** * * *.'

"Our general revenue fund is just about holding its own and while it is my opinion that this statute is broad enough to cover the situation and to authorize the county board to appropriate money to pay for the cost of such a survey, assuming that the county board determines the need for such a survey, the questions hereinafter stated arise.

"I might add that our county board is now levying the maximum under the statute for general revenue purposes while there is no maximum levy in our welfare fund; consequently, it would be considerably better for us if the cost of the survey could be met out of welfare funds."

Question

"Do you agree that the statute [M. S. 1949, § 376.50] is broad enough to authorize the county board to pay for the cost of such a survey out of the general revenue fund of the county?"

Opinion

Yes.

Question

"Would it be possible for the County Welfare Board to include in its budget an item to cover the cost of such a survey inasmuch as the Welfare Board now budgets the cost of sanatorium care and makes its levy accordingly to cover such sanatorium care in line with an opinion from your office rendered a few years ago?"

Opinion

No.

The county welfare board has such powers only as are expressly conferred by statute or are necessarily implied in those which are expressly conferred.

M. S. 1949, § 393.01, provides for the establishment of a county welfare board in each county of the state. The powers and duties of a county welfare board are prescribed by § 393.07. This latter statute, so far as pertinent to your inquiry, charges the county welfare board "with the duties of administration of all forms of public assistance and public welfare, both of children and adults," and provides that the board "shall supervise, in cooperation with the director of social welfare, the administration of all forms of public assistance which now are or hereafter may be imposed on the director of social welfare by law, including aid to dependent children, old age assistance, veterans aid, aid to the blind, and other public assistance or public welfare purposes."

The project involved in your inquiry is essentially one of public health. While the public welfare might well be subserved by the prosecution of such a public health project, the project is not one of public assistance or public welfare within the meaning of M. S. 1949, § 393.07. The public assistance programs, the administration of which is committed to the county welfare board, are programs for the relief of poor, indigent, or otherwise needy persons. The benefits of the project involved in your inquiry are available to all regardless of ability to pay. That circumstance characterizes the project as a pure health measure and not one allied with the relief of the poor, indigent, or otherwise needy. The fact, pointed out by you, that "the Welfare Board now budgets the cost of sanatorium care and makes its levy accordingly to cover such sanatorium care," does not authorize the expenditure out of county welfare funds of public moneys for the purposes involved in your inquiry.

Where a "poor person" within the meaning of the Poor Law requires sanatorium care for tuberculosis, the cost thereof is paid out of county welfare funds because of the governmental obligation to support the poor. Where a person is hospitalized in the University of Minnesota Hospitals at the expense of a county, it is because the person so hospitalized is an indigent person within the meaning of the University of Minnesota Hospitals Law. See M. S. 1949, §§ 158.01 - 158.19. M. S. 1949, § 158.091, authorizes the county board to delegate to the county welfare board "all the rights, powers, and duties conferred upon it and them by sections 158.01 to 158.12, with reference to the hospitalization of indigent persons." Because the expense connected with such hospitalization is a matter of public assistance to "indigent persons," the expense is payable out of county welfare funds. The same is true with reference to the hospitalization of indigent persons under the General Hospital Law (M. S. 1949, §§ 261.21 - 261.23). See Attorney General's opinion dated June 17, 1949 (file 339g-2), discussing hospi-

talization under the Poor Law, the University of Minnesota Hospitals Law, and the General Hospital Law. Also see Attorney General's opinion of October 10, 1949 (file 556a-8).

LOWELL J. GRADY,
Assistant Attorney General.

Carlton County Attorney.
September 22, 1950. 125-A-15

90

Appropriation — Hospitals — Construction — Cost — Increased cost of construction when necessary by minor changes in plans and specifications may be paid by county in addition to original contract price under authority of M. S. 1949, § 376.08, and money required therefor may be appropriated from general revenue fund.

Facts

By authority of M. S. 1949, §§ 376.01 - 376.05, the County Board of Renville County has proceeded to erect a hospital. The cost thereof and the cost of equipment therefor are being borne jointly by the county and the Village of Olivia. The county and the village have each separately issued their bonds to obtain money therefor. Individuals have contributed to the same object. The Government of the United States is cooperating and will pay one third of the total cost of construction and equipment. The building is nearing completion. Since the original plans were adopted and the work of building has progressed, certain minor changes in the plans have been proposed and have the approval of the county board and the village and the United States Government. The details of those improvements are stated in your letter, but for the purpose of this opinion it is sufficient to say that they are minor. If these changes can be made before certain concrete floors are laid, a saving of cost will be effected. The increase in cost involved in the change in plans will probably be between three and four per cent of the total cost of the building and equipment. The county board and the village deem the changes prudent, desirable, and for the public benefit. To wait until the building is constructed according to the original plans and thereafter make the changes deemed to be necessary would increase the total cost and result in loss to the public.

Question

Does the county board have authority under M. S. 1949, § 376.08, to appropriate and pay from the general revenue fund the sum required as its share of the increased cost, estimated to be between $7,500 and $10,000, to accomplish the changes in the plans and specifications to bring about the desired result, this to be accomplished under the terms of a resolution, copy of which has been submitted?

Opinion

The resolution mentioned embodies the foregoing facts and purports to appropriate the sum required to be transferred from the county revenue fund to the Renville County hospital fund.

The statute cited is authority to the county board in any county having not more than 25,000 inhabitants to appropriate from the general revenue fund a sum not exceeding $65,000 in any one year to aid in the maintenance or erection of a hospital within such county.

There appears to be no valid reason why the county board, with the approval of the village and the Government of the United States, cannot change the hospital plans in such minor detail as is provided in the proposed resolution and clearly in the interest of the public and use for that purpose the funds authorized to be expended by the board of county commissioners under § 376.08.

Obviously, it could not be contended that the fact that the county, acting through the electors, has authorized a bond issue the purpose of which was to provide funds for the erection and equipment of a hospital would prevent the county board from availing itself of the authority, granted in the above cited section, to make necessary changes in a hospital already constructed. If the proposed changes here involved would be considered necessary after completion of the hospital in accordance with the original plans, it would appear absurd to go to the expense required to complete the construction under such plans and thereafter incur the additional expense made necessary in altering the completed construction so as to make the changes which are now deemed to be necessary.

It is my opinion that, under the facts related and stated in the resolution proposed, the county board has authority to appropriate and pay from the general revenue fund, the sum required and mentioned as the county's share of the increased cost of construction of the building because of the proposed changes.

So far as inconsistent herewith, opinions dated July 7, 1949, May 18, 1949, April 5, 1948, January 23, 1947, September 7, 1943, September 2, 1943, and March 11, 1947, are modified.

J. A. A. BURNQUIST,
Attorney General.

Renville County Attorney.
September 20, 1950. 1001-B

91

Audits — Certified accountants — City of St. Peter may employ qualified accountant, not CPA, to audit city books, under authority conferred by Spec. Laws 1891, Ch. 5.

Facts

"During the past two years, the books of our city have been audited by the firm of X and Y of this city. One of these men is an attorney and the other an accountant. Neither is a Certified Public Accountant, however.

"In the recent city election the question was raised as to the advisability of having our city books and records audited by one who was not a C.P.A."

Question

May the City Council of the City of St. Peter employ a qualified accountant to audit the books of the city, even though such person is not a certified public accountant?

Opinion

The question is answered in the affirmative.

Attorney General's opinion dated April 13, 1933 (file 353a-3), ruled that a village did not have authority to employ an auditor other than the public examiner to audit the books of the village. That opinion relied upon the following quotation from Dunnell's Digest, 2d Ed., § 6684:

"Municipalities have such powers only as are expressly conferred by statute or are necessarily implied in those which are expressly conferred. They have no inherent powers."

That opinion further stated that "so far as municipalities are concerned, and unless authorized to the contrary by charter provision, express or implied," the statutory method for the examination of books and records of municipalities by the public examiner constituted "the exclusive one for such municipalities."

After that opinion was written, and in March of 1943, the legislature amended the law with reference to the examination of the books of a municipality by the public examiner. The law had theretofore provided that the public examiner should examine the books of a municipality upon written request signed by a majority of the members of the governing body. By the amendment adopted in 1943 — L. 1943, ch. 188 (now embraced within M. S. A., § 215.20) — this provision was added:

"* * * Nothing contained in any of the laws of the state relating to the public examiner shall be so construed as to prevent any city, village, town or school district from employing a certified public accountant to examine its books, records, accounts and affairs."

The foregoing amendment is clear authority to a city to hire a certified public accountant to examine its books.

The question now is whether the language of the 1943 amendment, above quoted, constitutes a prohibition against the employment of an accountant, other than a certified public accountant, to examine the books, records, accounts, and affairs of the City of St. Peter.

So far as the City of St. Peter is concerned, I am of the view that the question last stated should be answered in the negative.

The City of St. Peter operates under Chapter 5 of Special Laws of Minnesota 1891,[1] and we consult that chapter to determine the extent of the power conferred thereby upon the City Council of the City of St. Peter. Chapter I, § 1, of the St. Peter charter provides, so far as here material, that the municipal corporation of Saint Peter thereby created "shall be capable of contracting and being contracted with, and have the general powers possessed by municipal corporations at common law; and in addition thereto shall possess the powers hereinafter specially granted."

Ch. IV, § 5, provides, so far as here material, as follows:

> "The common council shall have the management and control of the finances and all the property of the city, and shall likewise, in addition to the power herein vested in them, have full power and authority to make, enact, ordain, establish, publish, enforce, order, modify, amend and repeal all such ordinances, by-laws, rules and regulations for the government * * * of the city, the protection of its property * * * as they shall deem expedient."

Ch. IV, § 15, provides, so far as here material, as follows:

> "The common council shall examine and adjust the accounts of all city officers and agents of the city at such times as they may deem proper, and may require such officers or agents, whenever they deem it necessary, to exhibit to them all their books and papers belonging to their respective offices * * *."

Ch. X, § 9, provides:

> "No law of this state contravening or conflicting with the provisions of this act shall be considered as repealing, amending or modifying the same, unless said purpose be expressly set forth in such law."

Attorney General's opinion dated March 24, 1933 (file 353a-3), dealing with the authority of the City Council of New Prague to employ accountants to audit city affairs under a charter provision similar to the provision of § 15, ch. IV of the St. Peter charter, is consistent with this opinion.

Attorney General's opinion dated September 14, 1948 (file 353a-3), holds that the City of Ortonville, under the provisions of its city charter, might employ an accountant, not a certified public accountant, to audit the city books notwithstanding the 1943 amendment, hereinabove quoted, of the law with reference to the examination of the books of the city by the public examiner.

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[1]See Vol. 24, M. S. A., p. 65.

While the charter provisions of the Ortonville city charter there considered are not identical with, and are perhaps broader than, the provisions of the St. Peter charter here considered, the powers of the City Council of St. Peter, under its charter, are sufficiently broad to make the opinion of September 14, 1948, applicable to St. Peter.

Copies of the Attorney General's opinions hereinbefore referred to, as well as copies of Attorney General's opinions dated October 18, 1948, and July 1, 1943 (both file 353a-3), have heretofore been sent to you.

So far as your inquiry refers to the question of the "advisability of having our city books and records audited by one" other than a certified public accountant, that is a question for determination by your city council. It may well prescribe, if it is disposed to do so, under its broad powers, that the books, records, accounts, and affairs of the City of St. Peter shall be audited only by a certified public accountant employed for that purpose.

LOWELL J. GRADY,
Assistant Attorney General.

St. Peter City Attorney.
April 22, 1949. 353-A-3

92

Bond issue — Bridge repair — The words "taxable property" as used in M. S. A. 164.18 include money and credits value as assessed in 1942.

Facts

M. S. A. 164.18 gives authority to the county board to construct, repair or renew any bridge over water within the county or bordering thereon and the county has no outstanding road and bridge bonds issued as such and a petition to such board by twenty-five or more voters of the county who are freeholders has been made seeking such action. The board may then cause the bridge bonds of the county to be issued and sold in an amount not exceeding one-half of one per cent of the assessed valuation of the taxable property within the county without submitting the matter to a vote of the electors of the county.

Question

Do such words "taxable property" include the last assessment of moneys and credits?

Opinion

M. S. A. 285.023 provides that for the purpose of determining net bonded debt limitations now established by statute, the assessed value of money and credits in each municipality or other taxing district shall not be less than the assessed value of money and credits as finally equalized for the

year 1942. This indicates that the words "taxable property" in the context mentioned are intended to include the assessed value of money and credits as finally equalized for the year 1942.

CHARLES E. HOUSTON,
Assistant Attorney General.

Swift County Attorney.
March 29, 1949. 614-R

93

Bond issue — Sheriff residence, jail and office space in court house — Construction job — Two separate buildings.

Facts

The sheriff's residence and jail in Scott County is no longer suitable for the purposes for which intended. The county board has decided to replace it with a new structure. Additional office space must be provided in the courthouse. The courthouse is in a building separate from the jail and residence. It is intended to build the two structures as one job providing the additional offices as a part thereof.

Question

May the entire project be undertaken as a unit?

Opinion

It is observed that you state that it is intended going through the ordinary procedure of issuing construction bonds without any vote of the people. You do not cite the authority to be found in the statute authorizing that procedure. See opinions of the Attorney General dated January 29, 1940, January 18, 1940, August 15, 1913, and August 5, 1913, file 37-B-3.

I see nothing to prevent making one contract for the construction job.

On the matter of issuing the bonds, it appears to me that M. S. A. 475.52, subd. 3, and 475.58 are applicable.

CHARLES E. HOUSTON,
Assistant Attorney General.
37-B-3

Relative to the above opinion, you have made some additional inquiries on the general subject of the construction of the jail and sheriff's residence and addition to the courthouse in your county, issuing bonds to obtain money to accomplish those purposes, and the procedure relating to the issuance of such bonds.

M. S. A. 375.18 relates to the general powers of the county board. You call attention to paragraph (3) in that section, which states that the county board has power:

> "to erect, furnish, and maintain a suitable courthouse and jail, but no indebtedness shall be created for such purpose in excess of five mills on each dollar of assessed valuation; * * *"

In **Rogers v. LeSueur County**, 57 Minn. 434, 59 N. W. 488, the court said on page 439 of the opinion:

> "We are of the opinion that the board has no authority to incur liability on the part of the county which, with the ordinary current yearly expenses and other liabilities payable within the year, will exceed the amount of available funds in the treasury, and the amount which can be assessed as one year's taxes according to the tax lists on file when the contract is made under which the liability is incurred."

So, we see that the county board's power to erect a suitable courthouse and jail is limited. This provision in itself is not authority to issue bonds for the purpose of raising money without the county board complying with all of the provisions of the law with reference to the issuance of bonds, which we find in M. S. A., C. 475.

M. S. A. 475.58, L. 1949, c. 682, sec. 8, specifies when it is necessary and when it is not necessary to obtain the approval of a majority of the electors voting on the question of issuing bonds before such bonds are issued. That provision is specific and controlling. Accordingly, I am of the opinion that before a county may issue bonds to obtain money with which to construct a courthouse or additions thereto, or with which to construct a jail and sheriff's residence, it is necessary that the approval of a majority of the electors voting on the question of issuing the obligations be first obtained.

In fundamental principles, the law has not changed substantially in many years on the subject of issuing bonds. An opinion of the Attorney General, dated March 20, 1914, 37-B-3, shows that the law on the subject under consideration is substantially unchanged. It changes in detail, but not in principle. It appears to have been the policy of the law for many years that before a municipality may incur substantial debts beyond its present power to pay, the question whether the county shall go into debt for the issuing of bonds must be submitted to the people for their opinion and authority before an obligation shall be imposed upon the people, which they, themselves, must pay.

CHARLES E. HOUSTON,
Assistant Attorney General.

Scott County Attorney.
September 13, 1949. 37-B-3

94

Claims — Tax forfeiture proceedings — Slander of title — Claim for should be disallowed by county board — M. S. A. 375.18 (1).

Facts

Many years ago, through error, a tax forfeiture proceeding was had and a certificate issued and the land later sold by the state, all covering property erroneously. In other words, through a poor or inadequate description all these proceedings were had on an innocent person's property.

In order to clear the cloud on this party's property, the party retained an attorney and after considerable proceedings, the certificate in tax proceedings was cancelled, thereby clearing the title.

The innocent party now submits a bill to the county board for his legal expenses, abstracting, etc., involved in the clearing of this title.

Question

Does the county board have authority to pay such a claim?

Opinion

It does not appear upon what theory the claimant believes to be entitled to reimbursement from the county. If the claimant has a cause of action, what is it? The county board under authority of M. S. A. 375.18 (1) may settle a cause of action against the county.

Is it claimed that there was a slander of title? If so, the facts stated do not show slander of title. Where is any bad faith shown? If there was bad faith, there was no bad faith on the part of the county. If some county officer maliciously performed an unauthorized act, the claim should be against the officer and not against the county.

A good case on slander of title is **Kelly v. First State Bank of Rothsay,** 145 Minn. 331, 177 N. W. 347, but in these facts I recognize nothing which appears to be slander of title. And if an action should be brought against the county based on such facts, the county surely ought to prevail.

So, it is my opinion that on the basis of the facts related the claim should be disallowed.

CHARLES E. HOUSTON,
Assistant Attorney General.

Mower County Attorney.
August 23, 1949. 107-B-4

95

Claims — Verified — M. S. A. 471.38 amends law relating to verified claims against towns and counties but does not amend law relating to villages and school districts.

Facts

M. S. A. 471.38 relates to claims against municipalities. Such claims as are therein mentioned must be verified before audited and allowed. L. 1949, C. 416, amends that section and provides that the claim may be verified, not by affidavit, but by the statement therein prescribed. It is noticed in reading this act both before and since amendment that it relates to municipalities. Your letter of May 24 calls attention to **Olsen v. Independent School District**, 175 Minn. 201, 220 N. W. 606, wherein it was held that in so far as this statute is concerned, the word "municipality" does not include school districts. This is not a general proposition but it is a ruling applied to that section on account of the history thereof.

Attention is called to L. 1949, C. 119, Sec. 34, Subd. 1, M. S. A. 412.271, and Sec. 412.931, which fixes the effective date of this act as July 1, 1949. Accordingly, it is not now in effect. Sec. 412.271 prohibits disbursement by a village of its funds except as therein provided. It is observed that certain claims must be verified by an attached affidavit before they can be audited and paid.

Question

Does Sec. 471.38 as it now reads apply to any municipality other than towns and counties?

Opinion

Olsen v. Independent School District, 175 Minn. 201, 220 N. W. 606, applies to M. S. A. 471.38, as amended, with the same force as it applied to the statute in 1928, in that decision mentioned. It does not apply to villages or school districts. But we have other statutes which do apply to villages and school districts in respect to verification of claims. As to villages, see M. S. A. 426.075. As to school districts, see M. S. A. 125.22. The last two sections named were not amended by L. 1949, C. 416.

CHARLES E. HOUSTON,
Assistant Attorney General.

Lac qui Parle County Attorney.
May 25, 1949. 476-A-5

96

Funds — Apportionment — Delinquent taxes collected — Separation — Disposition upon separation of village from town — M. S. 1949, Sec. 379.06.

Facts

On July 10, 1950 the Town of West Lakeland was formed from a portion of the Town of Lakeland, in Washington County. The division line between the two townships runs along the center of Highway No. 12 and of the so-called Hudson Bridge which spans the St. Croix River between the City of Hudson, Wisconsin, and the old Town of Lakeland and which is owned by the City of Hudson, Wisconsin.

On July 14, 1950 the City of Hudson paid to the County Treasurer of Washington County delinquent personal property taxes for the years 1947, 1948 and 1949. These taxes resulted from personal property assessments made against the City of Hudson for the years 1947, 1948 and 1949 because of its ownership of that portion of the bridge located in the old Town of Lakeland.

The division of assets and liabilities has been set at 39.194 per cent and 60.806 per cent for the two towns.

Questions

1. Should the delinquent taxes collected on July 14, 1950 be divided between the towns on an equal basis because of the equal location of the bridge property in both townships, or on a 39.194 per cent and 60.806 per cent basis?

2. If the division of these taxes should be on a 39.194 per cent and 60.806 per cent basis, should not future assessments be equal even though the taxes might not?

Opinion

Minnesota Statutes 1949, Section 379.06, provides in part as follows:

> "In case of the division or partition of any town, the funds in its treasury and undistributed town taxes shall be apportioned to the town or towns to which the portions thereof shall be attached, or to the new town or towns established, to the extent the same are collected from the territory so attached or established into a new town. **All taxes collected after the division or partition of such township shall when collected be paid to the town in which the property upon which the taxes are collected is located;** * * *" (boldface type supplied).

Under this statute it is clear, assuming that the portion of the bridge now located in the new Town of West Lakeland and the portion of the bridge remaining in the Town of Lakeland have the same value (and this assumption seems warranted inasmuch as the line runs down the middle of the bridge), that if the taxes involved were **real estate** taxes, the delinquent

taxes for the years 1947, 1948 and 1949, collected from the City of Hudson on July 14, 1950 and the 1950 taxes which will be collected next year, would be paid one-half to each of the towns.

But this office has ruled that the legislature did not intend to include **personal property** taxes under a similarly worded statute (Minnesota Statutes 1945, Section 413.07), which provided for the disposition of taxes collected after a village separates from a town for election and assessment purposes.

Opinion No. 289, 1932, Published Opinions of the Attorney General.

Opinion No. 438, 1936, Published Opinions of the Attorney General.

Opinion dated June 23, 1949, File No. 440-b.

That statute, so far as here pertinent, reads:

> "Upon the separation of the village from the town for election and assessment purposes * * * All town taxes previously levied **upon property within the village** and not yet collected shall when collected be credited and paid to the village. * * * "

It was reasoned in those opinions that there is nothing in the public records from which it can be said how much of a personal property tax represents the property located within the village limits and how much represents property located outside the village and that because of the impossibility of the county officers dividing the personal property tax upon the basis of "property located within the village," it must be held that the legislature did not intend to include personal property taxes under that statute, and that the village was therefore not entitled to receive any part of the taxes levied upon personal property of residents of the village which were in process of collection when the separation took place. We think that the reasoning of those opinions applies with equal force to Section 379.06.

It follows that the Town of West Lakeland is not entitled to any part of the 1947, 1948 and 1949 delinquent personal property taxes which the City of Hudson has recently paid into the county treasury, and will not be entitled to any part of the 1950 taxes which the City will pay in 1951 (the 1950 assessment having been made before the new Town of West Lakeland was created), and that all of the town taxes included in the taxes which the City has paid for 1947, 1948 and 1949 and will pay for 1950 should be paid to the Town of Lakeland.

Insofar as future assessments are concerned, since personal property permanently located in Minnesota but owned by a resident of another state is subject to assessment in Minnesota in the taxing district where found on May 1, separate assessments will be made against the City of Hudson in the taxing districts of the Town of Lakeland and the Town of West Lakeland. There will therefore be no occasion for any division of taxes as between the two towns for the year 1951 and thereafter.

CHARLES P. STONE,
Assistant Attorney General.

Washington County Attorney.
August 24, 1950.

440-B

97

Funds—Apportionment—Division of money realized from taxes between town and village—Ownership in division of other personal property. Division of money realized from collection of personal property taxes.

Facts

Formerly, an area now included in the village of Woodland was embraced within the geographical location occupied by the town of Minnetonka. The village of Woodland was organized in December, 1948. Since that time, the village has been detached from the town for assessment and election purposes in pursuance of authority of M. S. A. 413.05.

The total assessed value of Woodland is about $300,000. The total assessed value of property in the town is about $2,150,000. The tax rate in the town is 23.1 mills.

Questions

"1. Pursuant to Section 413.07, Laws of 1945, will the Hennepin County Auditor credit the Village of Woodland with approximately $6,930.00 this year as 'taxes levied and not yet collected'?

"2. Minnetonka Township had approximately $12,000.00 cash on hand at the time that Woodland separated from Minnetonka Township, is Woodland entitled to approximately one-eighth of this cash balance at said time?

"3. Minnetonka Township has road equipment inventoried at $24,000.00, has the Village of Woodland an eighth interest in the value of this equipment?

"4. Does the term 'moneys levied and not yet collected' include personal property taxes levied against the people who reside in the Village of Woodland, which taxes were from assessments made on May 1st, 1948, by the Minnetonka Township assessor against residents of what is now the Village of Woodland, the assessor not designating the situs of said personal property?"

Opinion

M. S. A. 413.07 does not specifically state what the county auditor shall do. The language is: "All town taxes previously levied upon property within the village and not yet collected shall when collected be credited and paid to the village." It appears to me that the duties of the collecting officers do not go beyond the requirements of the statute. The duty of distribution begins when the money is collected. When and as collected, the collecting officer has the duty to credit town taxes previously levied upon property within the present village to the village and when remittance is made, it will be made to the village.

In respect to the division of money which was in the town treasury at the time of separation by election, we see that this section provides that it shall be ascertained how much money was then in the town treasury. The floating indebtedness of the town is also ascertained. The town treasurer will then hold enough money in the treasury to pay such floating indebtedness. The surplus of such money in excess of the amount of the floating indebtedness will be divided. The proportion of the excess as the total assessed valuation of property within the village bears to the entire valuation of the town belongs to the village and should be paid by the town to the village. I am unable to give a specific answer to your second question for the reason that no facts are stated with reference to the floating indebtedness of the town.

The village and the town appear to be the common owners of the road equipment. If it is practical to divide the property, it may be done under the terms of Sec. 413.072. It is only when it is practical to divide the property that it becomes of any importance as to what the proportionate interest of the village and the town in the property is.

The question of the division of the money realized from the taxation of personal property is discussed in the opinion of the Attorney General contained in the Attorney General's 1922 Report as Opinion No. 70, see also Opinion 438 of the 1936 Report of the Attorney General.

CHARLES E. HOUSTON,
Assistant Attorney General.

Town of Minnetonka Attorney.
March 11, 1949. 440-B

98

Funds—Apportionment—Firemen's Relief Association—Funds received by duly incorporated firemen's relief association from 2% tax on insurance premiums under M. S. A. 69.02 et seq. belong to association and do not constitute "public funds." Such funds belong to duly incorporated relief association and are not money of the town within meaning of M. S. A. 413.07, providing for apportionment of money upon separation of village from town.

Facts

"The Town of Rose of Ramsey County has been completely incorporated into three Villages, namely, Roseville, Falcon Heights and Lauderdale. The Village of Roseville was first incorporated and separated from the Town; the Village of Lauderdale next incorporated and separated from the Town; the remaining area of the Town then incorporated into the Village of Falcon Heights.

"Prior to the incorporation of any of the Villages within the Town, the Town of Rose maintained and operated a fire department. After the incorporation of Roseville, the fire department was maintained under

a mutual cooperation agreement by the Village and the Town. After the incorporation of Lauderdale a new mutual cooperation agreement was made between the two Villages and the Town and at present the fire department is being operated under a mutual cooperation agreement by the three Villages. It is contemplated that within the near future the assets of the fire department will be divided among the three Villages in proportion to their respective interests. A number of the present volunteer firemen will become firemen for the various municipalities. There are funds belonging to the Fire Relief Association of the existing fire department."

Our inquiry at the office of the Secretary of State discloses that on November 3, 1947, the Rosetown Firemen's Relief Association was duly incorporated under the laws of the State of Minnesota as a social corporation pursuant to M. S. A., ch. 309.

Question

"Will you please advise me as to the ownership of these funds?"

Opinion

We assume that the funds to which you refer are those received from the two per cent tax on insurance premiums under M. S. A., §§ 69.02 et seq.

On the basis of the correctness of the foregoing assumption, you are advised that the ownership of these funds is in the Rosetown Firemen's Relief Association, a Minnesota corporation. These funds are not "public funds," but are funds of the corporate relief association, to be used for the purposes set forth in the statute. They are not money of the town within the meaning of M. S. A., § 413.07, providing for the apportionment of any money in the town treasury upon the separation of a village from the town.

The foregoing opinion is, of course, restricted to the funds derived under M. S. A., ch. 69, and payable thereunder to the treasurer of the corporate relief association and is not to be construed as applying to fire equipment, apparatus, or other assets belonging to the township and used in connection with the operation of a fire department of the township.

Question

"Upon the division of the fire department assets," in what manner should these "funds belonging to the Fire Relief Association" be distributed?

Answer

Since these funds belong to the corporate firemen's relief association, the matter of the distribution thereof is a proper one for reference to the attorney for that corporation, and we offer no opinion in respect thereof.

LOWELL J. GRADY,
Assistant Attorney General.

Roseville Village Attorney.
April 22, 1949. 688-M

99

Funds—Apportionment—"Money" as used in M. S. A. 413.07 includes U. S. Government bonds, and allocation formula provided in that section applicable—Even assuming such bonds not "money" within 413.07, then they are "property" within 413.071 purchased in common "prior to such separation," and allocation formula of 413.072 applicable.

Facts

"The Village of Woodland was incorporated in December, 1948. On January 15, 1949, at a special election duly called in the Village, the voters voted that the Village become a special election and assessment district. * * *

"It appears that the Township of Minnetonka from which this village was separated has in its treasury in excess of its floating indebtedness, as of the time of the separation of the Village from the Township, government bonds which are held as surplus invested funds for general purposes, as well as cash bank balance."

Question

Does the term "money," as used in M. S. A. 413.07, relating to the apportionment of money and debt between the separated village and the town, include the funds invested in United States Government bonds?

Opinion

The question is answered in the affirmative.

We are of the view that the legislature, in enacting M. S. A. 413.07 did not intend to limit the phrase "any money" therein to only "cash"—meaning thereby the coinage of the government and the issues of notes which the government by law ranks with its coins.

In **McGovern v. United States**, 272 F. 262, the Circuit Court of Appeals of the 7th Circuit, in holding that "Liberty Bonds" constituted "money" within the meaning of a court rule prescribing fees of the clerk "for receiving, keeping, and paying money in pursuance of any statute or order of court," said this:

> " 'Money' is a broader and more generic term and may include not only legal tender, coin or currency, but also any other circulating medium or instruments or tokens in general use in the commercial world as representatives of value. In Gillen v. Kimball, 34 Ohio St. 352, it was held that a bequest of all of the testator's money on deposit included a deposit of United States bonds."

You are correct in your conclusion that the allocation formula provided by M. S. A. 413.07 should be applied to the bonds as well as to the bank balance.

Even assuming, without conceding, that the above mentioned government bonds are not "money" within the meaning of M. S. A. 413.07, then they are "property," within the meaning of M. S. A. 413.071, purchased "prior to such separation" and "paid for by a tax collected from an assessment in common of the property within the village and within the town." The division of such property is practical within the meaning of § 413.072 and can be made in accordance with the formula in the last section prescribed, with substantially the same result as would follow from the application of the formula of M. S. A., § 413.07.

LOWELL J. GRADY,
Assistant Attorney General.

Village of Woodland Attorney.
March 22, 1949. 440-B

100

Funds—Expenditures—Library Fund—Library Board has exclusive control —M. S. A. 134.11; 426.06—Opinion of Aug. 5, 1944, part one, superseded—Opinion of May 21, 1940, superseded—Opinion of May 16, 1921, followed.

Facts

Attention is called to two opinions—one dated May 16, 1921, No. 59, 1922 report, file 285-A of the Attorney General, and the other dated May 21, 1940, file 285-A.

Question

Which of the two opinions should be followed?

Opinion

M. S. A. § 134.11 provides that the library board "shall have **exclusive** control of the expenditure of all moneys collected for or placed to the credit of the library fund, of the construction of library buildings, and of the grounds, rooms, and buildings provided for library purposes. All moneys received for such library shall be paid into the city or village treasury, credited to the library fund, kept separate from other moneys of the municipality, and paid out **only** upon itemized vouchers approved by the board. * * * With the approval of the council, the board may purchase grounds and erect a library building thereon."

M. S. A. § 426.06 provides that the treasurer of a village "shall pay out no money except upon the written order of the president of the council, attested by the clerk."

The special provisions of the above quoted § 134.11 give the library board exclusive control of expenditure of the library fund with the one exception that the approval of the council is required in the purchase of

grounds for erection of a library building thereon. The section clearly provides that library funds shall be paid out only upon itemized vouchers approved by the board. Even if a general law should require the approval of the village council of all village expenditures, a specific provision, such as we have here pertaining to the library board, if inconsistent with the general provision, prevails over the latter.

Therefore, *in my opinion*, when the library board presents itemized vouchers, approved by that board, to the village clerk, orders issued thereon shall be signed by the president and attested by the clerk without the necessity of the approval, auditing, or allowing of such expenditures by the village council, with the one exception hereinabove referred to.

Insofar as the opinion of May 21, 1940, is inconsistent herewith, it is hereby superseded, and the opinion of May 16, 1921, is the one to be followed.

J. A. A. BURNQUIST,
Attorney General.

Public Examiner.
April 11, 1949. 285-A

101

Funds — Expenditures — Removal of obstructions from creek — City has authority to remove obstructions from creek bed if it will tend to promote the public health.

Facts

"A small creek known as Cascade Creek enters the city limits on the westerly side of the city and follows a northeasterly course across the northwest corner of the city proper, emptying into the Zumbro River at a point near the northern boundary of the city. Seventh Street Northwest crosses Cascade Creek and at that point a bridge has been constructed and maintained for many years. Again at Fourteenth Street Northwest another bridge has been constructed and maintained over the said Cascade Creek. The properties between Seventh Street Northwest and Fourteenth Street Northwest have been developed into residential property, and the city owns a small portion just north of the Seventh Street bridge and some area just south of the Fourteenth Street bridge. At six points between Seventh Street Northwest and Fourteenth Street Northwest storm sewers terminate at this creek, but I am advised by the Engineer that these storm sewers serve an area that because of its contour would normally drain into the creek if the storm sewers were not present. There have been occasions when heavy storms have caused this creek to over flood, and in some instances it damaged private property owners whose property either abutted the stream or are a part of the stream bed itself. I am further advised by the Engineering Department that a flooding of this stream in no way jeopardizes

the interests of the city in the properties that they own abutting this stream. There seems to be no contention that either bridge is endangered.

"I am enclosing a section of a map of that portion of the city through which Cascade Creek flows, showing the storm sewer locations and property that is owned by the city.

"Complaint is made that due to the filling of the stream bed and the growth of willows, flowing of the water in storm time was partially impeded, resulting in damage to abutting properties."

Question

"Can the City of Rochester expend moneys from its General Fund, a fund which is made up of the general taxes collected throughout the entire city, to dredge, widen, straighten, or do such other work as may be found necessary either to stop or minimize the danger of overflowage?"

Opinion

The city council is empowered by Section 103 of the charter, paragraph 38, "To do all acts * * * which may be necessary and expedient to the preservation of health and the suppression of disease."

The city council is also empowered by Section 103, paragraph 60 "To restrain the pollution of the waters of any creek, run, pond, lake, or water course within or adjacent to the city * * * and to provide for the cleansing and purification of waters, water courses and canals * * * on private property whenever necessary to prevent or abate nuisances."

If the situation is such that the health of the city or its inhabitants, or any considerable number of them, is menaced by the obstruction in the water course, if the removal of the obstruction will tend to preserve the health of the people of the city, I think that under the section cited the city council would have authority to clear out the creek and remove the obstructions therefrom.

Or if it is necessary or advisable for the purpose of preventing the pollution of the water of the creek, to cleanse the same by removing the obstructions, I think that the city would have authority to do so under the section cited.

Therefore, it is a question of fact whether the situation is such that considerations of the public health make it necessary or advisable to remove the obstructions from the creek at public expense.

If basements are likely to be flooded and become breeding places for disease, and if removal of the obstructions from the creek will prevent that from occurring, I think the city has authority to act at public expense.

I find no authority in the charter for the city to remove the obstructions in the creek merely to accommodate certain of the residents of the city whose basements are liable to be flooded, subject to what has been said with reference to health conditions.

RALPH A. STONE,
Assistant Attorney General.

City Attorney Rochester.
November 5, 1949. 59-A-22

102

Funds—Hospital—Funds derived from operation of village hospital may not be disbursed by hospital board established under M. S. A. 412.221, subd. 16—M. S. A. 412.221, subd. 16; 412.271, subds. 1, 2, 3, 4; 412.371; 412.531.

Question

"May the Village Council of Heron Lake, Minn., in establishing by ordinance a hospital board and specifying its powers and duties, confer upon such board the full power to receive and disburse all moneys received from the operation of the Village Hospital?"

Opinion

The question is answered in the negative.

M. S. A. 412.221, subd. 16, so far as it pertains to your question, provides as follows:

> "The village council shall have power to provide hospitals. The council of any village operating a municipal hospital may by ordinance establish a hospital board with such powers and duties of **hospital management and operation** as the council confers upon it; * * * ."

M. S. A. 412.271, subd. 1, so far as here material, specifically provides:

> "No disbursement of village funds * * * shall be made except by an order drawn by the mayor and clerk upon the treasurer. * * * and except as otherwise provided in subdivisions 2 and 3, no order shall be issued until the claim to which it relates has been audited and allowed by the council. * * * "

Subd. 2 of that section provides, in substance, that, when payment of a claim based on contract cannot be deferred until the next council meeting without loss to the village through forfeiture of discount privileges or otherwise, it may be made immediately if the itemized claim is endorsed for payment by at least a majority of all the members of the council.

Subd. 3 of that section provides, in substance, for the establishment of petty cash funds for the payment in cash of any proper claim against the village not exceeding $10.00.

Subd. 4 of that section then specifically provides, so far as here pertinent, as follows:

> "Subdivisions 2 and 3 shall apply to any independent board or commission of the village **having authority to disburse funds without approval of the council.** * * * "

It is to be noted that, if a public utilities commission is established in the village pursuant to the Code, a separate fund or a separate account shall be established in the village treasury for each utility, and into this fund or account are payable all receipts from the utility, and from it are payable all disbursements attributable to the utility. The utility commission audits the claims to be paid from that fund, and then orders for disbursement upon the village treasurer are drawn and countersigned by the secretary and president, respectively, of the commission. See M. S. A. 412.371.

Likewise, where a park board is established under the new Village Code, that board audits the claims payable from the park fund, and the orders thereon are drawn by the secretary and countersigned by its president. See 412.531.

But I find no such similar provisions in respect to the authority of a hospital board established under M. S. A. 412.221, subd. 16, to disburse village funds received from the conduct of the village hospital, except by an order drawn by the mayor and clerk upon the treasurer, after proper auditing, as provided in M. S. A. 412.271. The powers and duties of a hospital board established under subd. 16 above are confined to powers and duties of hospital management and operation, and the statute is not sufficiently broad to authorize the conference by the council of authority upon such board to disburse village funds.

Of course, the village council may, in prescribing the powers and duties of the hospital board, prescribe that all claims against the village arising from the hospital operation shall be first approved, before audit thereof by the village council, by a member or officer of the board. Likewise, under subd. 3 of 412.271, the council may establish a petty cash fund for the payment in cash of any proper claim against the village arising in the course of the hospital operation to the extent and in the manner in that subdivision provided, and it might name the manager of the hospital as custodian of that petty cash fund.

If payment of a claim based on contract arising in the course of the operation of the hospital cannot be deferred until the next council meeting without loss to the village through forfeiture of discount privileges or otherwise, it may be made immediately in accordance with the procedure set forth in subd. 2 of 412.271.

LOWELL J. GRADY,
Assistant Attorney General.

Heron Lake Village Attorney.
August 24, 1949. 1001-H

103

Funds—Municipal liquor stores—Membership in Chamber of Commerce—Village possesses no authority to join Chamber of Commerce whether dues are paid from the general fund or the liquor store fund.

Question

Whether the village of Buffalo may join the Buffalo Chamber of Commerce, paying an annual membership fee of $35 out of the municipal liquor store fund.

Opinion

The village possesses only such powers as are conferred upon it by statute. There is no power conferred upon a village to join or pay dues to a local Chamber of Commerce. Lacking the authority to do so, it makes no difference whether the payment is to be made out of the general fund or the liquor store fund.

RALPH A. STONE,
Assistant Attorney General.

Buffalo Village Attorney.
February 24, 1949. 218-R

104

Funds—Recreation—Recreation programs: as part of recreational program village may show free outdoor movies—M. S. A. 471.15 et seq.

Question

Whether the Village of Vesta may use public funds for the purpose of free outdoor movies in the Village.

Opinion

Any village may operate a program of public recreation and expend funds for the operation of such program. M. S. A. 471.15 et seq.

The term "recreation" means and includes "refreshment of strength and spirits after toil; amusement; diversion." Recreation may be not only physical but may include mental recreation. See 36 Words and Phrases, page 585.

It is my opinion that the Village may adopt a program of recreational activities and include in that program the showing of free outdoor movies.

RALPH A. STONE,
Assistant Attorney General.

Redwood Falls Village Attorney.
June 28, 1949. 476-B-10

105

Funds—Transfer—Moneys from parking meter fund—After amending ordinance, moneys may be transferred from parking meter fund to the general fund.

Facts

The parking meter ordinance of the city of Faribault provides that the money received as parking fees should be used:

> " * * * to provide for proper regulation, control, and inspection, of traffic upon the public streets and to cover the costs of supervising, regulating, and inspecting the parking of vehicles in the parking meter zones * * * the cost of placing and maintaining lines or markings designating parking spaces in parking meter zones, the cost of purchase, supervision, protection, inspection, installation, operation, maintenance, control, and use of the parking meters installed hereunder, and to pay for the purchase of parking area or space to relieve congestion on the streets and avenues in the business section of Faribault."

There is now a surplus in the parking meter fund.

> "Our City Council now proposes to (a) purchase a tract of land, which is known as the City Market, from itself for a fair appraised value for use as a parking lot and (b) erect a large city garage on city dump property, this garage to be used to service the equipment of the street department and incidentally trucks operated by our City Park Department and the Airport."

Question

Whether it would be proper to use the meter fund surplus for such purposes.

Opinion

The question really resolves itself into the question of the right of the city council to transfer moneys from the parking meter fund to the general fund of the village.

I see no objection to doing so if the parking meter ordinance is amended so as to permit such a transfer. All that is necessary is to add an amendment to Section 10 of the ordinance providing that "surplus funds in the parking meter fund may be transferred by the council to any other city fund."

The city simply proposes to use a tract of land which it now owns as a parking lot. It may do this if there are no restrictions in the title to the land on which the city market is located. The city may also build a garage on the city dump property if there are no restrictions in that title limiting its use to specified purposes. It is simply a question of the right of the

council to transfer moneys from the parking meter fund to the general fund. With an amendment to the parking meter ordinance, as suggested, I think this may be done.

I do not pass upon the right of the city to operate and maintain a parking lot.

RALPH A. STONE,
Assistant Attorney General.

Faribault City Attorney.
February 6, 1950. 59-A-53

106

Tax levies—Bands—Joint municipal band of two villages—Each village may vote separately on the proposition of levying a tax for establishing a band—If both villages vote favorably, bands could operate jointly under M. S. A. 471.59—Election—See 449.09.

Opinion

Two separate villages desire to establish and operate a joint municipal band.

Each village has authority to levy a tax for the purpose of providing a fund for the maintenance or employment of a band for municipal purposes by complying with the provisions of M. S. A. 449.09, et seq.

Sec. 449.10 provides for a petition for an election, and 449.11 provides for the election.

In each village the question should be voted upon separately and each without reference to the other.

If band elections turn out favorably so that both villages are authorized to maintain a band for municipal purposes, then I think they could combine their operations under the provisions of M. S. A. 471.59, which authorizes two or more villages to jointly exercise any power common to both. This section further provides for an agreement covering the joint operation and the handling of the funds.

So that when each village, being separately authorized thereto by a favorable vote, establishes a band they could then combine their operations under 471.59 and operate as a joint band.

The ballot in each village should contain no language except that stated in M. S. A. 449.10.

RALPH A. STONE,
Assistant Attorney General.

Ironton Village Attorney.
September 27, 1949. 519-H

107

Tax levies — Bands — Municipal entertainment — L. 1949, c. 100 and c. 563, are not inconsistent but cumulative, and cities of the 4th class coming within the purview of these statutes may proceed under either or both.

Facts

Springfield is a city of the fourth class operating under a home rule charter. Section 68 of such charter authorizes the city council to provide funds by a tax levy for the maintenance of a municipal band and the giving of public band concerts within the city limits.

Reference is made to M. S. A. 449.06, as amended by Laws 1949, chapter 100, and M. S. A. 449.09, as amended by Laws 1949, chapter 563, and that the city, pursuant to §§ 449.09 to 449.14, submitted to the electors the question of authorizing a tax levy not to exceed 3 mills for the purpose of furnishing a band, which was approved by the electors, and which has not been rescinded.

You submit these

Questions

"1. Does Chapt. 100, L. 1949, authorize the City Council to levy a 1½ mill tax for providing musical entertainments for the City, and in addition levy the 3 mill tax, for maintenance or employment of a band for municipal purposes?

"2. The voters of the City of Springfield, having already approved a 3 mill band tax for maintenance of a band for municipal purposes, and the giving of public band concerts, is it necessary to again submit the proposed 3 mill band tax levy, now contemplated by Chapter 563, Laws 1949?"

Opinion

Section 449.06, as amended by L. 1949, c. 100, reads as follows:

"The governing body of any city of the fourth class in this state operating under a home rule charter or commission form of government is hereby authorized to annually levy a tax not exceeding one and one-half mill on the dollar in excess of existing mill limitations but not in excess of any existing per capita limitations against taxable property in the city for the purpose of providing musical entertainments to the public in public buildings or upon public grounds. The total sum that may be levied or expended in any year shall not exceed the sum of $3,500."

and § 449.09, as amended by L. 1949, c. 563, provides:

"Cities of the second, third, or fourth class, villages, boroughs, or towns, however organized, may, when authorized as hereinafter provided, levy each year a tax not to exceed three mills for the purpose of

providing a fund for the maintenance or employment of a band for municipal purposes. No such levy by any such municipality shall exceed, in any one year, the sum of $10,000 nor such levy by any such towns shall exceed the sum of $1,500. Any and all sums so levied shall be separately levied and when collected shall be paid into a separate special fund and used for these purposes. In the event taxes have been levied and collected for the maintenance or employment of a band for municipal purposes and the band shall have been discontinued or the city, village, borough, or town by a vote of the people as now provided by law shall have decided not to employ a band, the city or village council may transfer the sums so levied and collected to the general fund of the municipality; no such levy shall be made for any such fund when, at the proper time for the making thereof, according to the municipal records of the receipts thereof and disbursements therefrom, there shall be in the fund an unexpended balance amounting to as much as the maximum levy permitted by law therefor, reckoning in such receipts all uncollected but not delinquent taxes, and reckoning in such disbursements all outstanding obligations against the fund."

Section 449.06, as amended, is applicable only to cities of the fourth class operating under a home rule charter or a commission form of government, and the amendment by chapter 100 authorizes a tax levy of not to exceed 1½ mills and in excess of existing mill limitations but not in excess of any existing per capita limitations. The total sum levied or expended in any one year for such purposes shall not exceed $3,500.

Sections 449.09 to 449.14, inclusive, have their origin in Laws 1927, c. 79. These statutes are also applicable to cities of the fourth class, however organized, and the amendment, chapter 563, supra, authorizes a tax levy each year of not exceeding 3 mills so as to produce a sum of not exceeding $10,000 for the maintenance or employment of a band for municipal purposes when authorized by the voters as provided for in sections 449.10, 449.11, and 449.12. It appears that the voters have authorized a tax levy of not to exceed 3 mills pursuant to the provisions of the aforementioned statutes, and for the purposes therein stated, and that such action has never been rescinded as provided for under the provisions of section 449.13.

We do not believe that section 449.06, as amended by chapter 100, supra, and section 449.09, as amended by chapter 563, supra, are incompatible or inconsistent. Neither the original acts nor the amendments contain repealing provisions. Under chapter 100 the levy therein authorized may be made in excess of existing mill limitations not exceeding, however, the sum of $3,500, but not in excess of existing per capita limitations. The legislative grant or authority is not ambiguous.

In our opinion the two statutes above mentioned should be construed as cumulative and not as being inconsistent with each other, and the city of Springfield, which is within the scope of both acts, may avail itself of either

or both of these acts, subject to the limitations therein provided, and use the proceeds resulting from tax levy or levies for the purposes authorized by these statutes.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Springfield City Attorney.
June 1, 1949. 519-H

108

Warrants — Anticipation — Tax anticipation warrants issued to pay cost of construction of buildings on county fair grounds — "Public sale" construed — L. 1947, c. 449, § 2; M. S. 1949, § 475.60.

Facts

Laws 1947, c. 449, § 2, prescribing that tax anticipation warrants therein provided to be issued by the county board without vote of the electors to pay the cost of construction of buildings on county fair grounds **"shall be sold at public sale."** L. 1947, c. 449, contains no definition of the phrase "public sale," and you have "found no statutory definition of public sale."

Question

What notice, if any, must be given and what other steps are required to comply with the requirements of the "public sale" prescribed by L. 1947, c. 449?

Answer

What did the legislature mean when, in L. 1947, c. 449, it used the phrase "public sale"? In attempting to ascertain the legislative intent, we should consider, among other things, other statutes relating to the same subject matter — the sale at public sale of evidences of public indebtedness — so far as they shed light on the question here involved. See **Stabs v. City of Tower** (1949), 229 Minn. 552, at p. 557, 40 N. W. 2d 362. At the time of the enactment of L. 1947, c. 449, the then existing public indebtedness chapter (M. S. A., c. 475) provided for the manner of sale of municipal obligations at public sale where no different method of sale was specifically provided in the act or charter authorizing the same. See M. S. A. 475.15, repealed by L. 1949, c. 682. L. 1949, c. 682, § 10, now coded as M. S. 1949, § 475.60, prescribes the method of sale of obligations at public sale.

I am of the view that the requirements of M. S. 1949, § 475.60, should be followed in respect of the sale of the warrants involved.

LOWELL J. GRADY,
Assistant Attorney General.

Steele County Attorney.
August 11, 1950. 107-A-1

109

Warrants — Endorsements — County treasurer must use reasonable diligence in determining endorsement of payee to be genuine before he pays auditor's warrant — Administration of old age assistance law — M. S. A. 385.31.

Facts

In the administration of the old age assistance law in your county, the county agency certifies to the county auditor the names of persons to be paid old age assistance and the amounts to be paid to each, respectively. The auditor prepares an instrument in the following form:

"WELFARE WARRANT CHECK OLD AGE ASSISTANCE NO.....
For payment of claim allowed by law (Chapter 95, Special Session Laws 1935-1936).

"TREASURER OF WADENA COUNTY, WADENA, MINN.

....., 194....

"PAY DOLLARS $.....
to the
order
of

.....
County Auditor.

Thru—
First National Bank 75-223
Wadena, Minnesota 9

.....
Accepted County Treasurer."

The auditor signs the same. The county treasurer also signs and it is then mailed to the old age assistance recipient. Ordinarily the recipient goes to a bank and sometimes to the treasurer, endorses the same, and receives his money. The instruments often find their way to the bank. The bank presents it to the treasurer and the treasurer pays the same.

Question

"Is it not the duty of the County Treasurer as the disbursing agent of the county to exercise reasonable diligence to ascertain the correctness of the endorsement by the payee, and if necessary to check those endorsements against signature cards which are obtained from recipients by the County Welfare Agency?"

Opinion

It is assumed that your county operates on a cash basis. M. S. A. 385.31 states the duty of the treasurer to pay warrants drawn upon him. It is apparent that the instrument used for the payment of such claims in your

county is an attempt at compliance with the last sentence found in the cited section. After the warrant is countersigned by the treasurer, it is a check for the payment of the money required to the person named as payee.

In **Board of County Commissioners v. Elmund**, 94 Minn. 196, 102 N. W. 719, it was held that:

> "Where the county treasurer recognizes an order on the treasury issued from the county auditor's office on the proper blank, which is in all things regular on its face, and issues a check upon the legal county depositary for the sum named therein, payable to the person who is designated as payee, and apparently entitled to receive the same, then delivers such check to the pretended representative of such payee in good faith and without negligence, neither he nor his sureties are liable on his official bond for a forgery of the order or of the indorsement of the payee named thereon."

This case turned on the fact that the treasurer had acted in good faith and without negligence. But it approved the doctrine in **Board Commrs. of Ramsey County v. Nelson**, 51 Minn. 79, 52 N. W. 991, where it was held that, "if the treasurer was negligent in failing to ascertain whether the purported signatures of the payees of certain fraudulent certificates were genuine, and such negligence being the immediate and proximate cause of the loss to the county, the treasurer and his sureties would be liable."

When the county treasurer is negligent in the performance of his duty in paying out money belonging to the county, he does not execute the duty of his office. He does not safely keep the money. He does not pay it over according to law. All these things he engages to do when he takes office. He gives bond that he will do these things.

My conclusion is that it is the duty of the county treasurer to exercise reasonable diligence to ascertain that the payee named in the warrant has endorsed it before he pays it.

CHARLES E. HOUSTON,
Assistant Attorney General.

Wadena County Attorney.
October 18, 1949. 450-A-16

110

Warrant — Signature — Signing of warrants by rubber stamp facsimile of mayor's signature — Warrant held valid when stamp is affixed by mayor's authority.

Question

> "In lieu of the mayor signing warrants for payment of bills and accounts against the City allowed by the Council, may his signature be affixed by the use of a rubber stamp with his facsimile signature thereon?"

Opinion

You refer to Sec. 19 of your city charter which as to the duties of the mayor requires: "He shall sign all warrants and all orders drawn on the treasury and all bonds, obligations, and contracts on behalf of the City except as may be otherwise provided for herein." You also refer to Sec. 28 of the charter with respect to the duties of the treasurer, which provides: "The treasurer shall pay no money out of the treasury except in the following cases: Upon an order or warrant properly drawn and countersigned which has been first duly authorized by the Council." You also refer to Sec. 84 of the charter which provides: "All money * * * shall be under the management * * * of the Council and money shall be paid out upon the warrant of the mayor countersigned by the clerk * * *."

I think the important question is whether the signature of the mayor is authorized and directed by him.

See **Conlan v. Grace**, 36 Minn. 276, 281, 30 N. W. 880, where our court holds that it is not necessary that a grantor should actually write his signature to a deed with his own hand; it is sufficient if written by the grantor's authority.

Hence, if the mayor's signature is affixed to a warrant by a rubber stamp, when authorized and directed to do so by the mayor, I think the warrant is valid.

RALPH A. STONE,
Assistant Attorney General.

Worthington City Attorney.
April 27, 1949. 59-A-49

HIGHWAYS

111

Bridge — Town road — Vacation — A bridge constitutes a part of highway, M. S. A. 160.01, subd. 6, including town road, M. S. A., Ch. 163. Upon vacation of a town road where town merely has a road easement therein, title vests in the abutting property owner — Whether title to bridge forming a part of vacated road remains in town or vests in abutting owner is an open question in this state.

Facts

The town board of the town of Friendship recently straightened out a town road which replaces in whole or in part the old road. The board plans to vacate the old road, in which section exists a bridge. The owner of the land contiguous to the road to be vacated has offered to pay the town $400 for the bridge. Other parties have offered the town $800 for the bridge. The vacation proceedings will be initiated under either section 163.13 or section 163.19.

Question

Upon vacation of the old road wherein the bridge is located, will the title to the bridge remain in the town or will the title to the bridge and the vacated road vest in the abutting property owner or owners?

Opinion

We are not informed as to whether the town owns the title to the road sought to be vacated in fee or merely has a road easement therein. Neither are we advised as to whether the lands abutting the right of way upon which the bridge exists are owned by the same person. We have not been advised as to whether the award for damages to the landowner upon which the lands for road purposes were taken by the town included any provision or condition relative to the construction and maintenance of the road in question. We have not been advised whether the bridge in question affords access from one part to another part of the land of the same abutting owner.

If the town owns the title to the right of way upon which the road and bridge exist in fee simple, and where the road is to be vacated, then the title of the town in such bridge would not be impaired as the result of the vacation of the road.

We shall assume that the town merely possesses a highway easement in that portion of the road including the bridge which it is proposed to vacate.

A highway easement is an interest in real property. **Burnquist v. Cook,** 220 Minn. 48, 53, 19 N. W. 2d 394. A bridge by statute constitutes part of a highway. M. S. A., § 160.01, subd. 6, and town roads are included. Ch. 163.

A highway easement is an intangible interest in property. It merely gives to the political subdivision of the state possessing the same the right to use a particular strip of land for highway purposes, and such political subdivision holds such easement in trust for the public for the use and purposes for which it was acquired. The fee remains in the abutting owner or owners, subject to the burden of the highway easement. Dunnell's Digest, Vol. 3, § 4183.

In **Roseau County v. Township of Hereim,** 149 Minn. 292, 294, 183 N. W. 518, the Court said:

> "The trial court held that the material taken from the old bridge as well as the culverts belonged to the county, and judgment was ordered against the town for the value thereof with costs of the action. We concur in that conclusion. Whatever proprietary title or interest the town had to the material during the time the road remained a town charge, ceased and ended by operation of law when it passed to the control and jurisdiction of the county by the action of the commissioners in declaring it a part of the state road, as authorized by the statute. The town originally held merely the naked legal title to the material in trust for the public; the legislature lawfully could transfer the title to the county as the new trustee. 19 R. C. L. 766; City of Columbus v. Town of Columbus, 82 Wis. 374, 52 N. W. 425, and note in 16 L. R. A.

695. Such was the necessary legal effect and operation of the statute following the action of the county board thereunder. Both the county and town are mere agencies of the state with no rights in the discharge of governmental functions superior to the state. Merchants National Bank of St. Paul v. City of East Grand Forks, 94 Minn. 246, 102 N. W. 703."

The general rule is to the effect that the vacation of a highway is to extinguish the public easement therein and to relieve the governmental body having charge thereof from the duty to keep the vacated portion thereof in repair. Upon vacation of a highway the general rule is that the fee to the land involved reverts to the owner thereof. McQuillin Municipal Corporations, 2d Ed., § 1352. **Steenerson v. Fontaine**, 106 Minn. 225, 119 N. W. 400.

Under date of March 29, 1923, file 642-B-4, it was held by the Attorney General that "upon legal vacation of the town road the culvert and bridge material thereon still belong to the public, and may be removed or sold by the public, which in this case is the town."

We have not found any decision of our own Court upon the particular question presented. The Wisconsin Supreme Court has passed upon this question, and its conclusion is contrary to the aforementioned and enclosed copy of attorney general's opinion. A Wisconsin statute similar to our own provides that a bridge shall constitute a part of a highway. Wisconsin has a statute which provides that upon vacation of a road the title vests in the abutting owner or owners. This statute is a statement of the common law rule which has been applied and followed by our Court in the Roseau County case, supra. The Wisconsin Court, in **Carpenter v. Town of Spring Green**, 285 N. W. 409, at page 411, said:

"By virtue of the provisions of sec. 80.32 (3), at the moment when the highway in question became effectively discontinued, it belonged to the owners of the adjoining lands. In order to uphold the judgment of the circuit court we should have to say that whenever a highway is discontinued it should be broken up into its component parts,—land, grading and bridges,—and hold that only the land and grading belong to the adjoining owners and that the bridges, which immediately theretofore were a part of the highway, belong to the town. We cannot read out of the plain words of the statute a meaning which would permit of such a construction.

"It is our opinion that when the highway in question was discontinued, it became the property of the adjoining land owners and that the highway included the bridge structures thereon. Since the judgment must be reversed, it becomes unnecessary to consider the question of damages raised by the motion of the town of Spring Green for review."

As to the liability of a town for damages resulting to a landowner having a special interest in a road or a bridge, see **Underwood v. Town Board of Empire**, 217 Minn. 385, 14 N. W. 2d 459, and **In Re Petition of Krebs to Vacate Street**, 213 Minn. 344, 6 N. W. 2d 803.

In order to avoid legal complications relative to the ownership of the bridge upon vacation of the road in question, we believe that the town board could incorporate in and make a part of such vacation proceedings, including the final order, a proviso and condition to the effect that the title to the bridge is reserved in the town with the right to remove or otherwise dispose of the same as the governing body of said town shall determine.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Friendship Township Attorney.
March 30, 1950. 642-B-4

112

Bridge — Width — Bridge in park — If bridge is on and part of a public road or highway, M. S. A. 160.03 and 164.22 apply.

Facts

Your city contemplates building a bridge over a nonnavigable stream located in a city park within the city limits. It is proposed to build this bridge 16 feet wide.

Question

Whether M. S. A. 160.03 pertaining to the width of bridges would be applicable in the case of this bridge.

Opinion

The answer to this question depends upon the purpose for which the bridge is constructed. If it is merely constructed for use as a foot bridge and not for vehicular traffic, I would say that M. S. A. 160.03 is not applicable.

On the other hand, if the bridge is to be part of a road or highway, as defined in M. S. A. 160.01, I think that M. S. A. 160.03 is applicable.

M. S. A. 160.01, Subd. 6, provides that the words "road" or "highway," whenever used in Chapters 160, 161, 162, 163, and 164, shall mean, unless otherwise specified, the several kinds of highways, as defined in this section, and also cartway, street, alley, avenue, boulevard, **together with all bridges** or other structures thereon which form a part of the same.

Hence, if this bridge is for the purpose of carrying a public highway across the nonnavigable stream, it is part of the public highway, and the requirement of § 160.03 that it shall be at least 20 feet wide is applicable.

Question

Whether the city is governed by M. S. A. 164.22 pertaining to the letting of contracts for the construction of a bridge.

Opinion

This question is answered in like manner. If the bridge carries a public road or highway across the stream, that is, if the bridge is a part of such public road or highway, M. S. A. 164.22 would apply to the contract for the construction thereof; if it is not a highway or road bridge but simply a foot bridge for pedestrians, M. S. A. 164.22 does not apply.

RALPH A. STONE,
Assistant Attorney General.

Owatonna City Attorney.
March 25, 1949. 642-A-5

113

Cartways — Established by town boards are two rods wide — M. S. A., § 163.15. M. S. A., § 160.19, applies only to roads established by user and has no application to cartways established by town boards.

Facts

For many years a cartway has been laid out and established to a width of two rods. It extends between points A and B. Public funds have been expended for improvement and repair of the road for more than six continuous years. Such maintenance and repair was always within the two-rod limit.

Attention is called to M. S. A., Sec. 160.19.

Question

Under the section cited, or any other statute, may the town improve the road to a width of four rods over the objection of the adjoining property owners?

Opinion

I understand the question to involve the right of the town officers to enter upon the strip one rod wide on each side of the cartway boundaries without taking the steps required by law to acquire an easement thereon. In other words, does Section 160.19, in and of itself, give the public an easement to a width of two rods on each side of the center line of the road in the absence of appropriate proceedings taken by the town, county or state, irrespective of the fact that the extra two rods has not been traveled and worked. In **Bosell v. Rannestad**, 226 Minn. 413, 33 N. W. (2d) 40, the court said:

> "* * * Section 160.19 is not exclusive and did not supersede the common-law rule of dedication of a highway to public use. Klenk v. Town of Walnut Lake, 51 Minn. 381, 53 N. W. 703."

On the same page the court also said:

"The rules for the establishment of a public highway by common-law dedication have been fully stated in Keiter v. Berge, 219 Minn. 374, 18 N. W. (2d) 35."

The court also said:

"While it is necessary, in order to establish a public highway by statutory user under § 160.19, to show that the highway has been used by the public and also that it has been kept in repair by the public at public expense for the prescribed period, Minneapolis Brg. Co. v. City of East Grand Forks, 118 Minn. 467, 136 N. W. 1103; Town of Wells v. Sullivan, 125 Minn. 353, 147 N. W. 244; Whiteley v. Strickler, 159 Minn. 145, 198 N. W. 420, it is not necessary, in order to establish a common-law dedication of a highway, that the public keep the road in repair. Carpenter v. Gantzer, 164 Minn. 105, 204 N. W. 550; Rose v. Village of Elizabethtown, 275 Ill. 167, 114 N. E. 14; Dickinson v. Ruble, 211 Minn. 373, 1 N. W. (2d) 373; Keiter v. Berge, 219 Minn. 374, 18 N. W. (2d) 35."

And the court further said:

"The intent of the owner to dedicate a road may be implied from a long-time use by the public, Case v. Favier, 12 Minn. 48 (89); Dickinson v. Ruble, supra."

Thus we see several methods by which land may be dedicated to public use for a road.

In the facts that we are considering, the improvement and repair of a road has been confined to the two-rod limit. To that extent it has been used and kept in repair. The repair has been at public expense.

The only conclusion attempted herein to be expressed is whether this road is now established to the full width of four rods under Section 160.19.

Gilbert v. Village of White Bear, 107 Minn. 239, 119 N. W. 1063, held that Chapter 152, L. 1899, providing that, when a road has been used, kept in repair, and worked for six years continuously as a public highway, the same shall be deemed to have been dedicated to the public to the width of two rods on each side of the center line of the road, has no application to roads which had become established highways by user prior to the time the act took effect.

Our facts under consideration do not show when this road was established.

But the facts do show that a cartway was established. Cartways are recognized in the law. They are two rods wide. M. S. A., Sec. 163.15. That being the defined width of a cartway, I fail to see that Sec. 160.19 has any application for the reason that it applies to roads dedicated by user, whereas cartways are the result of the establishment by the town board. Accordingly, it is my opinion that your question requires a negative answer.

CHARLES E. HOUSTON,
Assistant Attorney General.

Otter Tail County Attorney.
February 10, 1949. 377-B-1

114

Condemnation — Taxes — Lien — When same accrues — M. S. A. 117.02, subd. 3; 117.05; 272.31.

Facts

"In a land condemnation proceeding in connection with the widening of an existing state highway in Itasca County, a proceeding commenced in October, 1948, listed the County of Itasca as a lien holder on a certain parcel of land by virtue of delinquent taxes.

"When the award was made in March of 1949, the check for the damages sustained as a result included the County of Itasca as an interested party. The land owner has now presented this check to the County Treasurer together with a tendered payment of the delinquent taxes, and requested the County Treasurer to endorse this award check.

"The County Treasurer has refused to so endorse such check until the 1948 current taxes are also paid, and on the basis of our study of pertinent legislation, we are disposed to agree with him."

Question

Did the 1948 taxes, even though not then delinquent, constitute a lien on the premises subject to the condemnation proceedings at the time the "taking" therein occurred?

Opinion

The question is answered in the affirmative.

The County of Itasca is a proper party in the condemnation proceeding involved. M. S. A. 117.05 provides that the petition in the proceeding, among other things, shall give "the names of all persons appearing of record or known to the petitioner to be the owners thereof." M. S. A. 117.02, subd. 3, prescribes that the word "owner" extends "to all persons interested in such property as proprietors, tenants, **encumbrancers, or otherwise.**"

M. S. A. 272.31 provides:

"The taxes assessed upon real property shall be a perpetual lien thereon * * * **from and including May first in the year in which they are levied,** until they are paid; but, as between grantor and grantee, such lien shall not attach until the first Monday of January of the year next thereafter."

See **Merle-Smith v. Minnesota Iron Co.**, 195 Minn. 313, 262 N. W. 865; **Merrimac Mining Co. v. Gross**, 216 Minn. 244, 251, 12 N. W. 2d 506.

Accordingly, at the time of the "taking" in the condemnation proceedings here involved the lien for the 1948 taxes had accrued, and such lien cannot be properly discharged without the payment thereof.

LOWELL J. GRADY,
Assistant Attorney General.

Itasca County Attorney.
April 28, 1949. **229-A-11**

115

Construction — Road and bridge fund — County aid roads — Appropriation by town meeting for county aid road purpose may not be used for construction of town roads — M. S. A. 163.01, 163.02, 296.36, 296.38, 365.10, 365.03.

Facts

The Town of Manston in Wilkin County for several years past at the annual town meeting has levied taxes for road purposes "to be set aside for the construction of county aid roads." The money collected from such taxes is in the road and bridge fund.

Due to the financial condition of the county, it appears that no county aid roads can be constructed for a considerable length of time. I understand that such roads cannot now be built by the county and that there is no immediate prospect for improvement of the county's financial situation. The town supervisors are of the opinion that such town road funds should be used for the construction of town roads now needed and considered necessary. At the town meeting held this month the matter of so using such funds was considered. A majority of the electors voted that such funds be held until the county could assist in the construction of county aid roads.

Question

Upon these facts, does the town board have the power to exercise its judgment and use such funds to construct town roads, contrary to the expressed views of the voters?

Opinion

County aid roads are constructed, improved, and maintained by the county (M. S. A. 296.36), whereas town roads are under the general care and supervision of the town board (M. S. A. 163.01).

The town board may appropriate to the county moneys out of its road and bridge fund, and any moneys so appropriated shall be expended by the county in the construction and maintenance of county aid roads within such town (M. S. A. 296.38). It, therefore, appears that, under authority of 296.38, the town board may appropriate and pay the money in question to the county, whereupon the county has the obligation imposed. It would seem that the purpose of the voters would be thereby accomplished. But that is not the question.

A broad view of the action taken at the town meeting appears to conform to the authority of M. S. A. 163.02, which reads:

> "Any town may at its annual meeting determine to authorize the town board to expend through the county board of the county in which such town is situated funds of the town for the construction, improvement, and maintenance of roads within such town, with the construction, improvement, and maintenance of which the town is charged by law."

An examination of former opinions of the Attorney General fails to disclose any opinion stating that, where a town meeting has voted a tax to be spent for a particular purpose, the town board has the right to spend the money so raised for any other purpose.

The general powers of the town meeting are stated in M. S. A. 365.10. It has only such powers, plus such special powers as are specified in other statutes, as have been hereinbefore mentioned (M. S. A. 365.03).

The town meeting has the granted power "to vote money for the repair and construction of roads and bridges." It was held in **Childs v. Hillsborough Electric Light & Power Co.**, 70 N. H. 318, 47 A. 271, 272, 44 W. & P., Perm. Ed., 454, that in Pub. St., c. 40, § 4, providing that towns may vote such sums as they judge necessary to light streets, "vote" and "appropriate" have the same meaning. So, when the town meeting has the power to vote money for the repair and construction of roads and bridges, this language means that the town board has the power to appropriate money for that use.

The definition of the term "appropriate" is: "to consign to some particular purpose or use; to set apart for some use." **Henry v. Trustees of Perry Tp.**, 48 Ohio St. 671, 677, 30 N. E. 1122, 1124.

> "The appropriation of public money and its disbursement are two different and separate acts. Webster's definition of 'appropriation,' so far as here pertinent, is: 'The act of setting apart or assigning to a particular use or person in exclusion of all other; application to a special use or purpose, as of money to carry out some object.' 'Disbursement' is of course the same as 'payment.' In our systems of government, federal and state, the appropriation and the payment of public moneys are always kept distinct, and appropriations are often coupled with some condition whose performance is to come after the appropriation, but before the actual payment. Brown v. Honiss, 68 A. 150, 158, 74 N. J. L. 501." 3 W. & P. 803.
>
> "An 'appropriation' is the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other. State ex rel. Finnegan v. Dammann, Wis., 264 N. W. 622, 624." 3 W. & P. 805.
>
> " 'Appropriation' of money is the setting it apart officially, out of public revenue for special use or purpose, in such manner that executive officers of government will have authority to withdraw and use such money, and no more, for such object, and for no other. Const. art. 9, § 4. There is a pronounced distinction between the 'appropriation' or the setting aside of a sum of money for a particular thing, and the actual 'disbursement' of funds to meet the object of such an 'appropriation.' State ex rel. Kurz v. Lee, 163 So. 859, 871, 121 Fla. 360." 3 W. & P. 806.

It thus appears that the action taken at the various town meetings as above stated had the effect of setting apart or assigning the money voted to be used in the construction and upkeep and repair of county aid roads, and

for no other use. It was set aside for that purpose. The object for which the money could be used was specified. It could be used for no other use. When used, it must be to meet the objects of the appropriation.

In the light of these decisions and in the light of the action taken at the various town meetings, these funds are dedicated to the purpose for which they were appropriated in the vote of the people. To say that the town board may spend the money to accomplish objects not chosen by the people when they dedicated the money they voted, when the tax is to be imposed upon themselves, is to say that the voters at the town meeting may vote to impose taxes for road purposes without a voice in designating the purposes for which the money can be used. This would seem to be an unnatural and absurd interpretation of what the legislature meant when it wrote these laws.

Accordingly, it is my conclusion that the town board is not authorized, in the face of the action taken at the town meetings, to disregard the wishes of the voters and spend this money in question, as though it had been raised from tax levies without condition, for ordinary town road and bridge purposes.

CHARLES E. HOUSTON,
Assistant Attorney General.

Wilkin County Attorney.
March 24, 1950. 380-B-4

116

Establishment — Town roads — Delay or neglect in filing order establishing town road with county auditor under M. S. 1949, § 163.13, Subd. 6, will not destroy such an order made by lawful authority.

Facts

The town clerk has a book entitled "Town Road Record" in which there is recorded a number of proceedings for the establishing and vacating of town roads. The record in this book is signed by the supervisors and each order is signed by the supervisor. The town made several orders establishing roads in 1913. A record of these orders has not been located in the office of the county auditor where the orders are required to be filed in accordance with M. S. 1949, § 163.13, Subd. 6.

Question

Does the failure of the town board to send an order establishing a road to the county auditor for filing affect the validity of such a road order?

Opinion

Minnesota Statutes 1949, § 163.13, relates to the establishment, alteration or vacation of town roads. Subd. 6 thereof, in so far as it relates to your inquiry, requires that after the order establishing a town road has been

confirmed, the order and the award of damages shall be, by the town clerk, recorded and sent to the county auditor, who shall file and preserve the same. The substance of Subd. 6 has been in the law for many years and appears in Revised Laws 1905 as § 1176 and in General Statutes 1913 as § 2535.

On the basis of the facts submitted, apparently the town board entered the orders establishing roads in the book entitled "Town Road Record" in lieu of sending the original order to the county auditor for filing as required by the statute. If the orders establishing the roads to which you refer are otherwise valid, we do not believe that the failure to file the orders with the county auditor affects the validity thereof.

There is nothing in the statutory provision referred to and in the antecedent statutes which requires that the order shall be sent to the county auditor for filing and the preservation of the same within a fixed period of time. In the absence of such a mandate in the statute requiring the sending of the original order to the county auditor, it would seem that mere delay or neglect will not destroy an order establishing a town road by lawful authority.

In **Freeman v. Township of Pine City**, 205 Minn. 309, 286 N. W. 299, wherein the court was concerned in a declaratory judgment proceeding with the question of whether a township had the right to construct or maintain a public road on a town line, one of the matters discussed related to the filing of a road order with the town clerk. With reference thereto, the court said:

> "The statute does not state at what time a duplicate or copy of the order laying out the road must be filed with the town clerk of the town that did not take the leading part in the proceeding. In fact there is no statutory requirement that any document touching the proceeding be so transmitted for filing. In the absence of such mandate, it would seem that mere delay or neglect of either clerk of the two towns to file or transmit some document should not destroy an order establishing and laying out a public road by lawful authority. The laying out of a public road by town supervisors or county commissioners is not to be tested by the strict rules pertaining to court proceedings. State ex rel. Simpson v. Rapp, 39 Minn. 65, 38 N. W. 926. In Anderson v. Supervisors, 92 Minn. 57, 59, 99 N. W. 420, 421, it was said:
>
> " 'Proceedings in the matter of laying out public highways have always been treated liberally by this court, and the statutes on the subject construed broadly, and with a purpose to facilitate the action of public authorities. To apply strict rules of jurisdiction would result in rendering invalid nearly all such proceedings, and be subversive of the best interests of the public'."

We therefore answer your inquiry in the negative.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Attorney for Town Board of Lincoln Township.
November 8, 1950. 377-B-10-d

117

Establishment — Town roads — Duty to construct when funds sufficient — M. S. 1949, § 160.09, 163.01, 365.10 (6), 160.17.

Bids and contracts — Failure to advertise — Where preliminary agreement with contractor is amended during course of work so as to bring cost thereof above $500, provisions of M. S. 1949, § 160.39, applicable — Application of rule of Kotschevar v. Township of North Fork, 229 Minn. 234, 39 N. W. 2d 107, fact question—If situation within rule of Kotschevar case, liability of township already fixed; if not within rule, town meeting cannot make contract valid.

Facts

"In 1917, by proceedings under G. S. 1913, Sec. 2530-2538, now M. S. A., Sec. 163.13, a town board established a mile long road running north and south between Secs. 32 and 33. Some 20 rods of the road at the southerly end were then opened. About 4 years ago, another 20 rods joining the part earlier opened were opened, but nothing more was done on the road. The town board has now hired a road builder to extend the road and he has completed the opening of the mile."

Question

"Could the town board, in 1950, order the remaining part of the road opened pursuant to the order establishing the road entered in 1917?"

Opinion

This inquiry, as I understand it, is intended to raise the question whether the town board was authorized, in 1950, to construct the "remaining part of the road" established in 1917. If that is the question, it is answered in the affirmative.

M. S. 1949, § 160.17, provides:

"Every road established by the public authorities, where no appeal has been taken within the time limited therefor, is hereby declared to be a public road to all intents and purposes and all persons who have neglected to appeal within the time prescribed by law shall be forever debarred from any further redress."

We assume, for the purposes of this opinion, that the road involved was duly established. Once a road is legally established by the town board, it remains a public road until vacated as prescribed by statute. The road here involved, established in 1917, apparently has never been vacated. M. S. 1949, § 160.09, prescribes that all town roads shall be located, constructed, repaired, and maintained by town boards. M. S. 1949, § 163.01, commits to the town board of each town the "general care and supervision of all town roads therein." The exercise of the authority so conferred is subject to the limitation of the availability of funds for such purposes. The electors of

the town must first provide the necessary funds for any road improvement that may be undertaken by the town board. See M. S. 1949, § 365.10 (6). So far as I can ascertain, the statutes do not require a town to construct a road within a certain or limited time after the road has been established. See opinion of the Attorney General dated April 22, 1915, printed as Op. No. 335, 1916 Report of Attorney General.

In connection with the town road involved in your first question and with reference to the contractor hired by the town board "to extend the road," you state these

Additional Facts

"He (the contractor) was hired to do the work at so much per hour for his bulldozers and men. The preliminary hiring was that he would do the work, at so much per hour, until he had done $500 worth of work, and then complete the road next year. After it was commenced, the roadbuilder ascertained that to leave it unfinished might cause considerable expense for repair in the event of considerable moisture and he was instructed to go ahead and finish it. His entire bill runs around $1100.00. There were no plans and specifications filed and no advertising for bids.

"In this latter connection, * * * in 1949, $1500 was levied for road and bridge purposes and there is sufficient in the town's road and bridge fund to pay the amount involved."

Question

"Did the hiring of the roadbuilder at so much per hour, without bids and plans and specifications, violate M. S. A., Sec. 160.39?"

Opinion

M. S. 1949, § 160.39, provides that no town shall contract for the construction or improvement of any road where the contract price exceeds $500, unless plans and specifications shall have been made and prepared and filed and an award thereof has been made to the lowest bidder after advertisements as provided in M. S. 1949, § 164.22.

Opinion of the Attorney General dated April 7, 1925, printed as Op. No. 193 in the 1926 Report of Attorney General, holds that that statute **"has no application to work done by day labor."** But the arrangement involved in your inquiry was not an undertaking "by day labor." On the contrary, it appears that the town board agreed to pay the contractor involved in your inquiry so much per hour for his road-building machinery and his operators thereof. That is exactly the kind of arrangement that was involved in **Kotschevar v. Township of North Fork,** 229 Minn. 234, 39 N. W. 2d 107, the decision of which was predicated upon the application of M. S. 1949, § 160.39, to such situation. See also opinion of the Attorney General dated May 19, 1930, printed as Op. No. 292 in the 1930 Report of Attorney General. The "preliminary hiring" at an hourly basis until the contractor "had done $500

worth of work," standing alone, would fall outside the application of the statute. However, during the course of the work under the original agreement, the "preliminary hiring" was amended by mutual agreement to encompass an improvement the cost of which fell within the operation of the statute. In these circumstances, I am of the view that M. S. 1949, § 160.39, was applicable to the contract involved in your inquiry.

Question

If the contract involved is within the operation of M. S. 1949, § 160.39, "cannot the township pay the contractor under the doctrine of Kotschevar v. Township of North Fork, 229 Minn. 234?"

Opinion

The "doctrine" of the **Kotschevar** case, **supra**, as I understand it, may be summarized as follows: Where a contractor performs labor and furnishes services to a township in building town roads under a contract involving an expenditure in excess of $500 and no plans or specifications, no bids, no written contract, and no bond are provided for as required by M. S. 160.39, the township is, nevertheless, liable to the contractor for the reasonable value of the benefits received by the township from the performance of such labor and the furnishing of such services if (1) the contract involved was in its entirety within the power of the township to make, (2) the contract was made and carried out in good faith and without purpose or intent to violate or evade the law, (3) the contract was invalid only because the requirements of the law in respect of competitive bidding were not met, and (4) the township accepted the improvement and benefited thereby.

The **Kotschevar** case was decided by reference to the peculiar facts of that particular case. The application or nonapplication of the rule of the **Kotschevar** case to the situation presented by you is dependent wholly upon **all** the facts and circumstances attendant upon the making and the prosecution of the contract involved in your inquiry. We are not advised of **all** those facts and circumstances. For instance, one of the most determinative factual questions is the good faith of the contractor involved, and concerning that feature we are given no information. But, even if we were informed on that feature, there are so many other circumstances and factual features involved in any situation like this that the Attorney General could not with any finality determine facts concerning which there might be some dispute. It is not within the province of the Attorney General to pass on questions of fact; that is the province of a court of competent jurisdiction. Accordingly, I offer no categorical answer to this question. On the contrary, I answer it this way: If the rule of the **Kotschevar** case is applicable to the peculiar facts of the case submitted by you, the proper district court, at the suit of the contractor for the reasonable value of the benefits received by the township, will unquestionably, upon all the facts and circumstances adduced in evidence, so determine; if, however, the peculiar facts and circumstances in the case submitted by you do not bring it within the rule of the **Kotschevar** case, the town board has no authority to pay the contractor "under the doctrine of Kotschevar v. Township of North Fork."

Question

"Could the township, by a special meeting of the electors thereof, validate and ratify the hiring of the roadbuilder and payment of his bill?"

Opinion

If the peculiar facts of the case submitted by you bring it within the operation of the rule of the **Kotschevar** case, then, and in that event, the township is liable to the contractor for the reasonable value of the benefits received by the township. Nothing more. Nothing less. If that be so, the rights and liabilities of the parties are already fixed. They cannot be legally enlarged or delimited by action of the town meeting.

If the rule of the **Kotschevar** case is **not** applicable to the facts involved, then there is no liability upon the part of the town, the contract is void, and in those circumstances no recovery can be had upon **quantum meruit** for the benefits received. The town meeting has only such powers as are conferred by law, and breathing life, by attempted ratification, into a completely void contract out of which no rights can arise is not one of them.

LOWELL J. GRADY,
Assistant Attorney General.

Wadena County Attorney.
September 22, 1950.

377-B-10-d
707-B-5

118

Maintenance—Blacktop—State aid and county aid roads—County has duty of improving and maintaining state aid and county aid roads. Village cannot be compelled to contribute to the cost thereof; M. S. 1949, §§ 160.07, 160.43, 160.46, 296.36, 296.37. Village may contribute to cost of state aid and county aid roads under M. S. 1949, §§ 429.30-429.31 — Trunk-driveways from abutting property: road authorities obligated to furnish culvert on county aid road under M. S. 1949, § 160.31 but under no such obligation as to trunk highways.

Facts

A part of Wright County State Aid Road No. 6 runs through the village of Delano. Several years ago it was blacktopped by the county board within and without the village without any agreement between the village and the county relating to a division of the cost. The width and surfacing of the road are the same both inside and outside of the village.

Questions

1. May the county now compel the village to pay the cost of the blacktopping done within the village limits?
2. May it compel the village to pay any part of such cost?
3. Who bears the burden of maintaining this road inside the village limits, the county or the village?

Opinion

M. S. 1949, § 160.07, reads as follows:

> "All state aid roads shall be constructed, improved, and maintained by the counties under rules and regulations to be made and promulgated by the commissioner of highways, and the several counties are vested with all rights, title, easements, and appurtenances thereto appertaining, held by, or vested in any of the towns or municipal subdivisions thereof, or dedicated to the public use prior to the time such road is designated a state aid road."

M. S. 1949, § 160.43, in part, authorizes a county board, with the consent of the commissioner of highways, to designate a street or road within the corporate limits of a village as a state aid road and to improve the same. M. S. 1949, § 160.46, in part, makes it the duty of the county board of each county in which state aid roads may heretofore or hereafter be designated, to provide for the proper maintenance of the same in accordance with the rules and regulations of the commissioner of highways. We are unaware of any statutory provision compelling a village to contribute to the cost of improving a state aid road.

The first question is therefore answered in the negative; your second question is also answered in the negative; and we answer your third question by stating that the burden of maintaining a state aid road is on the county. See Op. No. 263, Report of the Attorney General for 1938, file No. 377-B-8.

See M. S. 1949, §§ 429.30 and 429.31 (L. 1949, c. 314), which authorizes a village to expend its funds on state aid roads pursuant to agreement with a county. See also M. S. 1949, § 160.36, which authorizes a village of not over 1,000 to oil and otherwise treat a state aid highway running through the village and to assess the cost thereof upon property benefited thereby.

Facts

Part of County Aid Road No. 6 of Wright County is within the limits of the Village of Delano. The road is blacktopped, but is in need of resurfacing. The width and surface of the road are the same inside and outside the village. The county contemplates resurfacing the road both inside and outside the village limits.

Questions

1. Who has the duty of maintaining the road inside the village, the county or the village?
2. May the county compel the village to pay any part of resurfacing the road inside the village?

Opinion

M. S. 1949, § 296.36, relates to the designation by the county board of county aid roads and provides in part:

> "All county aid roads shall be constructed, improved, and maintained by the county. * * * "

See also M. S. 1949, § 296.37.

In view of the foregoing statutory provisions, the duty of maintaining a county aid road duly established within a village is upon the county. We are unaware of any statutory provision whereby the county may compel the village to pay a part of the cost of resurfacing a county aid road within the village. But, the county board may revoke its designation of a county aid road at any time. M. S. 1949, § 296.36.

See M. S. 1949, § 163.10, which authorizes a village to expend moneys to assist in the improvement and maintenance of a road lying beyond its boundaries and leading into it. See also M. S. 1949, §§ 429.30-429.31 (L. 1949, c. 314), authorizing a village to enter into an agreement with a county for the improvement and maintenance of a county aid road located within the village.

Facts

County Aid Road No. 6 is graded and ditched within the village in such a way that persons now building homes on sides adjoining the property will require driveways to go to and from the highway.

Questions

1. Can the property owners require the public authorities to provide them with driveways, that is, pay the cost of the required culverts and filling without any expense to themselves?
2. If so, who must pay the cost or do the work, the village or the county?

Opinion

In the absence of any statutory requirement, the public authorities are under no duty to provide means of access to the highway from abutting premises or to such premises from the highway. 25 Am. Jur., Highways, § 71. However, M. S. 1949, § 160.31, reads as follows:

"The town boards, as to town roads, and the county boards, as to county and state aid roads, are hereby required to install one substantial culvert for an abutting owner in cases where by reason of grading a public highway the same is rendered necessary for a suitable approach upon such highway over driveways from abutting lands."

Under the foregoing statutory provisions, the property owners can compel the public authorities to comply with M. S. 1949, § 160.31. The county aid road being a county road, the duty of complying with the statutory provisions is imposed upon the county and not on the village.

Facts

The U. S. Highway No. 12 runs through Delano. In a part of the village the road is graded in such a way that there is a ditch on both sides thereof. Homes are being built on platted property adjoining said highway, and driveways will be required for the owners of said homes to have access to the highway. The driveways required will consist of culverts and dirt fill.

Questions

1. Are the property owners obliged to pay the cost of such driveways?

2. If not, who should bear the expense, the village or the state?

Opinion

From your letter we assume that the U. S. Highway No. 12 is a Minnesota Trunk Highway. If this assumption is correct, it is our opinion in the absence of any statutory requirement, that the public authorities are under no duty to provide means of access to the highway from abutting premises or to such premises from the highway. See 25 Am. Jur., Highways, § 71. We are unaware of a statutory provision similar to M. S. 1949, § 160.31 which is applicable to trunk highways.

Your first question is therefore answered in the affirmative; your second question requires no answer.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Delano Village Attorney.
June 2, 1950. 377-B-8

119

Passable roads—Town line—Authority of county board — M. S. A. 162.24.

M. S. A. 162.24 relates to impassable roads and the powers of the county board in respect thereto. Subd. 2 of that section, L. 1949, c. 30, § 1, relates to the hearings on complaints. When a complaint is made under Subdivision 1 and the county board finds that the complaint is well founded, it adopts a resolution directing the town board to do the work necessary

to put the road in passable condition. The statute provides for the service of this resolution on the town against which complaint is made. If such town neglects to put the road in condition, the county board has the power to cause such work to be done and to pay therefor from the county road and bridge fund, but the amount to be paid must not exceed two mills on the dollar of the taxable value of the town.

Attention is called to a situation where the road is on the town line between the towns of Fountain and Carrolton.

Questions

"1. Does Section 162.24 as amended by the laws of 1949, Chapter 30, grant to the County Board the authority to expend not to exceed two mills on the dollar of the taxable valuation on **each town?** In other words, is it the intent of the law that the County Board may expend not exceeding four mills (two mills in each town) where the road is situated on the line between two towns, whereas only two mills may be expended if the impassable or neglected road is wholly within one town?

"2. Under this section (162.24), is the County Board under any limitation or restriction as to the type and nature of said road to be built, or is it wholly within the discretion and judgment of the County Board as to the type of road-way to be constructed, name of contractor, etc.?"

Opinion

The answer to the first question is "no." One town has the obligation to maintain the section of a road which is in bad shape. The county board deals with that town, not with both towns. You will notice that in Subdivision 1 of this section the complaint relates to a road which is neglected by the town "charged by law with its maintenance and repair." In reading Section 163.17, Subdivision 2, you will notice that before making an order establishing a road under the provisions of this section, which applies to roads on town lines, the two town boards shall divide the length of the proposed roads into two parts, which parts may be of unequal length. After such order, it follows that the duty rests on the town to maintain the portion of the road assigned to it. So, in the consideration of your question, only the one town to which the section of the road is assigned is to be treated as the interested town.

The work to be done as required by the county board's resolution is such as the county board deems necessary to put such road in a passable condition. This does not mean that it must conform to the specifications of a county road or a trunk highway. When a road is in passable condition is, of course, a question of fact. If the county does the work, it may let the job on contract.

CHARLES E. HOUSTON,
Assistant Attorney General.

Attorney, Town of Fountain.
August 8, 1949. 379-C-8-C

119-A

Restricted use—Hard surfaced roads—M. S. 1949, Sec. 169.87, Subd 2, is to automatically restrict operation of vehicles on such county and town roads as are adversely affected by climatic conditions—"Hard surfaced roads" are not so adversely affected—What specific roads are hard surfaced roads is a question of fact—Minn. St. 1945, § 169.83; Minn. St. 1949, § 169.87, Subd. 1; Minn. St. 1949, § 645.16; L. 1947, c. 505, as amended by L. 1949, c. 695.

Facts

Attention is directed to Minnesota Statutes 1949, Section 169.87, Subd. 2, relating to the restricted use of town and county roads when restrictions are not imposed thereon pursuant to Subdivision 1 of said section and ask the following:

Question

What is the meaning of the words "hard surfaced roads" as used in Minn. St. 1949, Sec. 169.87?

Opinion

Minn. St. 1949, Sec. 169.87, Subdivision 1, was enacted in its present form by Laws 1937, Chapter 464, Section 129, and authorized local authorities and the commissioner of highways to prohibit the operation of vehicles upon any highway or impose restrictions as to the weight of vehicles to be operated upon any such highway, whenever any such highway, by reason of deterioration, rain, snow, or other climatic conditions, will be seriously damaged or destroyed unless the use of vehicles thereon is prohibited or the permissible weights thereof reduced. The text of the statutory provision in so far as it relates to local authorities appears to have been taken from the uniform act regulating traffic on highways as at one time proposed by the National Conference of Commissioners on Uniform State Laws. See 11 Uniform Laws Annotated, p. 69.

However, in order to prohibit or restrict the use of highways under Subdivision 1 of said Section 169.87, it is necessary to erect and maintain signs indicating the prohibition or restriction at each end of the portion of the highway affected thereby and the prohibition or restriction is not effective unless and until such signs are erected and maintained.

It is common knowledge in Minnesota that climatic conditions existing in the spring of each year have an adverse effect on many highways in the state and unless means are taken to protect these highways during the spring breakup heavy vehicular traffic thereon causes the roads to rapidly deteriorate and to become impassable. To protect these highways under Minn. St. 1949, Sec. 169.87, Subdivision 1, requires the expenditure of public moneys in the erection and maintenance of the required signs; an expenditure which is burdensome on most local road authorities.

To avoid the need for erecting and maintaining signs by counties and townships and at the same time provide an adequate means of protecting county and town roads from deterioration and damage from heavy vehicular traffic in certain sections of the state during the so-called spring breakup, L. 1947, c. 505, appears to have been enacted; it was subsequently amended by L. 1949, c. 695.

The new matter contained in these 1947 and 1949 enactments is Minn. St. 1949, Sec. 169.87, Subd. 2, and reads in part as follows:

> "Except where restrictions are imposed as provided in subdivision 1, no person shall operate any vehicle * * * 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 * * * exceeds 8,000 pounds; * * *; **provided, however, that this provision shall not apply to hard surfaced roads.** * * * "

The words "hard surfaced roads" as used in the underlined portion of the quoted provision are not defined in the statute. The meaning of the provision must be ascertained by considering the legislative intent. See Minn. St. 1949, Sec. 645.16 and annotations thereto.

In so far as is material to your inquiry, the purpose of Minn. St. 1949, Sec. 169.87, is expressed in the first paragraph of Subdivision 1 thereof, which authorizes road authorities to impose restrictions upon vehicles to be operated upon a highway when the highway by reason of rain, snow, or other climatic conditions would be seriously damaged or destroyed, unless the use of vehicles thereon was restricted. When rain, snow, or other climatic conditions do not adversely affect the use of a highway by heavy vehicular traffic, there is no reason for road authorities to impose restrictions on such use and such road authorities apparently do not do so.

Minn. St. 1949, Sec. 169.87, Subd. 2, in imposing an automatic restriction on the use of certain county and town roads between March 20 and May 15 of each year, in our opinion excepts from such restriction such roads as do not require protection during the so-called spring breakup from use by heavy vehicular traffic. The roads so excepted are the highways designated in the statutory provision as "hard surfaced roads."

It is therefore our opinion that a hard surfaced road within the meaning of the section of the statute discussed is a highway not adversely affected by rain, snow, or other climatic conditions which, if vehicles having a gross weight on any single axle in excess of 8,000 pounds as defined by Minn. St. 1945, Sec. 169.83, are operated thereon between March 20 and May 15 of any year, will not be damaged or destroyed. We believe that a concrete pavement is such a highway. Whether other types of constructed highways are "hard surfaced roads" within the meaning of the statutory provision as discussed herein involves a consideration of facts and not of law.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Otter Tail County Attorney.
June 8, 1950. 377-A

120

Width—Additional may be acquired—How—If upon petition, proceedings may be under M. S. A. 162.21. If on motion of county board without petition must be under M. S. A., C. 117.

Facts

A county road, four rods wide should be widened, regraded and otherwise improved. This involves acquiring an additional two rods of width for right of way. Proceedings were commenced under M. S. A. 162.21 but the county board allowed to the owners of the land no damages for the land taken. An appeal (§ 162.21, subd. 11) was taken by landowners to the district court from the action of the board in allowing no damages; but the appellant dismissed his appeal with the consent of the county board.

Question

May the county proceed under authority of M. S. A., Chapter 162, or must it proceed under authority of Chapter 117 to acquire the additional width of two rods, in case it is unable to obtain deeds from owners?

Opinion

M. S. A. 160.02 reads:

> "All roads, except cartways, established by town and county boards, shall be at least four rods wide and when necessary for the construction and maintenance or the safety of public travel additional right of way and easements for the erection of snow fences may be procured by purchase or condemnation, and the necessity for the taking of such additional right of way and such easements shall be determined by the town board, in the case of town roads, and by the county board, in the case of county roads."

The opinion of former Attorney General G. A. Youngquist, published in the Report for 1924 as opinion No. 172, refers to this statute and states that it is his opinion that under this act a county board may, when necessary for the construction or maintenance of the highway, procure additional right of way either by purchase or condemnation. If by condemnation, the opinion states, "proceedings should be had under §§ 5395, et seq., G. S. 1913 (M. S. A. C. 117)."

That opinion also calls attention to L. 1923, C. 439 (M. S. A. 160.02 et seq.), but he states that the act takes effect December 1, 1923, which was subsequent to the date of such opinion; hence, the procedure was not then available. Of course, that comment does not now apply to this procedure.

Another Attorney General's opinion is in the 1946 Report, No. 104. It calls attention to Sec. 160.02 and states that if the right of way is to be acquired by condemnation, the proceedings should conform to M. S. A. C.

117. But it does not say why the proceedings may not be conducted under Sec. 162.21, nor does the opinion, in fact, state that such proceedings may not be had thereunder.

It is my opinion that where there is a petition which conforms to Sec. 162.21, then the additional width may be taken under authority of that section. But where there is no petition, the county board does not have its authority granted in that section set in motion. It is the petition which sets the power of the board in motion. If the county board proceeds on its own motion, without a petition, then it must proceed to acquire the additional width under authority of Chapter 117.

CHARLES E. HOUSTON,
Assistant Attorney General.

Douglas County Attorney.
April 12, 1949. 817-N

INCORPORATION

122

Annexation Procedure—Territory under M. S. 1949, § 412.041, subds. 5 and 6—Validity thereof may not be collaterally attacked by private citizen, and can be tested only by quo warranto proceedings — State ex. rel. Childs v. Board of County Commissioners, 66 Minn. 519, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631; Evens v. Anderson, 132 Minn. 59, 155 N. W. 1040, followed — After annexation Town lost jurisdiction over streets and public places.

Facts

"Certain territory known as Forest Grove was annexed to the Village of Hibbing, pursuant to Section 412.041, Subdivisions 5 and 6, Minnesota Statutes Annotated. The Hibbing Village Clerk filed certified copies of the certificate of election with both the St. Louis County Auditor and the Secretary of State. Both the Secretary of State and the County Auditor shortly thereafter acknowledged receipt and filing of said certificate. The County Auditor further advised that the annexed lands were being entered on the tax rolls of the Village of Hibbing. The Village of Hibbing has a zoning ordinance which prohibits the moving of buildings without a permit first being applied for and granted. From about October 1st to about October 15th, a number of buildings were moved into the annexed territory without a permit being applied for or issued by the Village. However, a number of the owners of said buildings had secured permission from the Town of Stuntz, while the annexed territory was a part of the said Township. Complaints were issued out of the Hibbing Municipal Court for such alleged violations. Defendants now collaterally attack the annexation on the ground that only a certified copy of the certificate of election was filed with the Secretary of State and the County Auditor, whereas in Subdivision 5

of Section 412.041 provides that the certificate of election shall be attached to the original petition with a copy of the resolution calling for the electing and appointing the judges and the original proofs of posting of election notices, all to be filed as one document in the Village Clerk's office. As stated above, only a certified copy of the certificate of election was actually filed."

Questions

1. "Can the procedure followed in annexation of territory be collaterally attacked under a claimed violation of a Village Ordinance?
2. "Is the requirement found in Subdivision 6, Section 412.041, that the certificates, resolutions and proofs as stated above mandatory or directory, and as bearing upon the question as to whether annexation is complete upon the filing of only the certificate of election?
3. "Where as in this case a permit was issued by the Town of Stuntz at the time when the territory was a part thereof, but the actual moving took place after the people of the territory had voted themselves into the Village of Hibbing, and a certificate of election was filed, would a new permit from the Village of Hibbing be necessary?"

Opinion

1. Our court has held that the validity of the existence of a municipal corporation may not be directly or collaterally attacked by private litigants. Quo warranto at the instance of the Attorney General of the state is the exclusive proceeding to determine the legal existence of a public corporation.

In **Evens v. Anderson**, 132 Minn. 59, 155 N. W. 1040, the court said:

"A de facto public corporation has, as to all but the state, the qualities of a de jure corporation. Its right to exercise corporate functions can be challenged only by the state. Some courts have given as the reason that 'corporate franchises are grants of sovereignty only, and, if the state acquiesces in their usurpation, individuals will not be heard to complain.' Miller v. Perris Irrigation District, 85 Fed. 693, 699. Others place it upon consideration of public policy, suggesting the importance of stability and certainty in such matters and the serious consequences which might follow if the existence of a municipal corporation should be called into question, and perhaps determined void in actions between the corporation and private parties. State v. Honerud, 66 Minn. 32, 68 N. W. 323. But, whatever the reason, the rule is fixed by unanimity of authority that where a municipal body has assumed, under color of authority, to exercise the power of a public corporation of a kind recognized by the organic law, the validity of its organization can be challenged only by the state, and neither the corporation nor any private party can in private litigation question the legality of its existence." And cases cited.

In State ex rel. Child v. Board of County Commissioners of Crow Wing County, 66 Minn. 519, 529, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631, the court said:

"It is well settled in this court that an information in the nature of quo warranto will lie directly against the municipal corporation itself, to test the legality of its incorporation, and dissolve it if it is found to be illegally incorporated. State v. Tracy, 48 Minn. 497, 51. N. W. 613; State v. Minnetonka Village, 57 Minn. 526, 59 N. W. 972; State v. Village of Fridley Park, 61 Minn. 146, 63 N. W. 613. The question of the legal existence of a de facto municipal corporation cannot be raised in a collateral proceeding. Cooley, Const. Lim. (6th Ed.) 309; 1 Dillon, Mun. Corp. (4th Ed.) § 43a; Board of Commrs. v. Shields, 62 Mo. 247; Town of Geneva v. Cole, 61 Ill. 397; Coe v. Gregory, 53 Mich. 19, 18 N. W. 541; Rumsey v. People, 19 N. Y. 41.

"If an information in the nature of quo warranto is the proper remedy for ousting or dissolving a municipal corporation in toto, we see no reason in principle why it will not lie to oust such a corporation from specific territory over which it is wrongfully exercising jurisdiction, or to dissolve it so far as it covers that territory. The mistake of some of the courts seems to be in assuming that, as to such territory, the corporation may and should in all cases be wiped out as if it had never existed, which is the necessary effect of allowing its existence in such territory to be attacked collaterally. But, where the municipal corporation has acquired a de facto existence in such territory, this assumption is erroneous, and the corporation cannot, as to such territory, be thus wiped out. The state is entitled to dissolve it for all future purposes so far as it covers such territory, but not to wipe it out from the beginning, and thereby destroy all rights which have arisen by reason of such de facto existence, and create liabilities from which persons are protected by reason of the same. On the contrary, in settling and adjusting its affairs, the state itself will, as to such past transactions, recognize its de facto existence so far as required by justice and equity.

"True, the authorities all lay it down generally that quo warranto will not lie to prevent official acts in excess of jurisdiction, or to correct official misconduct. But, where a municipal corporation has permanently and continuously exercised jurisdiction over territory beyond its de jure limits, the case is not at all analogous to one of mere official misconduct, which is usually of a casual or temporary character, and to correct which quo warranto will not lie.

"Neither is the fact that the court should not or cannot completely dissolve the corporation, and end its existence, a sufficient reason why quo warranto will not lie. This court has several times held that an information in the nature of quo warranto will lie to oust from this state a foreign corporation doing business in the state contrary to law,

although no attempt was made to dissolve the corporation itself, and it could not be dissolved by our courts. State v. Fidelity & C. I. Co., 39 Minn. 538, 41 N. W. 108; State v. Somerby, 42 Minn. 55, 43 N. W. 689.

"To hold that the state, by its executive officers, cannot maintain some proper proceeding to prevent usurpation in the exercise of governmental powers over large tracts of territory within its borders, and that the private individual can do this, would, indeed, be a startling doctrine. Clearly, the state has sufficient interest in such a matter to entitle it to maintain an action to redress the wrong. A proceeding in the nature of quo warranto is the most appropriate remedy. Again, if an information in the nature of quo warranto will lie after the municipal corporation has acquired a de facto existence in the territory, we are of the opinion that it will lie immediately on the assertion by the corporation of jurisdiction over the territory. The state is not obliged to wait until so much time has elapsed that much mischief has been done by the inauguration of the new order of things within such territory, or until much confusion will arise by the dissolution of the municipality so far as it covers such territory. Then we are of the opinion that such a remedy is the proper one in this case."

In a later case, **State ex rel. Burnquist v. Village of North Pole**, 213 Minn. 297, 302, 6 N. W. 2d 458, the court said:

"Since the writ is an extraordinary legal remedy, it is not granted where another adequate remedy is available. State ex rel. Bell v. Moriarity, 82 Minn. 68, 84 N. W. 495. As to procedure in quo warranto, 'the general rule in this country is substantially that of the common law after St. 9 Anne, c. 20.' That procedure, 'but slightly modified, prevails in this jurisdiction.' State ex rel. Young v. Village of Kent, 96 Minn. 255, 266, 267, 104 N. W. 948, 952, 1 L. R. A. (N. S.) 826, 6 Ann. Cas. 905. And our cases uniformly hold that 'quo warranto is the proper and, in the absence of statute, the exclusive proceeding to determine the * * * legal existence or validity of the organization of a public corporation.' Evens v. Anderson, 132 Minn. 59, 63, 155 N. W. 1040; 5 Dunnell, Dig. & Supp., § 8064."

See also **State ex rel. Burnquist v. Leetonia**, 210 Minn. 404, 298 N. W. 717.

While the question here considered involves a collateral attack on the validity of the annexation of territory to a village, we think that the principle of law stated by our court in the cases above referred to and from foreign jurisdictions cited in these decisions is applicable to the question here presented.

Minnesota Statutes 1949, § 412.041 contains no specific provision for a judicial review of the proceedings, nor for an appeal from an order made in the course of the annexation proceedings. In that respect this statute varies from the detachment statute. Section 412.051, subd. 2.

In **People ex rel. v. Quisenberry** (Ill. 1912), 97 N. E. 697, on page 699 the court said:

"It is also a rule of law applicable to this case that the validity of the proceeding by which a municipal corporation is created cannot be determined in a collateral proceeding involving the enforcement of an ordinance or the liability to a penalty or tax, whether the objection is that the charter was never published as required by its terms or that its requirements were not complied with in any respect, or that the proceeding was defective or insufficient for any other cause. Town of Mendota v. Thompson, 20 Ill. 197; Hamilton v. President & Trustees of Carthage, 24 Ill. 22; Tisdale v. Town of Minonk, 46 Ill. 9; Kettering v. City of Jacksonville, 50 Ill. 39; Village of Nunda v. Crystal Lake, 79 Ill. 311. A city or village cannot be called upon to prove the regularity of its incorporation or its legal existence, either in a suit for penalties imposed by it or obligations to it, and the rule is the same for both parties, and precludes the corporation itself from denying its corporate existence for the purpose of escaping liabilities or evading its obligations. An indispensable element of a municipal corporation is territory, and an annexation of territory is to that extent a new organization of the municipality.

"An annexation of territory to a city or disconnection of territory from it is pro tanto a new organization of the municipality, and an act providing for annexation or disconnection is an act for changing the charter of cities and is upon the same footing as an act for original incorporation. State v. Des Moines, 96 Iowa 521, 65 N. W. 818, 31 L. R. A. 186, 59 Am. St. Rep. 381; City of Topeka v. Dwyer, 70 Kan. 244, 78 Pac. 417; 3 Am. & Eng. Ann. Cas. 239. The doctrine has been applied in a great many cases of annexation, where it has been held that the proceeding of the city council is not open to collateral attack for any defect in the exercise of jurisdiction. City of Albia v. O'Harra, 64 Iowa 297, 20 N. W. 444; Powell v. City of Greensburg, 150 Ind. 148, 49 N. E. 955; Schriber v. Langlade, 66 Wis. 616, 29 N. W. 547, 554; Sage v. Plattsmouth, 48 Neb. 558, 67 N. W. 455; People v. Smith, 131 Mich. 70, 90 N. W. 666. There is no ground for a distinction between a proceeding for annexation and one for disconnection of territory, and an immunity from collateral attack which exists in one case must necessarily apply to the other. The city did not have the right to question collaterally the validity of the ordinance on the ground that no petition was found by the city clerk, or that it was not proved that the petition which the evidence and recitals of the ordinance referred to was filed ten days before the action of the city council, or that the certificate of the county collector as to the payment of taxes, which the ordinance found had been paid, was filed with the petition."

Based upon the decisions above referred to, it is our opinion that the first question must be answered in the negative.

2. In view of our conclusions with respect to your first question, we believe that the validity of the annexation proceedings is a matter for determination by the court in a proper proceeding.

3. The permit to move buildings was issued by the town board having jurisdiction over the area which has now been annexed to the village. Upon annexation the town board lost jurisdiction and control over the streets and public places embraced within the territory annexed, and thereupon the jurisdiction and control thereof passed to the village. Consequently, any rights to use public streets within the annexed territory under the permit issued by the town board expired when the annexation proceedings were completed. In our opinion the village of Hibbing acquired jurisdiction and control over all streets and public places within the territory embraced in the annexation upon the completion of the annexation proceedings, and thereupon the town lost jurisdiction and control of such streets and public places. It therefore necessarily follows that any rights accruing by reason of the issuance of building permits by such town affecting buildings within the annexed territory expired upon the completion of the annexation proceedings.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Hibbing Village Attorney.
May 15, 1950. 484-E-1

123

Petitions—Withdrawal of names from petition: Under facts and at time stated, petitioners had right to withdraw their names, rendering petition insufficient—M. S. 1949, § 412.011, subds. 1, 2, 3.

Facts

"A petition was filed on October 16, 1950, with our Board of County Commissioners for the incorporation of a village to be known as Arden Hills. There were 33 signers of the petition. Laws 1949, Chapter 119, requires at least 25 signers.

"This petition was referred by the County Board to the County Auditor and the County Attorney to report as to the form and sufficiency of the petition. These officers reported that the petition was in proper form and sufficient.

"Action on this petition was continued from time to time at the request of various interested parties, but so far the date of election thereon has not been set.

"Today 25 of the petitioners have requested that their names be withdrawn from the petition.

"Also two new petitions were filed last week, both taking in all of the lands included in the first petition."

Question

"If 25 signers withdraw their names from the petition at this time, leaving 8 signers, does that make the petition insufficient?"

Opinion

Your inquiry raises this question: Did the 25 persons who withdrew their names from the petition on December 19, 1950, have on that day the right so to do under the facts stated?

That question is answered in the affirmative.

M. S. 1949, § 412.011, subd. 1, prescribes what territory may be incorporated as a village.

Sec. 412.011, subd. 2, provides for the taking of a census of the resident population of the area proposed to be incorporated under subd. 1. If the population is found to be within the limits prescribed by subd. 1, a petition may be prepared and submitted to the board of county commissioners requesting the board to call an election on the question of incorporation. The statute specifies what the petition shall set forth. Subd. 2 requires that the petition "shall be signed by at least 25 voters" having the specified qualifications of residence within the affected territory.

Sec. 412.011, subd. 3, in its portion pertinent to your inquiry, prescribes:

> **"If the petition complies with the requirements of subdivision 2, the county board shall by resolution fix a day** not less than 20 days nor more than 30 days after the passage of such resolution **when an election shall be held** at a place designated by the county board within the area described in the petition;"

on the question of incorporation.

Sec. 412.011, subd. 2, contemplates that the petition shall be "submitted to the board of county commissioners." Subd. 3 contemplates that a determination should be made by the county board as to whether "the petition complies with the requirements of subdivision 2."

The Village Code, of which M. S. 1949, § 412.011, is a part, makes no provision for the withdrawal of names from the petition.

In a somewhat analogous situation involved in **Slingerland v. Norton,** 59 Minn. 351, 61 N. W. 322, our Supreme Court, speaking through Mitchell, J., said:

> "There might seem to be a practical difficulty growing out of the fact that the statute makes no provision as to the manner of exercising the right of withdrawal. But, when it is remembered that a withdrawal is the mere act of the person himself, there is no serious difficulty. At any time before the right of withdrawal has expired, any signer has the undoubted right to demand of the board to have his name stricken off or withdrawn. He may authorize another to do it

for him. If he should request the county commissioners to do so, they would have the undoubted right to strike his name off the petition, not by virtue of their office, but by virtue of their authority from him." In the last cited case the Supreme Court said:

"We have no doubt of the right of any of the signers to withdraw his name from the petition at any time before the board of county commissioners has completed its inquiry and determination in the matter of purging the petition committed to it by the statute. This right is an absolute one, which the petitioner may exercise on his own motion, without assigning any reason therefor, or obtaining leave to do so from any one."

And, further:

"Moreover, petitioners have the same power to recall their withdrawals that they have to withdraw their signatures; and, in view of the facility with which some men are induced to do such things, the existence of such a state of things is not improbable. This 'place for repentance' remains open to them until the board of county commissioners have finally completed their action on the petition, so that, in one sense, the sufficiency of the number of signatures cannot be said to be finally and conclusively determined until that time arrives."

State ex rel. Streissguth v. Geib, 66 Minn. 266, 68 N. W. 1081, involved the right of persons who signed a petition for the removal of a county seat to withdraw their names therefrom at the stage of the proceeding in that decision indicated.

In that case one of the syllabi, written by Start, C. J., in its part here pertinent, reads:

"Electors who have signed a petition for the removal of a county seat have the absolute right to demand of the board of county commissioners, at any time before it has completed its action on the petition, that their names be withdrawn therefrom."

See also Annotation 126 A. L. R. 1031, at 1041 et seq.

We have not overlooked **In re Establishment of Judicial Ditch No. 75 in Polk County,** 172 Minn. 295, 215 N. W. 204, nor **Seibert v. Lovell,** 92 Iowa 507, 61 N. W. 197, and **Sim v. Rosholt,** 16 N. D. 77, 112 N. W. 50, which latter two cases were relied upon by our Supreme Court in its decision of **In re Establishment of Judicial Ditch No. 75.** The facts involved in the three cases last cited differ materially from those here considered.

Accordingly, your specific inquiry is answered in the affirmative.

You ask this further

Question

"If the withdrawal of sufficient signatures will invalidate such a petition, what is the last stage of the proceeding at which withdrawal can be made?"

In view of our answer to your first question and in the absence of a statement of a factual situation particularly applicable to your second question, we consider that an answer thereto is neither necessary nor appropriate.

LOWELL J. GRADY,
Assistant Attorney General.

Ramsey County Attorney.
December 22, 1950. 484-E-4

LIABILITY

124

Damages—Resulting from nuisance created by village in dumping sewage into drain, resulting in the poisoning of livestock—M. S. A. 561.01.

Facts

It appears that the village of Le Center, as a result of inadequate sewage disposal units, deposits sewage into a ditch which runs west of Le Center and empties into the Minnesota River. The ditch is not an established county ditch. The sewage has created problems upon farms through which the ditch passes. It is claimed to have caused the death of livestock.

Question

If it is definitely ascertained that the damage was caused by the sewage deposited by the village upon this farm land, is the village liable for damages, and is it authorized by law to compensate the owner of the livestock for his damage?

Opinion

It appears to me that the situation which you describe constitutes a nuisance as defined by M. S. A. 561.01. If it is a nuisance, then under authority of this section, an action may be brought by the farmer and by the judgment to be entered in such action, the nuisance may be enjoined or abated as well as damages recovered. See cases cited in the notes under this section and also **Bohrer v. Village of Inver Grove,** 166 Minn. 336, 207 N. W. 721; **Joyce v. Village of Janesville,** 132 Minn. 121, 155 N. W. 1067; **Wiltse v. City of Red Wing,** 99 Minn. 255, 109 N. W. 114; **Welter v. City of St. Paul,** 40 Minn. 460, 42 N. W. 392. Also see **Greenwood v. Evergreen Mines Company,** 220 Minn. 296, 19 N. W. 2d 726.

CHARLES E. HOUSTON.
Assistant Attorney General.

Attorney, Village of Le Center.
July 28, 1949. 844-B-7

125

Nuisance—Fire siren—Blowing fire siren as curfew at 8 o'clock in the evening is not a private or public nuisance—M. S. A. 616.01.

Facts

"The Village of Freeport, Stearns County, Minnesota, has erected a fire siren within the Village limits. The siren is blown every night at about 8:00 o'clock in the evening.

"A person who lives in the neighborhood claims that the loud noise bothers his ears and prevents him from sleeping."

I also presume that the fire siren is blown as a fire alarm whenever a fire breaks out in the community.

Question

Whether the complainant can compel the siren to be moved to a more distant point and whether the village is liable to the complainant for damages on account of the blowing of the siren.

Opinion

I do not believe that the blowing of the siren constitutes a public nuisance within the meaning of M. S. A. 616.01.

It does not annoy, injure or endanger the safety, health, comfort or repose of any considerable number of persons.

It does not offend public decency. On the other hand, it is a public service. It does not render a considerable number of persons insecure in life or the use of property. Hence, I think it is not a public nuisance.

The claim might be advanced that the blowing of the siren constitutes a private nuisance within the meaning of M. S. A. 561.01, which provides:

"Anything which is injurious to health, or indecent or offensive to the senses * * * so as to interfere with the comfortable enjoyment of life or property, is a nuisance. * * * "

While it is probably true that the question whether this siren constitutes a private nuisance within this statute is a question of fact, yet I have very little doubt as to the manner in which that question of fact would be decided.

The fire alarm is a device commonly employed in villages and smaller cities. It has been found efficient, useful and desirable. I do not feel that the blowing of a whistle as a fire alarm could be held to be a public nuisance.

I do not feel that the court would find that the blowing of the whistle at eight o'clock in the evening when people are usually not sleeping is a private nuisance.

While there might be some question of fact on this point, I feel that it would be decided adversely to the person complaining.

Neither am I of the opinion that complainant can compel the siren to be moved to a more distant point. Its usefulness and serviceability depend upon its being placed at a point where it can be heard throughout the village. If this complainant could compel the moving of the siren, so could anyone else adjacent to whose property it might be placed.

After all, I think that the public interest is paramount and transcends such slight inconvenience as the party complaining may suffer for a minute or two from the blowing of the siren at eight o'clock in the evening.

RALPH A. STONE,
Assistant Attorney General.

Attorney for Village of Freeport.
September 26, 1949. 913-F

LOCAL IMPROVEMENTS

126

Assessment—Benefits—In estimating cost of an improvement, it is improper to include an arbitrary fixed percentage for "legal fees, advertising, engineer's fees, and similar expenses."

Facts

Moorhead is a fourth-class city, operating under home rule charter. When a local improvement is made, it is the practice to assess the property benefited. The amount to be assessed is the cost of the improvement if the benefits equal that amount.

It is customary to include, in computing the cost of an improvement a fixed percentage of the contract price of the improvement for legal fees, advertising, engineer's fees, and similar expenses. The city engineer and city attorney each receive an annual salary from the city.

Question

"Is the practice of charging a fixed per cent of the contract price for engineer's fees and legal fees, and similar other items, a legal procedure?"

Opinion

I find this subject mentioned in Dunnell's Minnesota Digest, § 6861, from which I quote:

"An assessment materially greater than the cost of the work is illegal, but it may include incidental expenses beyond the contract price, such as expenses for abstracts, engineering, advertising and the like * * * . Engineering expenses may be included though the engineers are municipal employees."

Referring to the cases cited to sustain the text in Dunnell, I call your attention to the case of **City of St. Paul v. Mullen**, 27 Minn. 78, 6 N. W. 424, wherein Judge Gilfillan said:

"The other objection is to the effect that, in ascertaining the amount to be assessed for the improvement, there was added to the contract cost of the work, certain items, such as the cost of abstract, engineering, advertising for bids, assessment notice, and treasurer's notice. This objection is based on the constitution. Section 1, art. 9, empowers the legislature to 'authorize municipal corporations to levy assessments for local improvements upon the property fronting upon such improvements, or upon the property to be benefited by such improvements, without regard to a cash valuation.' We see nothing in this to exclude such items as are objected to, if they are a necessary expense incurred on account of the improvement. They are, in such case, as much a part of the cost of the improvement as the contract price of doing the work."

In the case which you cite, **In re Widening Twenty-eighth street Minneapolis**, 172 Minn. 454, 216 N. W. 222, an item of $35.00 for legal expense was included in the cost. It does not, however, appear in that case whether the attorney who rendered the services was on a fixed salary.

In re Improvement of Lake of the Isles Park, 152 Minn. 29, 188 N. W. 54, was a case involving an assessment under the Elwell law. The basis of the assessment was the same as for other improvements. It is there stated (on p. 39):

" * * * The items covering engineering and engineering equipment were properly included as a part of the actual cost of the work, although the engineers were regularly salaried officers and employes of the city and the city owned the equipment."

In the case of **Turley v. Incorporated Town of Dyersville** (Iowa), 211 N. W. 723, an assessment was objected to because it included an item for legal expenses. The court reduced the tax levy to the extent of the amount so levied for the item of attorneys' fees. The court held that this item was improperly included.

Although the question is a debatable one, I shall assume, for the purposes of this opinion, without deciding, that an item could be included for attorneys' fees in computing the cost of an improvement. The authorities cited also recognize the propriety of including an item for engineering expense.

However, I do not approve the practice of adding a fixed percentage for "legal fees, advertising, engineer's fees, and similar expenses." Such a practice is purely arbitrary. If such expenses are to be included, they should be itemized.

I do not know how the engineer, in estimating the expenses, would allocate a part of the engineer's salary or a part of the attorney's salary to the cost of such an improvement. If a reasonable basis for so doing could be found, I think the assessment could be sustained. I do not think that an assessment would be sustained where a fixed percentage was arbitrarily added for the items mentioned.

RALPH A. STONE,
Assistant Attorney General.

Moorhead City Attorney.
July 17, 1950. 59-A-4

127

Assessment—Streets—Contract—Failure to give notice and hold public hearing before letting contract—Where contract has been completed a new assessment may be made under M. S. 1949, § 412.451, Subd. 2.

Facts

"During the summer of 1950 the Village of Mora, by and through its Village Council, improved a street in Mora, which for brevity will hereinafter be referred to as street 'X'. The improvement consisted of bituminous treatment to the street. There is nothing in the minutes of the Village Council showing when or how this improvement was ordered by the Council. No petition of any kind was filed with the Council requesting this improvement. As stated above there are no minutes of any kind showing a resolution or any action approving or ordering this work and therefore no indication of the vote taken by the Council when this work was ordered to be done. The first indication in the minutes of any action having been taken by the council in regard to this improvement was a resolution ordering the Village Clerk to advertise for bids for this improvement. Bids were advertised for and the contract was let for this improvement. No publication was had for a hearing on the proposed assessment, no notice of any kind was given the property owners abutting street 'X' of any hearing, and no hearing of any kind was held on the proposed improvement. The bidder whose bid was accepted deposited a certified check. However, no bond of any kind was filed by the contractor. The contractor completed the improvement and was paid the contract price out of the general revenue fund of the Village. The certified check was returned to the contractor. Bills were then sent out to the property owners abutting this street apportioning the total cost of the improvement between them on a per

foot frontage basis. This was the first time that the objectors had any knowledge of an intention on the part of the Village Council to assess their property for this improvement. Subsequently a hearing was held pursuant to published notice on a proposed assessment for this improvement in which proposed assessment the total cost of the improvement was apportioned between the property owners on a per foot frontage basis. Objections have been filed by the property owners to this assessment alleging want of jurisdiction to order the improvement."

Question

"Would a reassessment by the Village Council under the above facts result in a valid assessment?"

Opinion

It is apparent that the village code was disregarded in the making of the improvement. It is provided in M. S. 1949, § 412.411, that

"No action shall be taken for the making of any such improvement, other than for the preparation of preliminary plans and estimated cost, until after the council has held a public hearing on the proposed improvement following publication in the official newspaper of two weeks' notice stating the time and place of the hearing, the general nature of the improvement and the area proposed to be assessed. * * * "

However, the improvement has been made. The contract has been completed and the contractor paid. The contract was one within the power of the council to make had the statute been complied with.

M. S. 1949, § 412.451, Subd. 2, provides:

"In any case where an assessment or any part of an assessment under this chapter is, for any reason whatever, set aside as to any parcel of land, or in event the council shall on advice of the village attorney determine that the assessment is or may be invalid for any reason, the council may, upon notice and hearing as provided for the original assessment, make a reassessment or a new assessment to defray the expenses of the improvement."

The statute last quoted is directly contrary to M. S. 1949, § 412.411, above quoted. It is in the nature of a curative act, and would permit a reassessment in disregard of the fact that the contract was originally void.

I refer you to the case of **City of St. Paul v. Mullen**, 27 Minn. 78, 6 N. W. 424. In that case the objection was raised to the assessment because the contract for doing the work was not let as prescribed by the charter. The contention was made that the contract was void and no assessment and no reassessment could be made to pay for the work done under the contract. Another section of the charter, however, provided that "no error, or omission, or irregularity, whether jurisdictional or otherwise, shall prevent a reassessment to the extent of the benefits conferred by such improvement when ordered by the council."

In holding the reassessment valid, the court said:

"It may seem strange that, after the enactment, in preceding parts of the charter, of provisions clearly intended to protect property owners against unnecessary or improvident expenses for local improvements, the observance of those provisions should be in any case dispensed with; but the language, especially of this amendment, is so full and precise that there is no avoiding the conclusion that the legislature intended such result. The council had power to order the reassessment in question."

I direct your attention to the case of **State ex rel. v. District Court,** 95 Minn. 183, 103 N. W. 881, the syllabus of which I now quote:

"The provisions of the charter of the city of St. Paul, sections 57, 58, and 64, relating to reassessments for local improvements, construed, and held, that an order of the common council directing a reassessment is not essential to its validity, and, further, following City of St. Paul v. Mullen, 27 Minn. 78, that no defects, jurisdictional or otherwise, in the proceedings relating to the original assessment, can affect the validity of the reassessment."

The Mullen case was again followed in the case of **State ex rel. v. District Court,** 102 Minn. 482, 113 N. W. 697, 114 N. W. 654, from which I quote as follows:

"In the case at bar the most that can be said respecting the contentions of relators is that the contract under which this improvement was made was void. The court so declared it, and in this respect the case is identical with the Mullen case. It is not important upon what ground the court declared the contract void, so long as the defects or omissions were of such a nature that they could be cured by legislation. It was held void for several reasons, none of which, in point of legal contemplation, differs from those in the Mullen case. * * *"

"The fact that there was a judgment in the Diamond case adjudging the contract void and restraining the municipal officers from performing it, or making special assessments to defray the cost of the same, does not change the situation. Richman v. Supervisors, 77 Iowa 513, 42 N. W. 422, 4 L. R. A. 445, 14 Am. St. 308; Gill v. Patton, 118 Iowa 88, 91 N. W. 904. The judgment has no operation or effect in the reassessment proceedings; the irregularities and defects in the contract, made the basis of the judgment, being all cured and obliterated by the charter authorizing the reassessment. * * *"

In Re Appeal of Fred W. Meyer from Confirmation of Paving Assessment, 158 Minn. 433, 197 N. W. 970, 199 N. W. 746. In that case the court reversed an order confirming an assessment, but held that a reassessment could be made under Laws 1919, Chapter 65, Sec. 3 and Sec. 10, citing and following the Mullen case and others.

It is my opinion that the provisions of the village code found in 412.451, Subd. 2, are operative, and that a reassessment or new assessment may be made to defray the expenses of the improvement, if that section is complied with.

RALPH A. STONE,
Assistant Attorney General.

Mora Village Attorney.
December 28, 1950. 396-G-7

128

Streets — Repairs — Towns — Public streets — County highways — M. S. 1949, § 160.08, 169.04, 368.01, 412.221, Subd. 6. In so far as former county highway has become a public street by dedication within a plat, the town board under § 368.01 would have authority to adopt regulations governing the use of the street — In so far as county roads are not dedicated as public streets, the town board would not have jurisdiction to adopt such regulations.

Facts

Many of the important streets in the Town of Bloomington are county roads and maintained and kept in repair by the county. The town deems it important to make regulations with reference to the use of these streets (roads) particularly with reference to: (1) Regulating the standing or parking of vehicles; (2) Regulating traffic by means of police officers or traffic-control signals; (3) Regulating or prohibiting processions or assemblages on the highways; (4) Designating particular highways as one-way roadways and requiring that all vehicles thereon be moved in one specific direction; (5) Designating any highway as a through highway and requiring a stop before entering or crossing the same; (6) Restricting the use of highways. It is proposed to do this pursuant to M. S. 1949, § 169.04.

Question

Whether the Town of Bloomington would have authority to enact regulations or by-laws with respect to county roads (streets) in the town.

Opinion

The Town of Bloomington is located in a county containing more than 150,000 inhabitants. M. S. 1949, § 160.08, provides as follows:

> "All county roads shall be established, constructed, and improved by the several county boards. The town through which any county road may pass shall maintain and keep it in repair; **provided, that in counties having a population of 150,000 or over the several towns thereof shall have no jurisdiction over county roads.**"

As respects the present problem, M. S. 1949, § 169.04, provides that the provisions thereof "shall not be deemed to prevent local authorities, with respect to **streets and highways under their jurisdiction,**" from enacting such regulations as are specified in paragraphs (1) to (6) supra. This law was enacted in 1923. Section 160.08 was enacted in 1921. It appears that so far as inconsistent, § 169.04 must prevail.

The Town of Bloomington has certain powers of a village because it falls in the classification specified in M. S. 1949, § 368.01. It would therefore have the powers specified in M. S. 1949, § 412.221, Subd. 6.

It occurs to me that it is necessary to differentiate between highways which are strictly county roads and highways which have become public streets in the town. A road established as a county highway may now be located in and dedicated as a public street in a plat in which the county road is located. By reason of the dedication, so far as the highway lies within the plat, it has become a street and subject to the control of the town in which the street (former county highway) was located. As to such county highways which are dedicated as public streets in the plat in which they are located, I think that the town would have the authority to adopt such regulations as are contemplated.

RALPH A. STONE,
Assistant Attorney General.

Attorney for Town of Bloomington.
December 4, 1950. 396-F

OFFICES

129

Incompatible — Charter commision — Mayor or members of the city council may be appointed to charter commission — Laws 1949, Ch. 210.

Question

"Can the mayor or members of the City Council of the City of Tower be appointed to and act as members of the City Charter Commission?"

Opinion

The Constitution, Article IV, Sec. 36, provides for the board of freeholders who constitute the charter commission. The only qualification expressed in the constitution is that the board members shall be freeholders and shall have been qualified voters in the municipality for the past five years.

Laws 1949, Ch. 210, provides as to membership on such commission: "* * * No person shall be disqualified from serving on such board by reason of his holding any other public office or employment. * * *"

I see no reason why the legislature may not provide that a person who holds public office or employment with a municipality may be a member of the charter commission. I think the 1949 law is to be followed.

RALPH A. STONE,
Assistant Attorney General.

Attorney for Charter Commission of City of Tower.
November 3, 1949. 358-E-1

130

Incompatible—Deputy clerk of the district court and deputy county treasurer are incompatible.

Question

May the office of deputy clerk of district court and the office of deputy county treasurer be held by the same person?

Opinion

The clerk of the district court and his deputy receive, in many instances, moneys that are collected for the benefit of the county, and such moneys, when so collected, are in turn delivered to the county treasurer or his deputy. Under those circumstances, it would be contrary to public policy for the same person to act as deputy clerk of the district court and collect moneys for the county, and then as deputy treasurer of the county accept such moneys and give a receipt therefor. We believe that the two offices may not be held by the same person, and are therefore incompatible.

This conclusion is in harmony with an opinion of this office dated February 28, 1910, file 358-B-1.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Lincoln County Attorney.
January 20, 1950. 358-B-1

131

Incompatible — Village clerk and relief investigator are incompatible offices where council appoints the relief investigator and sets his salary.

Facts

The village council of the village of Richfield appointed a relief investigator. It is his duty to investigate applications for poor relief. The council fixes the salary of the relief investigator.

Question

Whether the position of relief investigator and the office of village clerk would be incompatible.

Opinion

The two offices are incompatible. As clerk of the village it would be the duty of that officer to take part in making the appointment of the relief investigator and in fixing his salary. The clerk could not serve in another office when he is charged with the duty of appointment and fixing the salary of that other officer.

RALPH A. STONE,
Assistant Attorney General.

Attorney for Village of Richfield.
January 24, 1950. 358-E-7

132

Incompatible — Village clerk may also be manager and operator of village liquor store — Village optional plan A — M. S. 1949, §§ 412.151; 412.191, subd. 1; 412.241; 412.271; 412.281; 412.571, subds. 1 and 2; 412.581; 412.591.

Facts

"The Village of Parkers Prairie has voted to go on plan A, and under this plan the clerk and assessor will be appointed. The village also has the municipal liquor store."

Question

May the village clerk appointed under Optional Plan A of village government also be the manager and operator of the village liquor store?

Opinion

When Optional Plan A is first adopted in any village in which the standard plan of village government is then in operation, the council shall continue as then constituted until the expiration of the term of the incumbent clerk, and the incumbent clerk continues to serve as such until the expiration of his term. See M. S. 1949, § 412.571, subds. 1 and 2. Under the standard form of village government, the clerk of the village is a member of the village council. M. S. 1949, § 412.191, subd. 1. Under Optional Plan A of village government, the clerk of the village is appointed by the council. M. S. 1949, § 412.581. The village clerk so appointed by the council under Optional Plan A is required to "perform all the duties imposed on the clerk in villages generally but he shall not be a member of the council, except that when Optional Plan A is first adopted in any village, the incumbent clerk shall continue to be a member of the council until the expiration of his

term." M. S. 1949, § 412.591. We assume, for the purposes of this opinion, that the term of the incumbent clerk in the village involved will expire on the first day of January, 1951, and thereafter the clerk will be appointed by the council for an indefinite term.

The general duties of the village clerk are prescribed by M. S. 1949, §§ 412.151, 412.271, and 412.281. The village clerk appointed under Optional Plan A is **not a member of the council.** His duties are administrative, not legislative, in character. He does not audit, or participate in the auditing of, claims against the village. That is the function of the village council. M. S. 1949, § 412.271. Under § 412.241, the village council has "full authority over the financial affairs of the village." It is the village council which provides "for the collection of all revenues and other assets" of the village. The auditing and settlement of accounts of the village and the safekeeping and disbursement of public moneys are vested in the council. The village clerk appointed under Plan A has no voice therein.

In 5 Dunnell's Minnesota Digest, § 7995, we find this statement:

> "Incompatibility does not depend upon the physical inability of one person to discharge the duties of both offices. **The test is the character and relation of the offices; that is, whether the functions of the two are inherently inconsistent and repugnant. If one is not subordinate to the other, and no necessary antagonism would result from an attempt of one person to discharge the duties of both offices, there is no incompatibility."**

Applying the foregoing test to the positions involved in your inquiry, I see no incompatibility between the two, and, accordingly, your specific inquiry is answered in the affirmative.

LOWELL J. GRADY,
Assistant Attorney General.

Parkers Prairie Village Attorney.
December 19, 1950. 358-E-7

133

Incompatible — Village justice of the peace and village trustee incompatible — M. S. 1949, §§ 412.171; 412.101.

Question

Is the office of village justice of the peace incompatible with that of a village trustee "who may not be the president or mayor of the village"?

Opinion

The offices involved in your inquiry are incompatible and may not be held by the same person at the same time.

The grounds of incompatibility between the offices here involved are suggested by these considerations, among others:

1. Under M. S. 1949, § 412.171, the official bond of the justice of the peace "shall be approved by the council." The trustee, as a member of the council, would be called upon to pass upon the sufficiency of his own bond as justice of the peace.

2. "Village justices of the peace shall possess all the powers of town justices and shall be governed by the same laws * * *." Sec. 412.171. The village council, of which the trustee is a member, is required to pass upon and allow or disallow claims of the village justice as may be chargeable against the village.

3. A village trustee is a peace officer (412.101) and, as such, may be interested in making arrests and prosecuting cases which may come before the village justice of the peace.

4. Sec. 412.171 authorizes the village justice of the peace to "hear and determine accusations made against persons for the violation of any ordinance of the village." The village justice of the peace might be called upon to hear and determine an accusation against a person for the violation of a village ordinance in the enactment of which he, as a trustee and member of the council, participated.

LOWELL J. GRADY,
Assistant Attorney General.

Swift County Attorney.
December 13, 1950. 358-D-4

OFFICERS AND EMPLOYEES

134

Civil service — Tenure rights of persons appointed without competitive examination — Veterans' preference — Rights of veterans in temporary employ under civil service law—Minnesota Statutes 1945, Sections 197.45 to 197.48.

Facts

Three men, in the employ of the City of Minneapolis and classified as laborers, were detailed to the positions of meter servicemen on March 16, 1948. The initial details were for a period of five and a half months and have been renewed each five and a half months since that date. In connection with these details the men signed a document called "Waiver of Rights" every five and a half months, but these waivers have now expired. The salary of the men as common laborers was $11.60 per day, and their salary as meter servicemen has been $12.00 per day. Their service as meter serv-

icemen has been continuous since March 16, 1948. The men have taken an examination for the position of meter servicemen. Two have passed; the third has not.

Question

In view of the fact that the men have occupied the positions of meter servicemen for more than six months, may they be removed from these positions except for cause, upon written charges, and after an opportunity to be heard in their own defense?

Opinion

In order to give consideration to your inquiry, it is necessary that we consider certain facts that are not contained in your letters of inquiry. For the purpose of this opinion, we are therefore assuming that the three men, prior to March 16, 1948, were in the unskilled labor service, pursuant to Rule XIII of the Civil Service Rules, that their employment as meter servicemen was not from a list of eligible candidates after an examination, as contemplated by Chapter XIX, Sec. 7, Subdivisions b, d, f, and i of the Charter, and that the position of meter serviceman is not in the unskilled labor category and within the scope of Rule XIII. We are unable to ascertain from an examination of the Civil Service Rules under which rules these men were employed as meter servicemen and, therefore, assume from the facts indicated by you that their employment in these positions was intended to be temporary in character under the rules. We are also assuming that the examinations which the three men took were taken recently and that your inquiry does not in any way relate to their rights, if any, by reason of the fact that two of the men passed the examination and the third failed by a fraction of a point.

Chapter XIX of the City Charter of the City of Minneapolis provides for a civil service system. Sec. 4 thereof provides for a classified service embracing the entire service of the city, except certain designated officers and employees not here material. Sec. 7 thereof provides:

> "The commission shall, from time to time, make, amend, alter and change rules, to promote efficiency in the city service and to carry out the purposes of this chapter. The rules shall provide, among other things, for:
>
> "a. The classification of all offices, positions and employments in the classified service.
>
> "b. **Public competitive examinations to test the relative fitness of applicants.**
>
> "* * *
>
> "d. The creation of lists of eligible candidates after successful examination, in the order of their standing in the examination, * * *.
>
> "* * *
>
> "f. The certification of the name standing highest on the appropriate list to fill any vacancy.

"g. **Temporary employment without examination, but with the consent in each case of the commission, in cases of emergency and pending appointment from the eligible list; but no such temporary employment shall continue longer than sixty days, nor shall successive temporary employments be permitted for the same position.**

"* * *

"i. Promotion based on competitive examination and upon records of efficiency, character, conduct and seniority. Promotion shall be deemed, among other things, to include increase in salary, * * *.

"* * *

"k. Appointment of unskilled laborers in the order of priority of application — without examination * * *."

Sec. 11 of Chapter XIX provides:

"No officer or employe after six months' continuous employment shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense. * * *"

The Civil Service Law, as embraced in Chapter XIX of the City Charter, emphasizes a broad public policy to secure efficient service in the various departments of the city government. It contemplates that when a vacancy occurs in the classified service it will be permanently filled by a person whose name is the highest on an appropriate register after a competitive examination, except in the case of an unskilled labor vacancy or a vacancy in a position requiring peculiar and exceptional qualifications of a scientific, professional, or expert character. (Sections 15 and 16, Chapter XIX.) Once a vacancy has been permanently filled, it also contemplates that the tenure of the person holding the position will be secure. (Sec. 11 of Chapter XIX.)

The three persons referred to in the statement of facts, when detailed to the positions of meter servicemen, had not taken a public competitive examination, promotional or otherwise; they were not on any list of eligibles after a successful examination; and they had not been certified to any appropriate list for the purpose of filling any vacancies. Their employment as meter servicemen was therefore obviously of a temporary character, pursuant either to a rule promulgated under Sec. 7, subdivision g, of ChapterXIX, or to a rule adopted by the civil service commission, not inconsistent with Chapter XIX, such as the commission is authorized to make.

Sec. 11 of Chapter XIX places employees in the classified service in their positions permanently after six months' continuous employment, subject to removal on written charges after a hearing. This section must be read in connection with the other parts of Chapter XIX, and particularly Sec. 7 thereof, which covers the subject matter of the rules providing for the operation of the civil service system. In so reading the provision, we are of the opinion that Sec. 11 of Chapter XIX applies only to those appointed according to merit and fitness, ascertained by competitive examination, except in the case of unskilled laborers and those persons having special and peculiar qualifications previously referred to. To hold otherwise would

be to nullify and destroy the usefulness of Chapter XIX of the Charter, in so far as it was designed to emphasize a broad public policy to secure efficient service in the city government. Limitations upon the power of removal contained in Civil Service Laws do not affect probationary or temporary appointments or persons not appointed as the result of competitive examinations. **Wilson v. People ex rel. Cochrane,** 71 Col. 456, 208 Pac. 409.

Except for the two exceptions noted, we are unaware of any provisions in Chapter XIX of the Charter which authorize permanent employment in the classified service without a competitive test. The meter servicemen, not having been employed pursuant to the Charter so as to attain a permanent status, in our opinion cannot be given a permanent status by reason of the fact that they have worked continuously for more than six months. To construe Sec. 11 and the other provisions of Chapter XIX otherwise would be to permit that to be done by indirection which cannot be accomplished by direct means. See **Dayton v. Corser,** 51 Minn. 406, 53 N. W. 717. Illustrative of our opinion is the case of **State ex rel. Raines v. Seattle,** 134 Wash. 360, 235 Pac. 968. There the city had employed numerous trainmen in the city street railway department to fill temporary vacancies pending examination. The men were appointed pursuant to a charter provision authorizing temporary appointments to remain in force not exceeding sixty days and only until permanent appointments could be made in the classified service. In a mandamus proceeding, brought by these trainmen to compel the city to retain them as city employees, they contended that they should not any longer be considered as temporary employees, but as permanent employees and should not be discharged without cause. The court, with reference thereto, held:

> "* * * Such construction would evade the very objects of the civil service regulations. If they remained on the employment roll after the sixty-day period had expired, they simply remained by sufferance, and to construe them as permanent employees would be to violate the express provisions of the charter and disregard the civil service law. Their employment after that time, if not considered as re-employment by the city during the continuance of the emergency existing, must be considered as unlawful, and they would have no rights whatever as against any certified eligibles."

The holding of the Washington court, under facts similar to those relating to the three meter servicemen, is expressed in the syllabus of the decision, which reads as follows:

> "Municipal street railway trainmen appointed to fill temporary vacancies pending examination, who were not qualified under the civil service rules of the city, did not, by continued employment, acquire any rights as permanent employees, as against certified eligibles."

Your inquiry directs attention to the case of **Johnson v. Pugh,** 152 Minn. 437, 189 N. W. 257, as pertaining to the facts submitted to us. This case was relied on by the trainmen in the Washington case, supra. The Washington court said:

"The case of **Johnson v. Pugh,** 152 Minn. 437, 189 N. W. 257, relied upon by appellants, does not sustain them. The temporary employee in that case was a war veteran whose appointment was under a veteran's preference law, which provided that no person entitled to its benefits who held a position by appointment or employment in any county, city or town in the state should be removed therefrom except for incompetency or misconduct shown after a hearing on due notice on stated charges, the burden of proving which incompetency or misconduct should rest on the party alleging it. It was in no sense a case presenting such a situation as exists in the case at bar."

It is our opinion that **Johnson v. Pugh,** supra, has no application to the facts submitted by your inquiry unless one or more of the meter servicemen are veterans.

In your letter of March 11, 1949, you point out that two of the men discussed in this opinion are veterans and that one is not. You state that you would prefer to have our opinion written without considering the Veterans' Preference Statutes. Accordingly, we have confined our remarks in the forepart of this opinion to the applicable law as it relates to a non-veteran.

Veterans in the employ of the City of Minneapolis, under Chapter XIX of the City Charter, are protected by the Veterans' Preference Law. (Minnesota Statutes 1945, Sections 197.45 to 197.48.) See opinion of May 9, 1941, to the City Attorney of Minneapolis, relating to the application of the Veterans' Preference Law to the Civil Service Rules and charter provisions of the City of Minneapolis, our file 120. The meter servicemen referred to in the statement of facts who are veterans cannot be removed from their positions except after a hearing on due notice and stated charges, as provided by the Veterans' Preference Law, notwithstanding that they are not permanent employees of the city, as discussed in the forepart of this opinion. See **Johnson v. Pugh,** supra.

Whether the veterans have waived their rights under the Veterans' Preference Law by reason of their signing a document called "Waiver of Rights," which you state has expired, involves a question of fact which we are unable to determine.

In view of the foregoing, it is our opinion that the non-veteran meter serviceman may be removed from his position without compliance with the requirements of Sec. 11, Chapter XIX, of the City Charter, because that section is not applicable to him; that, unless the veteran meter servicemen have waived their rights under facts which we cannot determine, they cannot be removed except for cause and in accordance with the Veterans' Preference Law, which requires a hearing on due notice and stated charges.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Minneapolis City Attorney.
March 24, 1949. 120

135

Civil service — Veterans preference — Police and firemen — Veteran with service connected disability rating by veterans administration has no greater preference than veteran without such disability rating.

Facts

The city of Mankato operates its police and fire department under a civil service commission. In the examination for appointment and promotion, a candidate who is a veteran must be appointed over a non-veteran who received a higher grade. The federal civil service regulation provides that a veteran with a disability has a certain percentage added to his grade.

Questions

1. Under the State Veterans Preference Act, does a veteran with a disability receive any greater preference than a veteran without a disability?
2. Does a veteran with a disability have certain points added to his standing or grade because of his disability?

Opinion

Both of these inquiries are answered in the negative.

We assume that the law to which you refer as the State Veterans Preference Act is the law which by virtue of M. S. A. 197.47 is known as the Veterans Preference Law, M. S. A. 197.45 and 197.46, and applies to public employment other than state and federal.

For a discussion of the fitness and qualification of a person entitled to veterans' benefits, see **Kangas v. McDonald**, 188 Minn. 157, 246 N. W. 900 (under civil service), **State v. Empie**, 164 Minn. 14, 204 N. W. 572. The veterans preference law does not contain a different standard of preference for veterans who are rated disabled by the veterans administration than those who have no service connected disability. In this respect it differs from the veterans preference provisions of the state civil service act, see M. S. A. 43.30, and also differs from the provisions of law applicable to veterans under federal civil service referred to in your letter submitting the foregoing inquiries.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Mankato City Attorney.
January 31, 1950. 120

136

Civil service — Veterans preference — Rights — Non-veteran acquires no right from performing duties of a position in the classified service without proper appointment.

Facts

"The Committee on Personnel, Payrolls and Classification of the City Council has asked me to submit to you two questions:

1. Under the facts which I will detail to you is the position of Assistant Purchasing Agent that of a chief deputy and therefore without the Veterans' Preference Law, so that the Civil Service Commission may certify to the Purchasing Agent the man who passed highest in the examination, regardless whether or not he is a veteran?
2. Under the situation as it exists in this matter does the fact that a man performed the duties of Assistant Purchasing Agent at the direction of the Purchasing Agent, the duties as I will set out herein, for a period of eight years, confer upon him the right to the position of Assistant Purchasing Agent so that he cannot be removed except for cause and after a hearing?"

Question

"When the present Purchasing Agent was appointed to that position the position of Assistant Purchasing Agent was left unfilled. On December 17, 1947 the Purchasing Agent appeared before the Civil Service Commission of the City of Minneapolis and stated that he was requesting the City Council, after January 1, 1948, for authority to fill the position of Assistant Purchasing Agent. On January 9, 1948 the City Council requested the Civil Service Commission to hold a promotional examination within the Purchasing Department to fill the position of Assistant City Purchasing Agent. An examination was duly and regularly held on September 9, 1948.

"'A,' a non-veteran, passed highest with a standing of 83.48. 'B,' a veteran, was next with a standing of 83.20. 'B' claimed Veterans' Preference and was certified on October 15, 1948 as the highest veteran, upon the receipt of a requisition from 'C.' There is no record in the office of the Civil Service Commission that 'A' was detailed to this position nor has it been brought to the attention of that Commission that he was acting in the capacity of Assistant City Purchasing Agent.

"The duties of the position as set out in the official notice of examination are as follows:

> 'DUTIES OF POSITION: Under the general direction of the City Purchasing Agent, to assist in activities incident to the buying and the examining of supplies, materials, and equipment, involving

the preparation and awarding of bids, the negotiating of contracts for purchases, the preparing, approving, and issuing of purchase orders; and supervise related clerical activities and the buyers. Examples of Work:

1. Prepare specifications and invitations for bids for common and relatively standardized commodities;
2. Open and read bids in the presence of the City Comptroller and City Clerk's representatives and other interested parties, tabulate and analyze bids and make awards;
3. Secure quotations on small purchases by use of a telephone;
4. Interview vendors and salesmen and make inquiries into suitability of their commodities;
5. Arrange for transfer of equipment by the department;
6. Arrange for tests of material;
7. Consult with and advise representatives of City departments in connection with qualities and prices and the purchase and delivery of supplies, material and equipment;
8. Supervise and direct subordinates;
9. Act in the absence of the City Purchasing Agent; and
10. Perform related duties as required.'

"A reference to the ordinance of the City of Minneapolis setting out the duties of the Purchasing Agent (55:3, 1948 Compilation) discloses that these duties are substantially those of the Purchasing Agent, and have been discharged for the past eight years by 'A' at the direction of 'C,' the Purchasing Agent, when 'C' was absent from the office. 'A' has been the only one in the Purchasing Agent's office who has discharged these duties. In 'C's' absence from the office he has taken charge thereof, has appeared before committees, and has determined the amount of a check that must accompany a bid within the limits set forth in Section 6 of the ordinance. 'A' has never been formally detailed to the position of Assistant City Purchasing Agent.

"I have before me two opinions rendered by you, one under date of February 3, 1948 in which you hold that the position of First Assistant City Attorney for the City of Minneapolis is not that of a chief deputy within the meaning of the Veterans' Preference Law and therefore the position is one to which the Veterans' Preference Act applies. I have another opinion from your office under date of March 24, 1949 in which you hold that the fact that men have occupied the position of meter servicemen for more than six months does not give them any rights to the position under Section 11 of Chapter XIX of the Minneapolis City Charter, which provides:

> 'No officer or employee after six months' continuous employment shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense'."

Opinion

We have examined the facts which you have submitted with reference to the position of assistant purchasing agent of the City of Minneapolis. The reasoning applicable to the determination of the questions which you have submitted is set forth at length in our opinions to you dated respectively February 3, 1948, and March 24, 1949, and it is unnecessary to repeat it in this opinion.

For the reasons stated in our opinion to you dated February 3, 1948, your first question is answered in the negative.

For the reasons stated in our opinion to you dated March 24, 1949, it appearing that the man referred to is not a veteran, your second question is answered in the negative.

It follows that your unnumbered question "whether the facts as I have submitted them to you, differentiates the situation as it exists in the Purchasing Department to such an extent that either one or both of the opinions to which I have heretofore called your attention are inapplicable to the statement of facts submitted by me in this inquiry" is answered in the negative.

J. A. A. BURNQUIST,
Attorney General.

Minneapolis City Attorney.
August 25, 1949. 85-A

137

Compensation — Sick leave — May be granted under charter provisions — Members not using sick leave benefits may not receive extra compensation in lieu thereof.

Facts

The city of Anoka plans to establish a policy granting annual sick leave of seven days to employees who have served a probationary period of ninety days, and to pay additional compensation to employees who are eligible for such sick leave but have not been absent from their employment on account of sickness.

The proposal of the city commission in regard thereto in part provides:

"Any eligible employee who has not used his/her Sick Leave during a fiscal year and has a satisfactory record of attendance during the fiscal year will receive a bonus equal to seven (7) eight hour days at his/her regular rate of pay as a reward for perfect health and attendance. A satisfactory record of attendance will be construed to mean any employee who has been continuously employed during the fiscal

year and has not been absent more than twelve regularly scheduled work days during the fiscal year. The annual vacation period will not be included in totaling days of absence."

Question

Whether the above proposal is valid.

Opinion

The city charter, Chapter VIII, Section 3, empowers the city commission to fix the compensation of all officers and employees except as otherwise provided for in the charter. The salary of certain officers is prescribed in Chapter II, Section 5 of the charter. Under Chapter VII, Section 2, the commission is empowered to prescribe the duties of the city employees.

We have not found any provision in the charter which prescribes the compensation of city employees or officers except as provided for in Section 5, supra.

Legislative powers of the commission are set forth in Chapter VIII, Section 1, which in part reads as follows:

> "Section 1. The commission shall have full power, subject only to the limitations herein contained, to make, ordain, enact, establish, publish, alter, modify, amend, and repeal all such ordinances or resolutions as it shall deem necessary and expedient for the government and good order of the city; for the suppression of vice and intemperance; for the prevention and punishment of crime; for the promotion of health; and for the general welfare of the city and of the inhabitants thereof.
>
> " * * *
>
> "It shall have the power to enact appropriate legislation, and do and perform any and all other acts and things which may be necessary and proper to carry out the general powers of the City, or any of the provisions of this Charter, and to exercise all powers not in conflict with the Constitution of the State, with this Charter, or with ordinances adopted by the people of the city; and the above enumeration of specific powers shall not be held in any way to curtail or restrict any power which the Commission might otherwise have under the Common law."

In our opinion it rests within the discretion and judgment of the commission, subject to limitations contained in Section 3, supra, to fix the compensation of city employees. Under the charter provisions above referred to, we believe that the commission has power to prescribe reasonable provisions for annual sick leave for city employees as a part of the employment contract.

It has been recognized by the courts in this state that the state civil service board has authority to adopt a rule granting persons in the classified service of the state annual vacations with pay. **Nollet v. Hoffmann,** 210 Minn. 88, 92, 297 N. W. 164.

In **Wood v. City of Haverhill,** 174 Mass. 578, 55 N. E. 381, the court sustained the action of the governing body of the city providing for reasonable vacations with pay for policemen, under a general law authorizing the city to make such regulations for the government of the police department not inconsistent with law as the mayor and aldermen might deem proper.

In **Greene v. U. S.,** 85 Ct. Cl. (F) 548 it was held that a federal employee, upon termination of his employment, was entitled to commutation of accumulated leaves of absence due him by virtue of executive orders granting annual leaves of absence to certain federal employees, and providing for commutation for accumulations thereof upon termination of service.

A similar conclusion was reached by the court in **Ferguson v. U. S.,** 86 Ct. Cl. (F) 606.

These decisions establish the principle of law that a public body having power to fix the compensation of public employees, to prescribe their duties, and to provide regulations for its government, may authorize and grant reasonable annual leaves of absence with pay, and to compensate for accumulations thereof upon termination of employment.

We have found no authority which sustains the right of a public body to provide additional compensation in lieu of sick leave where an employee entitled thereto does not exercise or use sick leave rights or benefits.

It was held in **Rawlings v. City of Newport,** 275 Ky. 183, 121 S. W. (2d) 10, that the city was not authorized to compensate an employee who did not take an annual two weeks vacation, in lieu of such vacation.

It appears from the authorities hereinbefore referred to that a plan to compensate an eligible city employee a sum equivalent to seven eight-hour days as proposed in the sick leave policy plan hereinbefore quoted, would constitute a gratuity which was disapproved by our court in the Nollet case, supra.

In conclusion, it is our opinion that the above provision as quoted from the proposed sick leave policy, if adopted and carried out by the commission, would constitute a gratuity and an unlawful expenditure of public funds.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Anoka City Attorney.
September 26, 1950. 59-A-41

138

Compensation—Vacation periods—Employee entitled to vacation with pay who does not take a vacation cannot be paid for the vacation period, as the same would constitute double payment for the same period of time.

Facts

The Village of Mountain Iron operates a municipal light, heat, and power plant; it is operated by a water, light and power commission. I assume this is operated pursuant to the provisions of M. S. 1949, § 412.321, et seq. The commission hires its own employees necessary for operating the plant.

You state further that the commission has a rule that employees who have completed one year's work are entitled to two weeks' vacation with pay. You advise that there is no written rule to this effect; it is simply a general practice which has been followed for many years.

Due to the manpower shortage, some employees have worked an entire year without any vacation.

Question

Can these employees who did not have any vacation now be paid wages for the vacation which they did not take?

Opinion

To pay these employees now an extra two weeks' wages for the vacation which they did not take would be paying them twice for the same work, and would be a pure gratuity, not within the power of the village to grant, and in my opinion such payment should not be made. **Nollet v. Hoffmann**, 210 Minn. 88, 297 N. W. 164.

In the case of **Halek v. City of St. Paul**, 227 Minn. 477, 480, 35 N. W. 2d 705, our court said:

> "A grant by a governmental authority to a public employe of vacation with pay is a grant of a gratuity. Nollet v. Hoffmann, 210 Minn. 88, 297 N. W. 164, 134 A. L. R. 192. A grant by a governmental agency of a gratuity to a public employe creates no contractual obligation or vested right, and, because that is true, such a grant is terminable at the will of the grantor. * * * "

In the case of **Rawlings v. City of Newport**, 275 Ky. 183, 121 S. W. 2d 10, 17, the court said:

> "During the month of December, 1937, Meister and Miles A. McIntyre, director of finance and city treasurer, were paid $200 and $233.42 respectively for 'extra services, 1936-1937,' in addition to their salaries for the month of December, 1937. An attempt was made to justify the payments on the ground that neither of these officials had taken

vacations in 1936 and 1937. Meister testified that he had not taken a vacation since he came with the city in 1932, but that December, 1937 was the first time he had been paid extra for a vacation period he had not taken. The city solicitor contended that no vacation provision appeared in the salary schedule ordinance for administrative employees, while appellant sought to show that it was customary for these employees to take two weeks' vacation each year with pay. Be this as it may, there was no justification for an attempt to pay an employee for a vacation period not taken. This constituted double payment for a particular period of time."

I am inclined to follow the ruling of the Kentucky court and hold that to now pay these employees who did not take a vacation another two weeks' wages would be double payment for the same period of time, and this would not be proper.

RALPH A. STONE,
Assistant Attorney General.

Attorney for Village of Mountain Iron.
November 6, 1950. 469-A-13

139

Employment — County assessor — Term — M. S. A., Sec. 273.071, Subds. 3, 12, 15.

Questions

"What is the situation as regards a new appointment of a county assessor made January 1, 1949? Is it for a nine-month or more term, so as to comply with the two-year provision before a change can be made, or is he appointed for four years, subject to later termination at the pleasure of the board in the event they decide to change from the assessor system to the supervisor system?"

Opinion

The law for consideration is found in L. 1947, C. 531. Sec. 12 thereof, M. S. A., Sec. 273.071, Subd. 12, states:

"When a county assessor is appointed the same procedure shall be followed as provided in Section 2 of this act for the appointment of a supervisor of assessments, and all of the provisions relating to term, bond, assistants, supplies and salary as provided in Sections 3 to 7, inclusive, of this act shall apply to such county assessor."

The term is specified in Sec. 3 of the act, M. S. A., Sec. 273.071, Subd. 3. It would appear therefrom that the term of the county assessor, appointed in January, 1949, is four years. But as provided in Sec. 15, M. S. A., Sec. 273.071, Subd. 15, if, after a county assessor has been employed for a

period of not less than two years, the county board determines 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.

CHARLES E. HOUSTON,
Assistant Attorney General.

Itasca County Attorney.
February 21, 1949. 12-D

140

Employment — County Assessor — Veterans Preference Act — Not covered thereby—M. S. 1945, § 197.46; L. 1947, c. 531.

Question

Does the office of county assessor come within the terms of the Veterans Preference Act?

Opinion

The county assessor is appointed by the county board of your county, with the approval of the commissioner of taxation, pursuant to statute. His duties are fixed by law. He is required to file a bond conditioned upon the diligent, faithful, and impartial performance of the duties enjoined on him by law. He may, with the approval of the county board, employ one or more assistants and sufficient clerical help to perform the duties of his office. His term is fixed by statute, but it may be terminated by the county board on charges by the commissioner of taxation of inefficiency or neglect of duty. See L. 1947, c. 531. Attention is particularly invited to § 11, relating to a county assessor in lieu of a supervisor of assessments, and to § 12 thereof, which reads:

> "When a county assessor is appointed the same procedure shall be followed as provided in Section 2 of this act for the appointment of a supervisor of assessments, and all of the provisions relating to term, bond, assistants, supplies and salary as provided in Sections 3 to 7, inclusive, of this act shall apply to such county assessor."

Considering the nature of the position, the duties of the office, and the assessor's responsibility for his own work and that of the personnel which, with the approval of the county board, he may employ to assist him, it is our opinion that the county assessor is the head of a department and that, therefore, the Veterans Preference Act does not apply to him.

M. S. 1945, § 197.46, in referring to the exceptions to the Veterans Preference Act, states:

" * * * Nothing in Sections 197.45 and 197.46 shall be construed to apply to the position of private secretary, teacher, superintendent of schools, or one chief deputy of any elected official or head of a department, or to any person holding a strictly confidential relation to the appointing officer. * * * "

See also **State ex rel. McOsker v. City Council of Minneapolis**, 167 Minn. 240, 208 N. W. 1005; **State ex rel. Michie v. Walleen**, 185 Minn. 329, 241 N. W. 318.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Big Stone County Attorney.
February 11, 1949. 85-C

141

Employment—Public health nurse—County board has power to employ—No statutory authority exists whereby question of employment of such nurse should be submitted to the voters for approval—County funds cannot be used to defray the expenses of an unauthorized election— M. S. 1949, § 145.08.

Facts

It has been decided to submit the question of the employment of a public health nurse to the voters for their approval at the next general election.

Question

"Whether or not the expense incident to such submission is an expense properly chargeable to the County."

Opinion

Minnesota Statutes 1949, Section 145.08, in part reads as follows:

"Every city council, village council, board of county commissioners, school board, and town board is hereby authorized and empowered to employ and to make appropriations for the compensation and necessary expenses of public health nurses, for such public health duties as may be deemed necessary."

This statute vests in the county board the power to employ a public health nurse. We are not aware of any statute which provides for the submission of the question of the employment of a health nurse to the voters for their approval. Any expression by the electors upon such question would not be binding upon the county board. There being no statute which requires the submission of the question of employment to the voters for

their approval, it necessarily follows that public funds cannot be used to defray the cost of an election which is neither authorized nor required by law.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Kanabec County Attorney.
June 28, 1950. 905-B

142

Employment — Street commissioner — City council electing street commissioner—Charter prevails over council rules—Blank ballot does not invalidate election—Ruling of presiding officer, if not appealed from, becomes rule of council.

Facts

"The city council voted to elect a street commissioner for the ensuing two years. There were two candidates. One of the votes cast was blank.

"Because of the one ballot being left blank the Mayor insisted upon a second ballot in which all the aldermen were required to vote";

Question

"We wish to know whether his position was correct."

Opinion

You refer me to Rule Fourteen of Permanent Rules of the City Council, which reads in part as follows:

"When a question is put by the chair, every member present shall vote, unless the council for special reasons shall excuse him * * * ." You also refer to the following provision of your charter:

"Any member of the city council, who, being present when his name is called, fails to vote on any pending proposition shall be counted as having voted in the negative."

I assume that the charter contains no provision in the matter in question except the one above quoted.

2 McQuillin, Municipal Corporations, § 636 states that:

" * * * where an ordinance is enacted in compliance with the charter it will not be held void because in its passage one of the parliamentary rules of the council was violated. So the council may abolish, modify or waive its own rules. But, of course, it cannot disregard mandatory charter provisions."

Likewise, in the case of an inconsistency between the charter and the rules of the council in the matter of an election, the charter must prevail.

It is my opinion that, if one of the two candidates for street commissioner to whom you refer received the required majority of the votes when the first ballot was taken, the casting of a blank ballot by one member would not by itself invalidate such election. The rule of the council that a member must vote unless excused is superseded by the charter provision that, when he is present and fails to vote, he shall be counted as having voted in the negative.

If neither of the candidates for street commissioner received the required majority because of the blank ballot, then, of course, there would be no election, and a second ballot would be necessary. Even if one of the candidates had the required majority and, on the ruling of the mayor, a second ballot was taken with no objection by any member, such procedure would, in my opinion, be equivalent to a reconsideration of the vote originally taken, and then the vote on the second ballot would constitute the legal result.

When a presiding officer makes a ruling on any question, any member of the council objecting thereto may appeal to the council from such ruling. If the required majority sustains the presiding officer, his ruling becomes the rule of the council. If the required majority casts its vote in opposition to his ruling, the position taken by the council must prevail. If no appeal is taken from a ruling of the mayor and the members proceed unanimously to follow such ruling, then they must be deemed to have acquiesced therein.

What has herein been said must be limited to the facts referred to in your letter and as they are understood by the writer hereof. Any future opinion must, of course, be based on the facts involved in any question hereafter submitted.

J. A. A. BURNQUIST,
Attorney General.

Northfield City Attorney.
April 21, 1950. 59-A-29

143

Expenses—Traveling—Under facts stated, mayor and council members may be reimbursed for traveling expenses incurred in performing duties of office—following doctrine of Tousley v. Leach, 180 Minn. 293, 230 N. W. 788, and Lindquist v. Abbett, 196 Minn. 233, 265 N. W. 54—M. S. 1949, §§ 160.41; 412.181; 412.221, subds. 2 and 6; 350.11—Opinions of Aug. 17, 1905 (No. 346, 1906 Rep.), March 1, 1928, June 10, 1931, May 4, 1933, Feb. 5, 1940, and Jan. 5, 1940 (all file 471k), distinguished.

Facts

"During 1950 the Village of Albany made extensive street improvements, and in doing so U. S. Highway No. 52 and Minnesota State Highway No. 238, which lie within the limits of the village, came within the scope of the improvement. The mayor and members of the village council made several trips to St. Paul to negotiate a contract with the Minnesota State Highway Department. It was also in that connection that members of the village council incurred expense for meals. * * *

"The contracts with the Minnesota State Highway Department could not very well be negotiated by correspondence, because that would have taken too much time. At the time the trips were made the village had already called for bids and the lowest responsible bidder had to be accepted or rejected within ten days. A delay of the project would have cost the village considerable money in re-advertising, etc., and probably would have delayed the contract enough so that it could not have been completed in 1950."

The mayor's car was used in making the trips involved.

Questions

(1) May the mayor "be paid for the use of his car [in connection with the trips involved] at the rate of 6 cents per mile"?

(2) May the members of the council be reimbursed for their actual expenses incurred and paid for meals while on the trips involved?

Opinion

A question similar to those submitted by you was expressly described in **Tousley v. Leach** (1930), 180 Minn. 293, 230 N. W. 788, as "vexing."

The **Tousley** case was a taxpayer's action to restrain the City of Minneapolis and its officers from paying out of funds of the city the expenses of certain city officials in attendance upon meetings in various cities of the Mississippi Valley Association, the Rivers and Harbors Congress, and the Asphalt Association. Plaintiff appealed from an order denying his motion for a temporary injunction. The Supreme Court affirmed. A "clearly noted departure" from the former "narrow construction" of the law controlling the problem presented "in the direction of a less restricted rule" was therein expressly noted. The Supreme Court considered the home rule charter provisions of the City of Minneapolis authorizing its council "to control and regulate the construction of piers and wharves, or grading said wharves into the Mississippi river" and the provisions of the charter relating to the general care, supervision, and control of the streets of the city imposed upon the city council. In affirming the action of the trial court, the Supreme Court said:

"If the purpose is a public one for which tax money may be used, and there is authority to make the expenditure, and the use is genuine as distinguished from a subterfuge or something farcical, there is nothing for the court. Whether there shall be such use is then one of policy for the legislature. The trial court finds that there was a public use and purpose. After a thorough consideration its view is that all was in good faith and that substantial beneficial results came to the city. Its position on this point is definite and positive."

It is to be noted that in the **Tousley** case the trial court found "that there was a public use and purpose." In approving that finding the Supreme Court did not refer to any specific provision of the city charter of the City of Minneapolis authorizing the expenditures of the type in that case involved. On the contrary, the predicate of such "public use and purpose" was found in the general charter provisions referred to hereinabove.

The **Tousley** case was followed in **Lindquist v. Abbett** (1936), 196 Minn. 233, 265 N. W. 54. Beyond the express suggestion contained in the **Tousley** case that the "legislature might apply limitations," the court in the **Lindquist** case "observed that there is also the political remedy of voting out the officers responsible for any expenditure not approved by their constituents."

Several opinions of the Attorneys General issued since August 17, 1905, have been regarded as holding that the law does not permit the reimbursement of a village official for actual expenses incurred and paid by him, even though they were incurred in the performance of his duties as a member of the council. Some of those opinions antedate the decision of the **Tousley** case. Others were issued since. None of the latter, however, refer to the **Tousley** case. In these circumstances, a review of these former opinions of the Attorneys General is warranted.

Attorney General's opinion dated August 17, 1950, printed as Op. No. 346, 1906 Att'y Gen. Rep., held that, absent legislative act fixing the salary of the common council of a village or authorizing its common council to fix the amount of the salary, the members of the council must serve without any compensation whatever and the council was without power to vote its members any compensation. That opinion dealt with a situation where the law provided no salary or compensation to members of the common council. See McQuillin, Municipal Corporations (2d Ed.), Rev. Vol. 2, § 534. That is not the situation here considered.

Opinion of the Attorney General dated March 1, 1928 (471k), held that members of the village council were not entitled to compensation, in addition to their salaries as fixed by the statute, for performance of their duties as members of the council in connection with the village owned-operated electric light plant. The legality of expenses appertaining to the office was not involved in that opinion.

Attorney General's opinion dated June 10, 1931 (471k), without reference to the **Tousley** case or to any other authority, ruled generally that a village officer could receive only such sums as the law allows and that

he could "receive nothing additional because of loss of time or expenses incurred while attending to the business of the village." Neither the opinion cited nor the request therefor discloses the nature or the purpose of the "business of the village" in connection with which the expenses involved, if they were involved, were incurred.

Attorney General's opinion dated May 4, 1933 (471k), involved a fact situation where four residents of a village composed a special committee "to go to other villages" to investigate electric light rates therein. Two of the members of the special committee so composed were also members of the village council of the village involved. The then Attorney General concluded, upon the facts there considered, that the two members of the committee who were on the village council made the trip "as taxpayers and not as members of the council."

Attorney General's opinion dated February 5, 1940 (471k), held that a village councilman was not entitled to compensation in addition to his salary prescribed by law "for time spent by him" in viewing the village streets and in acting on the board of equalization, since such services were required to be rendered by a member of the village council under the law. The situation here considered is entirely different.

Attorney General's opinion dated January 5, 1940, without reference to the **Tousley** case or to any other authority, observed that the "compensation of village officials is fixed by statute" and ruled generally that there was no law[1] which would permit reimbursing a village official for actual expenses incurred by him, even though in the performance of his duties as a member of the council. Neither the opinion cited nor the request therefor discloses the nature or purpose of the actual expenses incurred.

Salaries of the mayor and trustees in villages are prescribed by M. S. 1949, § 412.181. That statute limits the **salaries** payable. That statute should not, in my opinion, be construed as an implied restriction upon the payment of expenses appertaining to the offices of mayor or trustee in the villages if those expenses are in good faith incurred for a purpose which is a public one and if there is authority to make the expenditure and the use is genuine as distinguished from a subterfuge. It is true that the Village Code contains no specific provision authorizing the payment of such expenses, but it is equally true that the court in the **Tousley** case predicated its decision, not upon any specific provision of the charter of the City of Minneapolis authorizing the payment of expenses there involved, but rather upon the general broad authorities contained in that charter hereinabove noted. The legal authority for the payment of such expenses might, as was done in the **Tousley** case, be fairly implied from the broad general authorities conferred under the law and the purposes and objectives of the particular activity in connection with which the expenses are incurred. Each case must be decided by reference to its own peculiar circumstances.

The following provisions of the law might well be considered pertinent to the peculiar circumstances presented by your inquiry:

[1]The writer of that opinion undoubtedly meant thereby that there was no specific **statutory provision** authorizing the payment of such expenses.

M. S. 1949, § 412.221, subd. 2, empowers the village council "to make such contracts as may be deemed necessary or desirable to make effective any power possessed by the council."

Sec. 412.221, subd. 6, empowers the village council, among other things, "to lay out, open, change, widen or extend streets, alleys, parks, squares, and other public ways and grounds and to grade, pave, repair, control, and maintain the same * * * ."

Sec. 160.41 authorizes the governing body of any village to enter into agreements with the commissioner of highways in connection with the construction and maintenance of trunk highways located over and along a street in a village under the circumstances and in accordance with the conditions in that statute specified.

We gather from the tenor of your inquiry that it was in connection with the negotiation of an agreement between your village and the commissioner of highways as authorized under § 160.41 that the members of the village council made the trips to Saint Paul for conference with the commissioner of highways or his representatives.

In these circumstances, I am of the view that, if the council finds facts required to render the expenditures involved legal under the doctrine of the **Tousley** and **Lindquist** cases, **supra**, namely, (1) that the actual expenses of the mayor and other members of the village council incurred for the purposes stated were necessarily incurred in connection with a public purpose and (2) that the trips here involved were taken for a genuine purpose as distinguished from a subterfuge, the payment of such expenses may be legally made.

The mayor, if he is to be reimbursed for the use of his car, is entitled to a rate of not exceeding six cents per mile for the use of his car in making the trips involved. M. S. 1949, § 350.11.

Expenses of the nature here considered should usually be authorized by appropriate action of the council prior to the time that the expenses are incurred. It is our understanding that in the matter in question ratification of the action of the members of the village council in making the trips involved is necessary. Such ratification and the payment of such reimbursement should be based on findings of fact by the council required to make the expenditures legal under the doctrine of the cases hereinbefore cited.

LOWELL J. GRADY,
Assistant Attorney General.

Albany Village Attorney.
December 26, 1950. 471-K

144

Public Employees Retirement Association—Membership—To be eligible for non-employee membership an employee must have 10 years consecutive public service immediately before he ceases employment—M. S. A. 353.14.

Facts

M became a contributing member of the Public Employees Retirement Association on March 1, 1944. At that time M. S. 353.09 provided that in order to be eligible for non-employee membership following termination of public employment, a person would be required to have ten years of public service and four years of contributory membership to his credit. However, the act was amended in 1947 by Chapter 18, which provides that the ten years of public service must be consecutive. M, who retired from public service January 1, 1949, does not have ten years of consecutive public service to her credit, although she has ten years of nonconsecutive public service; nevertheless, M claims that she is entitled to non-employee membership.

Question

Whether M is entitled to non-employee membership in the association even though she has not ten years of consecutive public service to her credit.

Opinion

As stated at the time M entered the Public Employees Retirement Association as a new member, March 1, 1944, the statute simply required four years of contributory membership and ten years of public service, not necessarily consecutive. The amendment of 1947, Laws 1947, Chapter 18, provides that ten years of consecutive service are required before an employee can become a non-employee member. The question is raised as to the validity of the amendment which changes the law as it read at the time she entered the association.

I cannot see any material dissimilarity between that situation and a similar situation in the State Employees Retirement Association.

The Minnesota State Employees Retirement Association Fund was considered in the case of **Hessian v. Ervin**, 204 Minn. 287, 283 N. W. 404. As in the case of the Public Employees Retirement Association, membership in the State Association was optional with the state employees who were such at the time the law took effect, but new state employees were automatically to become members of the association by the acceptance of state employment, and each member was required to contribute to the retirement fund by deduction from his wages or salary. 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 pay-

ments 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."

The same State Employees Retirement Association law was under consideration in the case of **Johnson v. State Employees Retirement Association,** 208 Minn. 111, 292 N. W. 767, where the court held that a pensioner or beneficiary has no vested right in a pension thereunder except as payments become due him absolutely under the law. It further held that any legislature had the power to alter or modify the pension law as it saw fit. It also held that to change or reduce the amount of the monthly annuity paid the plaintiff would not be violative of the constitution.

The court in the last case cited quotes and approves the following quotation from a Texas 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."

See also **State ex rel. Krake v. Minneapolis Fire Department Relief Association,** 205 Minn. 54, 284 N. W. 884, which supports the doctrine that the legislature has the right to change the law.

Relying upon these authorities, I am of the opinion that the legislature had the right to change the law so as to make ten years consecutive service a prerequisite to non-employee membership, and that M, not having such consecutive service, is not eligible to non-employee membership.

The conclusion reached is further supported by the following:

Minnesota Statutes 1941, Section 353.14 (being L. 1931, Ch. 307, § 16, as amended by L. 1941, Ch. 285, § 8), contained this language:

"Nothing done under the terms of this chapter shall create or give any contract rights to any person, except the right to receive back upon withdrawal from the association, through separation from the public service, any salary deductions made or assessments paid hereunder."

The language last above quoted is found in Laws 1943, Ch. 167, p. 231. The same provision in identical words is found in the compilation and revision of the General Statutes of the state which was filed pursuant to the act approved March 8, 1945, and quoted in the preface to M. S. A. 1945, page 111, § 1, Subd. 1.

The act last referred to provides:

"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'."

This compilation containing the language above referred to is on file in the office of the Secretary of State. However, in printing M. S. A. 1945, the language above referred to was omitted. It was likewise omitted in the printing of the Session Laws of 1945. See Ch. 78, p. 116.

However, as that provision was in the compilation filed by the revisor of statutes, it was and still is the law. See **State ex rel. Bergin v. Washburn,** 224 Minn. 269, 273, 28 N. W. 2d 652.

Therefore, at the time M. became a contributing member of the Public Employees Retirement Association on March 1, 1944, and ever since that time, the statute law has contained the provision that no person should have any contract rights other than the right to receive back the payments made by the member from his salary.

Inasmuch as the law at all times involved in your question contained a provision that no person should acquire any contract rights other than the right to a return of his contributions, I reiterate the opinion first above expressed that M cannot compel the Association to accept her as a non-employee member.

RALPH A. STONE,
Assistant Attorney General.

Public Employees Retirement Association.
March 23, 1949. 331-B-1

145

Residence—Assessor appointed by village manager—Assessor need not be resident of village either at time of appointment or during term of service—M. S. A. 351.02 (4) has no application — Opinions of Dec. 19, 1945 (Public Utilities Commission), and Nov. 16, 1949 (in re Village Hosp. Bd. members), (both file 1001h) superseded—Opinion of Feb. 2, 1934, printed as 151 in 1934 Report, Opinions dated March 8, 1940, and January 9, 1950, (Village Board of Health) (both file 225i-6) and Opinion March 21, 1947, (Village Police Officer) (file 785s) distinguished.

Facts

"This is an inquiry relative to the appointment of an assessor by a village operating under Optional Plan B as authorized by Chapter 119 of the Laws of Minnesota, 1949."

"Because the statute above referred to is not clear and explicit," you submit this

Question

"Whether or not an assessor is a head of a department, subordinate officer or employee authorized to be appointed by the manager by Subdivision 3 of Section 81, Chapter 119, supra."[1]

Opinion

Although you do not so specifically state, we assume that the Village of Mound constitutes a separate election and assessment district.

In any village adopting and operating under Optional Plan B of village government, the village assessor is an **appointive** officer, rather than an **elective** officer. The assessor in such village is appointed by the village manager.

M. S. A. 412.611 provides:

"The form of government provided in Optional Plan B shall be known as the council-manager plan. The council shall exercise the legislative power of the village and determine all matters of policy. The village manager shall be the head of the administrative branch of the village government and shall be responsible to the council for the proper administration of all affairs relating to the village."

M. S. A. 412.651 prescribes the powers and duties of the village manager. Subd. 3 of the last cited section, so far as here pertinent, prescribes that the village manager—

" * * * shall appoint upon the basis of merit and fitness and subject to any applicable civil service provisions * * * all heads of departments, and all subordinate officers and employees * * * ."

Under the standard form of village government, the office of assessor is an elective office (see M. S. A. 412.021, subd. 2); whereas, under the forms of village government provided by Optional Plans A, B, and C, the office of assessor is an appointive, rather than an elective office.

The last above quoted portion of M. S. A. 412.651, subd. 3 is the statutory authority for the village manager to appoint the assessor in villages operating under Optional Plan B.

Question

"Whether or not an assessor appointed to serve in a village operating under the Council-Manager Plan (Optional Plan B) is required to be a resident of such village

(a) at the time of his appointment and

(b) during the term of his service?"

1L. 1949, c. 119, the New Village Code, is now coded as M. S. A. 412.011-412.931. In addition to the standard form of village government there provided for, the code authorizes the adoption by the electors of any village of one of three additional, separate, and distinct plans of village government, known as Optional Plan A, Optional Plan B, and Optional Plan C. See M. S. A. 412.541-412.571. M. S. A. 412.601-412.751 apply only to villages adopting and operating under Optional Plan B, the council-manager plan.

Opinion

Generally, in the absence of constitutional, statutory, charter, or ordinance provision, residence within the district over which jurisdiction of office extends is unnecessary to eligibility. See **State ex rel. Brazda et al. v. Marsh** (1942), 141 Neb. 817, 5 N. W. 2d 206.

The decided weight of authority supports the view that residence within the district or other political unit for which an officer is appointed is not a necessary qualification of such officer, in the absence of an express constitutional, statutory, charter, or ordinance provision requiring such residence. See annotation in 120 A. L. R. at p. 672, and cases there cited.

In 42 Am. Jur., Title "Public Officers," § 45, p. 914, at p. 915, we find this statement of the general rule:

> "A candidate for election or appointment to an office of a district or other political subdivision or unit may be required by provision of the Constitution, statutes, or ordinances to be a resident or inhabitant thereof. Thus, county officers, or certain county officers, may be required to be residents of the county, and city officers to be residents of the city or of a particular part of the city, as where councilmen are required to reside in the ward from which they are chosen. **But where residence within the district or political unit is not made a condition of eligibility to holding office therein by express provisions of the law, such residence is generally considered not necessary, even though eligibility to the same office may require a stated period of residence in the state. So, in the absence of constitutional, statutory, or ordinance provision requiring it, it may not be necessary that a person be a resident of a city in order to be eligible to a city office, such as the office of clerk and treasurer, or city attorney."**

The village code contains no specific requirement for residence within the assessment district of an assessor to be appointed by the village manager under Optional Plan B. We assume, from the tenor of your inquiry, that there is no ordinance in the Village of Mound requiring that a person be a resident of the village in order to be eligible to appointment to the office of assessor under Plan B. There is no constitutional provision so requiring. Nor is there any general statutory provision requiring such residence as a condition of eligibility for appointment to that appointive office, unless it can be successfully claimed that M. S. A. 351.02, the so-called "vacancy statute," implicitly requires residence within the village for which the assessor is appointed as a prerequisite of his eligibility to appointment. We examine that claim.[2]

[2]This claim is examined herein only in respect of appointive offices where neither constitutional, statutory, charter, nor ordinance provision requires residence in the district as a condition of eligibility. All elective officers must, of course, be qualified voters and must be, consequently, residents of the election district for at least 30 days next prior to the date of the election at which they are chosen.

M. S. A. 351.02, so far as here pertinent, provides:

"Every office shall become vacant on the happening of either of the following events, before the expiration of the term of such office:

" * * *

"(4) His ceasing to be an inhabitant of the state, or, if the office is local, of the district, county, city or village for which he was elected or appointed, or within which the duties of his office are required to be discharged; * * * ."

It seems clear that the above quoted provision of M. S. A. 351.02 can have no possible application except to a present incumbent of a public office. So far as here pertinent, that quoted provision of the statute has reference to the officer's "ceasing to be an inhabitant of the * * * village for which he was * * * appointed, or within which the duties of his office are required to be discharged." It is only the **ceasing to be an inhabitant** of the village that creates the situation which requires, or even justifies, the application of the quoted provisions of the statute here considered. That statute can have, therefore, no possible application to the appointment of the assessor under Plan B when at the time of his appointment he was not a resident of the village. Residence in the village at the time of such appointment is **not a condition of eligibility**, under the statute or otherwise. That statute provides, then, no basis from which the eligibility of the prospective appointee may be determined prior to his appointment. Accordingly, I conclude that an appointee to the office of village assessor in a village operating under Plan B is not required to be a resident of the village at the time of his appointment.

The question then arises: If residence is not a condition of eligibility to **appointment**, does M. S. A. 351.02 (4), in absence of a constitutional, statutory, charter, or ordinance provision so requiring, compel the conclusion that residence within the political unit is a condition or requirement of **tenure?** I think not.

The above quoted portion of M. S. A. 351.02 has, in my opinion, no application in the absence of constitutional, statutory, charter, or ordinance provision requiring residence within the district or political unit as a condition to eligibility to holding the appointive office. It is applicable only to those appointive offices where residence within the district is by constitutional, statutory, charter, or ordinance provision made a condition of eligibility. In other words, M. S. A. 351.02, paragraph (4), above quoted, was intended by the legislature to provide that, if residence in the district or political unit is made by constitutional, statutory, charter, or ordinance provision a qualification or condition of eligibility for the office, the "ceasing to be an inhabitant" of the district by the appointed officer is one of the grounds upon which an office "shall become vacant."

Attorney General Burnquist, in his opinion dated May 19, 1941 (file 59a-5), considered the question as to whether it was "mandatory that the city attorney [of the City of South St. Paul] be a resident of South St.

Paul." There was no express constitutional, statutory, charter, or other provision requiring the city attorney of South St. Paul to be a resident thereof. The charter of the City of South St. Paul provided for the appointment of the city attorney—an officer under the charter. Attorney General Burnquist held that it was not mandatory that the city attorney of South St. Paul be a resident of that city either at the time of his appointment or during the term of service. In that opinion the Attorney General referred to the provision of M. S. A. 351.02, paragraph (4), hereinabove considered, but held that that provision "does not apply to an officer when the incumbent at the time of his appointment was not a resident of the district that he serves and is not required by constitutional, statutory, charter or ordinance provision to be a resident of the district for which he is elected or appointed." Implicit in that opinion is the clear recognition that the test of the applicability of M. S. A. 351.02, paragraph (4) is, not whether the appointee is an officer of the political unit involved, but whether residence within that unit is made, by some constitutional, statutory, charter, or ordinance provision, a condition of eligibility to appointment to and tenure of the office.

That test was applied in Attorney General's opinion dated March 22, 1944 (file 12c-4). That opinion holds that, where a person was elected township assessor and during his tenure as such officer ceased to be an inhabitant of the township, a vacancy in the office occurred under M. S. A. 351.02 (4). That result follows because, the office there involved being an elective office, only a qualified elector of the township was eligible for election to the office. Residence in that case was a condition of eligibility because, to be qualified as an elector of the township, the person was required to be a resident of the State of Minnesota for six months and of the election district for 30 days next preceding the day of the election at which he was chosen assessor.

That test adopted by Attorney General's opinion of May 19, 1941, above cited, was likewise followed, without reference either to that opinion or to the so-called vacancy statute, in opinions of the Attorney General dated March 8, 1940, and January 9, 1950 (both file 225i-6), holding that, where a village has a board of health, one member thereof must be a physician who need not be a resident of the village.

Other opinions of the Attorney General, hereinafter referred to, have disregarded the test adopted by Attorney General's opinion dated May 19, 1941. Such an opinion is Attorney General's opinion dated February 2, 1934, appearing as Opinion No. 151 in Report of the Attorney General for 1934. The question there considered was whether or not the city council of a city of the fourth class might appoint a commissioner to the water, light, power, and building commission, under what is now M. S. A. 453.01 et seq., when the prospective appointee was not a resident of nor living within the corporate limits of the city. The enabling act of the legislature considered in that opinion contained no specific requirement of residence of the commissioners. The writer of that opinion considered at length the provisions of the legislative act involved and concluded therefrom "that it was

the intention of the legislature that commissioners so appointed under said section should have the same qualifications as to residence as that required of an elective officer of the municipality," and that, therefore, a person, in order to be eligible to hold office as a member of the commission, was required to be an inhabitant and resident of the city. Assuming, without conceding, the correctness of that opinion, it can serve as no binding precedent for this opinion, for the reason that, when the legislature provided for the appointment, rather than for the election, of an assessor in villages operating under Optional Plan B, it cannot be said that it was the intention of the legislature that the appointive assessor under that plan should have the same qualifications as to residence as that required of an elective assessor.

Opinion of the Attorney General dated December 19, 1945 (file 1001h), followed without discussion in opinion of the Attorney General dated November 16, 1949 (file 1001h), held that members of a village hospital board appointed pursuant to the authority of L. 1945, c. 102 (M. S. A. 447.05-447.07), were required to be residents of the village wherein the hospital was located. That conclusion was reached by the writer of that opinion by reference to M. S. A. 351.02 (4), but without reference to the test adopted by the Attorney General in his opinion of May 19, 1941.

To the extent that the two opinions last cited are inconsistent herewith, I am authorized to say that the same are superseded.

Attorney General's opinion dated March 21, 1947 (file 785s), applied M. S. A. 351.02 (4) to a village constable who also acted "as a policeman within the village." It was assumed in that opinion that the appointment of the village constable to act as policeman was made pursuant to Minnesota Statutes 1945, § 412.19, subd. 5. That opinion likewise disregarded the test of the applicability of M. S. A. 351.02 (4) adopted by the Attorney General in his opinion of May 19, 1941, but the conclusion of the March 21, 1947, opinion may have been influenced by the circumstance that the policeman involved was also a village constable, an elective officer of the village, and also by the circumstance that, from a consideration of all the provisions of R. L. 1905, c. 9, of which § 412.19 was a part, and the character of the duties of a policeman, it was the intention of the legislature that the policeman should possess the same residential qualifications as an elective officer of the village. In any event, the last cited opinion of the Attorney General furnishes no precedent for the particular problem here considered. In providing for the optional plans of village government in the New Village Code, the legislature had a purpose in substituting the appointive for the elective method of selecting the assessor in the villages adopting any one of those plans. Its purpose, it seems quite clear, was to provide a method of securing the highest possible order of administrative competence in that responsible position. It is to be noted that, under Optional Plan B of village government, the village manager is specifically required to make all the appointments of "all heads of departments, and all subordinate officers and employees" "upon the basis of merit and fitness."

Accordingly, I conclude, in response to your specific inquiry here considered: (1) that the assessor appointed to serve in a village operating under the council-manager plan (Optional Plan B) is not required to be a resident of the village at the time of his appointment; and (2) that an assessor appointed to serve in a village operating under the council-manager plan (Optional Plan B) is not required to be a resident of the village during the term of his service.

Nothing in this opinion shall be construed as being applicable to the appointment of a deputy assessor appointed under the provisions of the New Village Code. Section 16 of the New Village Code (M. S. A. 412.131) in part provides that any assessor "may appoint a deputy assessor as provided in Minnesota Statutes, Section 273.06." See opinion of the Attorney General March 15, 1950 (file 12b-4), a copy of which is herewith enclosed.

LOWELL J. GRADY,
Assistant Attorney General.

Mound Village Attorney.
April 4, 1950. 12-B-4

146

Residence — Deputy village assessor — Deputy must be citizen of village — M. S. A. 412.131; 412.901; 273.06.

Question

"May the Village lawfully expend Village funds to deputy assessors not living within the Village, but who do have residence within the County when there are no available deputy assessors within the Village?"

Opinion

The new Village Code was enacted by L. 1949, c. 119 (now coded as M. S. A. 412.011 et seq.). It is applicable to all villages (M. S. A. 412.901). Section 16 (M. S. A. 412.131) of the Village Code deals with the duties of village assessor. That section, in its portions pertinent to your inquiry, provides in part:

" * * *Any assessor may appoint a deputy assessor as provided in Minnesota Statutes, Section 273.06."

M. S. A. 273.06 provides as follows:

"Any assessor who deems it necessary to enable him to complete the listing and valuation of the property of his town **or district** within the time prescribed, with the approbation of the county auditor, may appoint a well-qualified **citizen of his** town or **district to act as his** assistant or **deputy,** and may assign to him such portion of his district as

he thinks proper. Each assistant so appointed, after giving bond and taking the required oath, shall perform, under the direction of the assessor, all the duties imposed upon assessors by this chapter."

The "district" means the assessment district. The Village of Fridley is the assessment district. The statute is plain in respect of the qualifications of a person eligible to appointment by the assessor as deputy assessor. Such person must be a well-qualified citizen of the assessment district. There is no statutory authority for the appointment of a deputy assessor of the village who is not a citizen of the village.

LOWELL J. GRADY,
Assistant Attorney General.

Fridley Village Attorney.
March 15, 1950. 12-E

147

Residence—Residence within the village is not a condition to eligibility for appointment of employee in municipal liquor store — Police officers: Appointed by council. Absent ordinance requiring same, residence within a village is not a condition of eligibility to appointment as or tenure of police officer in village.

Question

Is there any requirement as to the residence of an employee appointed to work in the municipal liquor store?

Opinion

M. S. 1949, § 412.111 authorizes the village council to "appoint such officers, employees, and agents for the village as may be deemed necessary for the proper management and operation of village affairs." The village code (M. S. 1949, §§ 412.011, 412.921) contains no specific requirement for residence within the village of an employee of the municipal liquor store appointed under the authority of § 412.111, nor is there any general statutory provision requiring such residence as a condition of eligibility for appointment as an employee in a municipal liquor store.

Accordingly, unless an ordinance of the village involved requires such residence as a condition of eligibility to the appointment involved, your specific inquiry is answered in the negative.

Additional Facts

"The village council wishes to appoint a police officer."

Question

"Is there any requirement as to residence of such an appointee?"

Opinion

This presents a more difficult question.

We assume for the purposes of this opinion, that the village involved has not established a police civil service commission in pursuance of M. S. 1949, § 419.01, and that the police officer will be appointed by the council in pursuance of the authority conferred by M. S. 1949, § 412.111.

A policeman appointed under the statute last cited is an "officer" of the village. See Dunnell's Minn. Digest (2 Ed.), § 6589 et seq.; **Parker v. Travelers' Ins. Co.**, 163 S. E. 159, 174 Ga. 525.

Generally speaking, residence within the district or other political unit for which an officer is appointed is not a necessary qualification for such office in the absence of a constitutional, statutory, charter, or ordinance provision requiring such residence as a condition of **eligibility to appointment.** See Attorney General's opinion dated April 4, 1950 (file 12b-4), a copy of which is herewith enclosed, and the authorities therein cited.

The village code contains no specific requirement for residence within the village as a condition of eligibility for appointment to the office involved. Nor is there a constitutional or general statutory provision requiring such residence as a condition of eligibility for appointment.

Accordingly, unless an ordinance of the village involved requires such residence as a condition of eligibility to the appointment involved, your specific inquiry is answered in the negative.

You will note that the above cited Attorney General's opinion dated April 4, 1950, holds that if residence is not a condition of eligibility to **appointment**, M. S. 1949, § 351.02, (4), in the absence of a constitutional, statutory, charter or ordinance provision so requiring, residence within the political unit is not a requirement of **tenure** of the office. The village code contains no specific requirement that residence within the village is a condition of tenure of the office involved. Nor is there any constitutional or general statutory provision so requiring. An ordinance of the village may so require.

LOWELL J. GRADY,
Assistant Attorney General.

Benton County Attorney.
December 20, 1950. 218-R 785-S

148

Surety bond — Agreement — Bid — County Board may enter into agreement with one bonding company to write all bonds for its officers and employees if such officers and employees (treasurer excepted) consent; county need not advertise for competitive bids on furnishing of such bond—M. S. 1949, § 574.19; 382.153; 375.21, subd. 1.

Facts

It has been suggested that bonds furnished by all county officers and employees be written by one bonding company; that such bonds might be procured at a reduced rate if one company wrote all the bonds; that the county board agree to such a transaction and authorize and designate a bonding company to write the bonds for all employees and pay the premium therefor.

Question

May the county board enter into an agreement with one bonding company to write all the bonds for its officers and employees?

Opinion

Subject to the qualifications hereinafter expressly stated, your specific inquiry is answered in the affirmative.

This office has held that there is a distinction to be made between the bond of the county treasurer and the bonds of other county officers or employees.

The county board has the right, under M. S. 1949, § 574.19, to designate a surety to write the bond of the **county treasurer.** See opinion of the Attorney General dated November 13, 1946, file 450b, copy of which is enclosed.

As to bonds required of other county officers in counties having a population of 250,000 or less[1], this office has held that the officers furnishing the bond has the right to designate the surety[2]. See opinion of the Attorney General dated October 30, 1950 (45d), supplemented by opinion dated November 1, 1950 (45d), copies of which are enclosed. If that be true, the officer's right of selection may not be defeated simply by the county board's entering "into an agreement with one bonding company to write all the bonds for its officers and employees." All the officers and employees involved, or any number of them, may, of course, consent to an arrangement whereby the county board enters into an agreement with one bonding company to write their respective bonds and thereby waive their right to select the surety on their respective bonds. Such officers or employees as may refuse or fail to consent to such arrangement would, of course, retain their right to choose their own surety.

[1]As to counties containing more than 250,000 population, it is provided by M. S. 1949, § 382.153 that the county board may designate the surety.

[2]The bond submitted by the officer or employee is, of course, subject to approval or disapproval by the county board. See opinion dated October 30, 1950 (45d).

In the event all or any number of such other officers and employees consent that the board should enter into the arrangement here involved, we understand your inquiry to raise this further

Question

Is the County Board of Olmsted County required to advertise for competitive bids for the furnishing of the bond of such other officers and employees involved in the proposed arrangement?

Opinion

This question is answered in the negative.

M. S. 1949, § 375.21, subd. 1, requires that in counties having less than 75,000 population "no contract for work or labor, or for the purchase of furniture, fixtures, or other property, * * * the estimated cost or value of which shall exceed $1,000, shall be made by the county board without first advertising for bids or proposals in some newspaper of the county."

Even though Olmsted County is within the classification of 375.21, subd. 1, as to population, I am of the view that the subdivision is inapplicable to your specific inquiry, because: (1) the bonds of county officers do not run to the county but to the state; they are contracts of indemnity to protect the state even though the county might enforce the bond involved for the benefit of the county; (2) the furnishing of such a bond does not involve "the purchase of furniture, fixtures, or other property" within the meaning of 375.21, subd. 1.

LOWELL J. GRADY,
Assistant Attorney General.

Olmsted County Attorney.
December 5, 1950. 45-D

149

Surety bond —Schedule or position insurance policy — City whose charter provides for execution of bonds to it by its officers is not authorized to take out schedule or position insurance policy in lieu of individual bonds.

Question

May the city council of Owatonna direct the bonding of its officers, with the exception of the treasurer of the hospital board, by a blanket bond instead of requiring that they give separate bonds as at present?

Answer

Chapter III, Sec. 5, of the city charter provides that the city officers therein named, and such other officers as the council may direct, shall execute such bonds to the city as the council may direct and approve. This is the

only provision in the city charter relating to the bonding of city officers, with the exception of Chapter X, Sec. 3, which provides for the bonding of the treasurer of the hospital board. There is no provision in the charter authorizing a blanket bond. By a "blanket bond" we presume you mean a schedule or position insurance policy.

It is therefore our opinion that the only bonds for city officers authorized by the charter are individual bonds executed by each officer personally, as principal, and that the council has no authority to provide for a blanket bond for all city officers.

Your charter, of course, may be amended so as to make this permissible. In this connection we wish to call your attention to M. S. A. 574.02, under which the state may take out a schedule or position insurance policy in lieu of requiring the execution of individual bonds.

IRVING M. FRISCH,
Special Assistant Attorney General.

Owatonna City Attorney.
November 17, 1949. 59-A-8

OFFICERS

150

Board of audit — Compensation — De facto member of board performing duties as such under color of right — Compensation paid to him therefor cannot be recovered by county — M. S. A. 385.06.

Facts

"County commissioner X was chairman of the County Board of Commissioners during the year of 1948. At a meeting of the Board of County Commissioners held January 4th, 1949, Y was elected chairman. During the first part of January, 1949, the County Auditor notified commissioner X, who was chairman of the Board during 1948, that the Board of Audit would meet on the 21st day of January. Apparently the County Auditor overlooked the fact that the chairman of the board had been changed since the last audit had been made.

"Commissioner X came to the county seat pursuant to said call on January 21st and together with the Clerk of Court and the County Auditor, audited the books of the County Treasurer pursuant to the provisions of Section 385.06, Minnesota Statutes.

"Thereafter commissioner X filed a bill with the Board of County Commissioners for $19.00, being $14.00 mileage and $5.00 per diem for making said audit and the claim was duly allowed by the County Board and paid by the County Auditor."

Questions

1. "Whether or not the payment of this claim was a lawful expenditure"; and
2. "If the expenditure was not lawful, can the County take action against the commissioner to recover the money so paid him?"

Opinion

M. S. A. 385.06 provides that the chairman of the county board, the county auditor, and the clerk of the district court of each county shall constitute a board of audit and that the board of audit shall meet and perform its statutory duties at least three times a year. For such services the members of the board of audit are entitled to the statutory allowance of necessary mileage traveled and the statutory $5.00 per diem.

In my opinion, on the 21st day of January, 1949, Commissioner X was a **de facto** member of the board of audit. He performed the services required by the statute of such member. He has been paid for such services by the county. The expenditure involved is justifiable. It is not recoverable by the county from Commissioner X.

During the year of 1948 and at least until the 4th day of January, 1949, Commissioner X, as chairman of the county board, was a statutory and **de jure** member of the board of audit. From January 4, 1949, when Mr. Y succeeded Mr. X as chairman of the county board, until at least subsequent to January 21, 1949, Commissioner X continued as a member of the board of county commissioners.

In 43 Am. Jur. at § 484, under the title "Public Officers," we find this general statement of the rule:

> "The rule has been generally stated that where an officer under color of right or title continues in the exercise of the functions and duties of the office without legal authority after his term of office has expired, or after his authority to act has ceased, he is an officer de facto."

That the acts of Commissioner X in the exercise, under color of title to membership on the board of audit, of the duties thereof are valid, notwithstanding that Commissioner Y was then the **de jure** member of the board of audit, see **Carli v. Rhener**, 27 Minn. 292, 7 N. W. 139.

With reference to the second question, it should be noted that Commissioner X was not a mere intruder or usurper in performing the functions on January 21, 1949, of a member of the board of audit. He rendered the services for which the statute allows $5.00; he traveled necessarily, for which the statute allowed him $14.00. The county has paid the total of $19.00 to Commissioner X. Under these circumstances, I am of the view that the

amount so paid to the commissioner cannot be recovered by the county where it does not appear that the commissioner acted in bad faith. See 43 Am. Jur., § 491, under the title "Public Officers."

LOWELL J. GRADY,
Assistant Attorney General.

Marshall County Attorney.
July 25, 1949. 541

151

Coroner — Mileage — When coroner rides with sheriff — M. S. A. 357.11.

Opinion No. 79, 1932 Report, affirmed.

Opinion No. 206, 1940 Report, reversed.

Question

Is the coroner entitled to "mileage at ten cents per mile for necessary travel" under M. S. A., § 357.11, when the coroner "rides with the sheriff * * * and does not use his own automobile or incur any actual expenses in regard to traveling to or from" the points required by the performance of his official duties?

Opinion

The question is answered in the affirmative.

M. S. A., § 357.11, is a statute which fixes **the compensation** of coroners. It is not a reimbursement statute. It does not prescribe an amount to be paid in reimbursement of expenses incurred or paid. It prescribes the compensation of the office. Accordingly, the coroner is entitled to ten cents per mile for actual mileage necessarily traveled in connection with the performance of his duties. See 1932 Attorney General's Report, opinion No. 79.

Opinion No. 206, 1940 Attorney General's Report, in so far as the same applies to the mileage allowance payable to the coroner, is reversed because that opinion seems clearly to be predicated upon the false assumption that M. S. A., § 357.11, is a "reimbursement" statute.

J. A. A. BURNQUIST,
Attorney General.

Brown County Attorney.
March 31, 1949. 103-A

152

County attorney — Duties — Collections — Not duty of county attorney to attempt collection of accounts due county arising from operation of hospital, but it is his duty to conduct litigation in behalf of the county if suit is brought thereon — M. S. A. 388.05.

Question

Is it the duty of the county attorney to collect delinquent accounts due to a county hospital operated under M. S. A. 376.01 et seq.?

Opinion

I take it that the hospital is operated under M. S. A. 376.06. Sec. 376.15 gives the county sanitarium commission the power to fix the amount to be charged for the care, treatment and maintenance of each patient. When a patient is unable to pay and has no kindred liable therefor, he may be admitted without charge. The commission may fix a charge according to the patient's ability to pay. Other arrangements are specified in this section for other cases.

I do not find any provision where the county can extend credit. I find no authority authorizing any accounts receivable. The county attorney has no obligation to collect accounts accumulated by the county which the law does not authorize to be incurred in the first place.

The duties of the county attorney are not prescribed by the county board. They are prescribed by law. See M. S. A. 388.05.

If the county institutes an action for collection of money due the county, it is the duty of the county attorney to appear for the county in such case. But it is not his duty to operate a collection system for the collection of accounts due the county which the hospital authorities did not have the right to incur in the first place.

CHARLES E. HOUSTON,
Assistant Attorney General.

Kanabec County Attorney.
May 16, 1949. 121-B-4

153

County attorney — Duties — No duty as to enforcement of ordinances of cities — M. S. A., Sec. 388.05.

Opinion

The duties of the county attorney are purely statutory and are specified in M. S. A., Sec. 388.05. The office is created and the duties are specified by law.

It appears that in the city of Waseca the sanitary sewers are adequate for sanitary purposes, but when overloaded with surface waters resulting from storms, in some localities the sewers back up and flood basements. Complaints result.

An ordinance forbids the discharge of surface waters into sanitary sewers. Some property owners have disregarded the ordinance. I do not know whether the ordinance provides a penalty for such conduct, but if it does, it is no duty of the county attorney to enforce the ordinance.

CHARLES E. HOUSTON,
Assistant Attorney General.

Waseca County Attorney.
February 19, 1949. 121-B-3

154

County commissioners—Compensation—While acting on committees: Standing committees of county board may be appointed and are entitled to compensation prescribed by M. S. 1949, § 375.06 in attending committee work which is in furtherance of duties of board and specifically delegated thereby.

Facts

M. S. 1949, § 375.06, specifies the compensation of members of a county board in a county having a population of less than 75,000 for services on any committee under the direction of the board.

Question

(a) Whether "standing committees of the County Board can be appointed," and,

(b) "if so appointed, can they collect the amount allowed under Sec. 375.06 for such committee work," or

(c) "must the Board appoint committees and by specific resolutions specify the assignment of such committees and the work to be done thereunder?"

Opinion

M. S. 1949, § 375.06, in its parts material to your inquiry, provides:

"The several members of the county boards in counties having less than 75,000 inhabitants shall receive $3.00 per day for each and every day necessarily occupied in the discharge of their official duties while acting on any committee **under the direction of the board,** and ten cents per mile, each way, for every mile necessarily traveled in attending such committee work * * * ."

(a) I see no reason why standing committees of the county board may not be appointed.

(b) If the members of a standing committee act thereon "under the direction of the board" in relation to a matter within the scope of the official duties of the board and in furtherance thereof, such members are entitled to the compensation prescribed by the statute involved "in attending such committee work"; otherwise not. It does not follow therefrom that it is within the authority of the board to designate any one or more of its members as a committee with blanket authority to do general work during the course of the year with the compensation as prescribed by this statute to be paid by the county. The language of the statute implies the delegation by the board of a specific matter to the committee. That delegation may be made by the board either by motion or by resolution.

(c) The answers to (a) and (b) above render unnecessary an answer to this subdivision of your question.

LOWELL J. GRADY,
Assistant Attorney General.

Aitkin County Attorney.
September 7, 1950. 124-J

155

County commissioners—Committee work—Expenses—M. S. A. 350.11, 375.05 (5), L. 1949, c. 681, L. 1943, c. 53, M. S. A. 375.055, 375.06.

Questions

1. Does M. S. A. 350.11 apply in Winona County?
2. Are county commissioners entitled to board and lodging if their meetings extend over a day and if so, by what authority?
3. Does M. S. A. 375.06 apply in Winona County in connection with committee work of county commissioners and if so, what is the rate per mile of compensation? Is it ten cents per mile or does Sec. 350.11, as amended, apply?
4. Under what situation would the mileage allowance under Sec. 375.05 apply?
5. Is a commissioner entitled to mileage under any of these sections when he does not supply his automobile in the attending of board meetings, committee meetings, such as nurses advisory committee, Winona County agricultural extension committee, or the county road and bridge committee?

6. Under the latter, if a board member rides with another in the examination of roads for which the committee is authorized to examine, is only the owner and operator of the automobile entitled to mileage or are all the commissioners riding in the automobile entitled to mileage, and if so, at what rate?

Opinion

Sec. 350.11 by its terms applies to all counties in the state except as limited by L. 1949, c. 681. In applying that section of the statutes you will note the language. You will notice that the language relates to "compensation or reimbursement for the use by such officer or employee of his own automobile in the performance of his duties."

In considering your second question, I call your attention to what is said in the opinion of the Attorney General, dated December 15, 1949 (124J), copy of which is enclosed.

M. S. A. 375.05 (5) makes provision for the payment to county commissioners in addition to their salaries of their actual and necessary traveling expenses incurred and paid by them in the discharge of their official duties; provided that the total aggregate amount of the traveling expenses of all of the county commissioners in any such county which may be so allowed and paid shall not exceed the sum of $1,200 in any one year; and if a county commissioner uses his own team or automobile in the necessary performance of the official duties of his office, he shall be allowed for the use thereof such reasonable amount as the use of a team or automobile could be hired for, under the same circumstances, from a person engaged in the livery business in the same locality; such allowance shall not exceed ten cents per mile for each mile actually traveled, and no charge shall be made or paid for the time consumed by such commissioner's conveyance while in waiting.

It is noted that, under the language in L. 1943, c. 53, which according to its terms applies to Winona County, county commissioners shall be paid in addition to their salary "their actual and necessary traveling expenses incurred and paid by them in the discharge of their official duties, provided that the total aggregate amount of traveling expenses of each county commissioner of any such county which may be allowed and paid, including salary, shall not exceed the sum of $1,200.00 in any one year." Chapter 53, supra, was enacted subsequent to Sec. 375.05, and assuming that they both apply to Winona County, Chapter 53 would supersede any provision in Sec. 375.05 inconsistent therewith.

I would assume that any member of the county board not residing at the county seat would have actual and necessary traveling expenses in attending a meeting of the county board and that he would be entitled to reimbursement of such expenses actually paid whether it included meals, lodging or both. But in computing the amount of reimbursement to which he is entitled for the use of his own automobile and travel, the amount of the reimbursement is limited by Sec. 350.11, supra.

The 1940 census appears to indicate that Winona County in 1940 had a population of 37,795. That population appears to bring it within the application of 375.06. This section was brought into the code from the 1913 laws. It relates to the per diem to be paid to the members of the county board for each day necessarily occupied in the discharge of their official duties and mileage for committee work and attending meetings of the board.

But M. S. A. 375.055, last amended in 1947, is later in point of time of enactment and so far as the two are inconsistent Sec. 375.055 applies.

A clear distinction in law exists between compensation for mileage, which is an emolument of the office, and reimbursement for expenses actually and necessarily paid. When we speak of expenses we are not considering mileage.

It is my opinion that in Winona County you may disregard Sec. 375.06. The commissioners are entitled to reimbursement for actual and necessary expenses paid in the discharge of their duties as hereinbefore stated under authority of M. S. A. 375.05. The limitation of M. S. A. 350.11 applies in so far as automobile travel with a car owned by the commissioner.

Sec. 375.05 does not provide for the payment of mileage as implied in the fourth and fifth questions. It provides for the payment of actual and necessary traveling expenses incurred and paid by the commissioners in the discharge of their official duties.

If the commissioner incurs actual and necessary traveling expenses in the discharge of his official duties, then he is entitled to be reimbursed therefor, as stated. Of course, if he travels in an automobile driven by another member of the board and he does not pay the other member of the board for his rides, he has no expense. Consequently, he is not entitled to reimbursement because he is reimbursed for expense. He is **not** paid mileage. If the law provided for mileage, then he would be entitled to compensation for his travel irrespective of the means of travel. Reimbursement for expense is an entirely different matter. It is noted that the measure of his reimbursement is his actual, necessary traveling expense.

CHARLES E. HOUSTON,
Assistant Attorney General.

Winona County Attorney.
December 27, 1949. 124-J

156

County commissioner — Qualification — Drainage — County ditch—Commissioner not to sit at hearing when financially interested in outcome of proceeding.

Question

If a county commissioner owns land directly affected by a ditch proceeding, may he sit as a county commissioner in reviewing the petition, attend hearings and vote for the establishment of the ditch or rejection of the petition?

Opinion

The county boards of the several counties and the district court are authorized to make all necessary orders for and cause to be constructed and maintained public drainage systems. M. S. A. 106.021. So, it appears that the powers of the county board in respect to county ditches are similar to the powers of the district court in respect to judicial ditches. The board or court determines the sufficiency of the petition in the proceedings. M. S. A. 106.101, subd. 3. The board or court has the same powers in making findings and orders. Subd. 5. Both have the same power in respect to making an order directing the engineer to make a detailed survey. M. S. A. 106.111. Both the board and court have the power to direct the viewers to amend the report. Sec. 106.191, subd. 2. They have like powers in respect to making an order establishing the ditch. Sec. 106.201, subd. 2.

The governmental powers exercised in a drainage proceeding are the police power, the power of eminent domain and the taxing power. Dunnell's Digest, Sec. 2819. In the exercise of this power of eminent domain, which reposes in the district court in a judicial ditch proceeding, if the presiding judge were the owner of land to be taken, there would seem to be no question that he would be disqualified to sit in a case involving his own interests. M. S. A. 542.13. The statute does not apply beyond its plain terms. It applies to judges. So, if the county commissioner is excluded from sitting as a judge in his own case, it is not because of this statute which disqualifies a judge of the district court who is interested in the determination or who might be excluded for bias from acting therein as a juror, but it plainly indicates the thinking of the legislature that no judge shall try his own cause.

We find no similar statute which applies to county commissioners acting in drainage proceedings. But, nevertheless, the reason behind the rule for judges is an equally good reason in a case of a county commissioner sitting as judge in his own cause. There is no difficulty in reaching a conclusion that common principles of justice forbid that a county commissioner should sit in his official capacity to pass upon questions which will arise before him as a public officer in which he has a personal, financial interest.

At various stages in a drainage proceeding, the law provides for a hearing. When the hearing is to be before the county board, the point is not debatable that any person interested is entitled to a fair hearing. Can it be said that a person has a fair hearing when the tribunal with the power of decision is financially interested in the outcome thereof?

In **U. S. v. Reynolds**, 2 Fed. Supp. 290, it was held that an alien in a deportation proceeding did not have a fair hearing where immigration inspector who presided also planned investigation, procured evidence, examined government's witnesses, cross-examined alien's witnesses, testified, and made findings and conclusions. It was further held in that case that it cannot be said that there has been a fair hearing if hearing is conducted in such manner or if practices are indulged in which lead to conclusion that denial of justice may have resulted.

In **Tang Tun v. Edsell**, 223 U. S. 673, it was stated that a fair hearing is one in which authority is fairly exercised, "that is, consistently with the fundamental principles of justice embraced within the conception of due process of law."

We may well pause here to inquire whether a county commissioner sitting as a member of the county board in a hearing in which the commissioner is financially interested is a fair exercise of power. Is such exercise of authority consistent with the fundamental principles of justice embraced within the conception of due process of law?

The exercise of authority in **U. S. v. Reynolds**, supra, was by a deportation agent, that is, an administrative officer. In the Reynolds case, the court said that no judge of a court would for a moment think of presiding under such circumstances and then inquired why an immigration inspector should. The court inquired:

> "Does the fact that he is an administrative and not a judicial officer, that his mind is untrained in legal proceedings make him less susceptible to be influenced by matters dehors the record? If so, it is a sad commentary upon our judiciary and our time-honored judicial system."

And, again, the court said:

> "The American idea of justice implies an unbiased presiding officer, whether he be called judge, referee, commissioner, master, or inspector. This was necessary to constitute a fair hearing."

In American Jurisprudence, we read:

> "An administrative hearing in the exercise of judicial or quasi-judicial powers must be fair, open, and impartial. The right to such a hearing is an inexorable safeguard and one of the rudiments of fair play assured to every litigant by the Fourteenth Amendment as a minimal requirement. * * * When such a hearing has been denied, the administrative action is void. The requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." **42 Am. Jur. Sec. 137, Public Administrative Law.**

> "Due process of law requires that a hearing in a judicial or quasi-judicial proceeding by administrative officers be by a fair and impartial tribunal, and the common-law rule of disqualification applicable to judges extends to every tribunal exercising judicial or quasi-judicial functions. The rule has been applied or recognized in cases of revocation of licenses, removal of officers, **the establishment of drainage districts,** eminent domain proceedings, and the making of local or special assessments." **42 Am. Jur., Public Administrative Law, Sec. 20.**

In 17 Am. Jur., Drains and Sewers, Sec. 34, we read:

> "While it is usually held that a judge is disqualified to preside at the hearing of a petition to establish a drain or a drainage district if he owns any real property within the area to be affected thereby, it

seems that his disqualification does not extend to the performance of ministerial acts after an order of establishment has been made. Thus, it has been held that the mere fact that a judge who approved the accounts of a board of drainage commissioners owned land affected by the proceedings did not invalidate the order of confirmation. But whether ownership of such property will disqualify an individual member of a board from sitting at the hearing does not appear to be definitely settled. Although it has been intimated that a member would not thereby be disqualified, there is well-reasoned authority to the contrary. Proceeding upon the theory that passing upon the petition is a judicial act, it has been held that any board member who owns land that will be affected by the decision has absolutely no right to vote, even though the statute is silent on the subject. And still other courts take the position that property ownership will not disqualify a member of the board, if the act provides for an appeal from the decision."

In **Carr v. Duhme**, 167 Ind. 76, 78 N. E. 322, 10 Ann. Cas. 967, it was held that there being no statute prohibiting county commissioners from serving in matters in which they are interested, proceedings for the establishment of a drain were voidable only, and not void because one of the commissioners before whom the proceedings were had was disqualified by interest. In the course of the opinion in that case it was stated:

"It is an ancient maxim of the law that no man should be a judge in his own cause, and this principle still prevails wherever judicial tribunals are maintained. Winters v. Coons, 162 Ind. 26, 69 N. E. 458. It is of such potent force that, under our Constitutions and enlightened sense of justice, a legislative act which should undertake to make a man arbiter of his own cause would be held void. Cooley's Const. Lim. (5th Ed.), §§ 403-410."

The trend of this decision is that, although the board has jurisdiction, such proceeding is erroneous and the procedure to correct the error is by appeal. In this opinion, it is stated that:

"A proper sense of propriety should in all cases prevent a member from acting in any proceeding to which he is a party, but if, disregarding such disqualification in a matter over which the board has jurisdiction of the subject and the parties, he does participate in rendering a judgment from which an appeal is allowed, his act and the action of the board will not be void, but only voidable."

In **Stahl v. Board of Supervisors**, 187 Iowa 1342, 175 N. W. 772, 11 A. L. R. 185, it was held that the constitutional guaranties recognize as a primal necessity that there be laws providing impartial tribunals for the adjudication of rights. In the Iowa case the board consists of three members. Two members of the board were in disagreement and the third member who was interested in the result cast the deciding vote. The opinion comments that where one judges his own case, there is a lack of due process of law.

Consider the powers of the board. M. S. A. 106.021. It may dismiss the proceeding. Sec. 106.061. It selects and appoints the engineer. Sec. 106.071. It holds a hearing on the engineer's preliminary report. Sec. 106.101. It determines the sufficiency of the petition and at this time makes findings if the petition is not dismissed. Those findings are conclusive as to the sufficiency of the petition, the nature and extent of the proposed plan and the need of a permanent survey. It appoints the viewers. Sec. 106.141. It holds the final hearing on the engineer's and viewers' reports. Sec. 106.191. It either dismisses or establishes the drainage system. Sec. 106.201. In fact, it controls the procedure.

We bear in mind that a county ditch proceeding is one in rem, and the order establishing the ditch has the same final and binding force as a judgment in rem. By the order, a new status is created for the lands affected, and where a benefit is derived and land is assessed for such benefit, it becomes a property right appurtenant to the land, and not to be taken or impaired even through governmental action, except by due process of law. **Lupkes v. Town of Clifton,** 157 Minn. 493, 196 N. W. 666. So, we see that such order has many of the attributes of a judgment of a court.

The drainage law makes no provision for the other members of the county board taking action to exclude from participation at a hearing of a member financially interested in the subject matter. But upon attention of the interested member being called to the factual situation, I would assume that when he is financially interested, he would stand aside. If not, and someone else than he makes a point thereof and in some appropriate manner brings it before the court, I should be inclined to the belief that in the interest of a fair hearing, the court would say, as was said in the case above cited, that such a hearing is not fair.

CHARLES E. HOUSTON,
Assistant Attorney General.

Kandiyohi County Attorney.
October 10, 1949. 90-B

157

Probation officer—Office—Telephone service—County board in its discretion may furnish telephone service to probation officer whose office is situated in courthouse—M. S. A. 382.04, 375.14.

Question

"May the County of Kandiyohi pay for the installation and monthly charges for a telephone for a State Parole and Probation Agent with offices maintained in the Kandiyohi County Court House and who serves the Probate and District Judges and Sheriff's offices of several counties?"

Opinion

Perhaps we should take a broad view of this question.

In many counties, the county furnishes an office and office facilities to the county agent. He is not a county officer. All counties furnish chambers to the district judge and I presume that in many, if not most, counties he is furnished a telephone. He is not a county officer. The law requires certain county officers to keep their offices at the county seat. It does not say that they shall be at the courthouse. M. S. A. 382.04. Nevertheless, the county furnishes offices to the county officers. Sec. 375.14 is authority to the county board to provide offices at the county seat for the officers named and to provide suitable furniture therefor, and to provide heat, light and maintenance for the offices. It would seem to me that such provision in the law is not for the benefit of the officer but for the benefit of the public.

The question for consideration does not involve supplying telephone service to a county officer or employee but to one employed by the state and for convenience, located in your county. It would appear that the fact that this person is located in your county is because that is considered a central location and it thus promotes the public convenience. This officer cooperates with other public officers who serve your county. In order to be efficient, of course, it is necessary that he be furnished telephone service.

The county board has general powers. M. S. A. 375.18 (2) gives it power of management of the county business except as otherwise provided. So, it appears to me that, if the county board considers that it is for the best interests and for the convenience of the public, including Kandiyohi County, that the probation agent be furnished with an office in the courthouse with telephone service, it is within the authority of the county board to say so. I should not consider the furnishing of the telephone service on a different basis than the furnishing of adequate lighting or heat. I do not mean to say that the board is obligated to furnish telephone service or that it is even obliged to furnish him an office, but if it decides to do so, there is nothing to prevent it from making the office efficient. It is my opinion that it is a question for the board.

CHARLES E. HOUSTON,
Assistant Attorney General.

Kandiyohi County Attorney.
November 16, 1949. 104-B-8

158

Register of Deeds—Deputy—Salary — In counties having less than 75,000 inhabitants, county board may allow compensation for deputy register of deeds without limitation.—M. S. A. 386.34, as amended by L. 1949, c. 451 — Legislation — Two bills approved same day amending same statute.

Facts

L. 1949, c. 451 and c. 455, amend M. S. A. 386.34 and both were approved April 15, 1949.

M. S. A. 386.34 is authority to the county board in any county having a population of less than 75,000 inhabitants to "allow one deputy register of deeds in such county compensation for services as such deputy."

Prior to the 1949 session of the legislature, M. S. A. 386.34 specifically provided that such allowance by the county board of compensation for such deputy register of deeds in those counties[1] might not exceed the sum of $900 per year.

Question

Did the 1949 legislature remove the $900 limitation formerly prescribed by M. S. A. 386.34, so that the county board of a county having a population of less than 75,000 may now allow one deputy register of deeds in such county compensation for services as such deputy without regard to the $900 limitation?

Opinion

The question is answered in the affirmative.

M. S. A. 386.34, as amended by L. 1949, c. 451, so far as here pertinent, reads:

> "The county board of each county having a population of less than 75,000, may by written order to be filed in the office of the county auditor allow one deputy register of deeds in such county compensation for services as such deputy **to be fixed by the board and specified in said order.** * * * "

Thus, L. 1949, c. 451, substituted the words above underscored, "to be fixed by the board and specified in said order" for and in place of the words "not exceeding $900 per year" found in M.S.A. 386.34 immediately before its amendment by L. 1949, c. 451. L. 1949, c. 451, was passed by the House on April 6, 1949, and by the Senate on April 8, 1949, and **was approved by the Governor on April 15, 1949.**

If we stopped at that point, there would be no question but that the legislature had effected a removal from M. S. A. 386.34 of its former $900 limitation. The only new matter in the bill which ultimately became c. 451, as indicated by the use of italics in that bill, was the phrase **"to be fixed by the board and specified in said order."**

L. 1949, c. 455, also amends M. S. A. 386.34, but the purpose of the amendment by c. 455 was different from that sought to be accomplished by c. 451.

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[1]Another provision of M. S. A. 386.34 prescribes that in certain counties having a certain number of townships and a population of not less than 30,000 and not more than 35,000, such compensation may not exceed $2,000 per year. That provision is immaterial to your inquiry. This opinion does not apply to counties within the limited classification of that provision, nor to counties within the limited classification contained in the last sentence of L. 1949, c. 455, § 1.

C. 455 added to the former provisions of M. S. A. 386.34, as evidenced by the italicized matter in the bill which ultimately became c. 455, the following sentence:

> "In each county containing less than 15 full and fractional congressional townships, and having more than 16,000 and less than 19,000 inhabitants according to the 1940 federal census, and having an assessed valuation of less than $7,000,000, exclusive of moneys and credits, the county board may by written order to be filed in the office of the county auditor allow one deputy register of deeds in such county compensation for services as such deputy not exceeding $1,500 per year."

In preparing the bill which ultimately became c. 455, the authors thereof prefaced the last above quoted sentence with the former language of M. S. A. 386.34 containing the $900 limitation, without reference to the contents of the bill which ultimately became c. 451. But it is safe to assume that the legislature, in enacting c. 455, considered that it was acting only upon the italicized matter in that bill which became c. 455, and that matter was the last above quoted provision, applicable to counties of more than 16,000 and less than 19,000 inhabitants.

C. 455 was passed by the House on April 8, 1949, and by the Senate on April 9, 1949, and was approved by the Governor, as was c. 451, on April 15, 1949. C. 451 nowhere refers to other amendments of the 1949 legislature affecting M. S. A. 386.34, and c. 455 makes no reference whatever to the amendment thereof effected by c. 451.

Under these circumstances, the following rule of construction, expressed in M. S. A. 645.33, is applicable:

> "When two or more amendments to the same provision of law are enacted at the same or different sessions, one amendment overlooking and making no reference to the other or others, **the amendments shall be construed together, if possible, and effect be given to each.** If the amendments be irreconcilable, the latest in date of final enactment shall prevail."

The two amendments here involved are not irreconcilable. In c. 451 the legislature was dealing with the question of the removal from the statute of the then existing $900 limitation. In c. 455 the legislature was dealing with the question of the advisability of authorizing county boards in counties having more than 16,000 and less than 19,000 inhabitants and containing 15 full and fractional congressional townships to allow compensation to one deputy register of deeds in such counties compensation for services not exceeding $1,500 per year.

Unquestionably the legislature, in acting upon c. 451, was not aware of the existence of the apparent conflict between that bill and the unitalicized matter in the bill which ultimately became c. 455.

Accordingly, the amendments should be construed together and effect be given to each.

In **Ausman v. Hoffmann** (1940), 208 Minn. 13, 292 N. W. 421, we find the following:

> "It is undisputed that both c. 401 and c. 430 were enacted on the same day and, insofar as it appears, were approved by the governor at the same time. * * * We think, however, that the legislature was not aware of the existence of such conflict, and we prefer to apply the rule of Halverson v. Elsberg, 202 Minn. 232, 233, 277 N. W. 535, that 'two acts passed, approved, and effective the same day are to stand together and be harmonized.'
>
> "Our attention has been called to a statement in 59 C. J., p. 1053, § 622 (c), which supports this view and which reads:
>
> " 'The rule that statutes in pari materia should be construed together applies with peculiar force to statutes passed at the same session of the legislature; especially where they are passed or approved on the same day, * * * It is to be presumed that such acts are imbued with the same spirit and actuated by the same policy, and they are to be construed together as if parts of the same act. They should be so construed, if possible, as to harmonize, and give force and effect to the provisions of each; * * * '."

While c. 451 and c. 455 were not passed on the same day, both were approved by the Governor on the same day and became effective at the same time.

My opinion that the rule of the **Ausman** case is applicable to the situation here dealt with is fortified by the circumstance that the editor of M. S. A., in editing the amendments of M. S. A. 386.34 made by the 1949 session, deletes the $900 limitation and inserts in lieu thereof the following language of c. 451: "to be fixed by the board and specified in said order"; and also carries in that amended section the provision hereinabove quoted found in c. 455 and applicable to counties of more than 16,000 and less than 19,000 inhabitants. See M. S. A., Pamphlet No. 4, June 1949, under § 386.34.

Accordingly, in your county the county board is authorized to allow one deputy register of deeds compensation for services as such deputy in an amount to be fixed by the board and specified in said order.

LOWELL J. GRADY,
Assistant Attorney General.

Waseca County Attorney.
July 12, 1949. 373-A-2

159

Register of Deeds—Fees—Veterans service records—Claims against county for fees for furnishing veterans certified copies should be presented to the county board for allowance—M. S. A. 375.18 (1), 386.20.

Facts

M. S. A. 386.20 provides that in any county where the compensation of the register of deeds consists of fees only, the register of deeds shall be entitled to a fee of 60c for recording a certificate of discharge from the United States Army, the United States Navy and the United States Marine Corps, which shall be paid by the county upon presentation of a verified claim by the register of deeds.

Question

Do bills, presented by the register of deeds for issuing certified copies of veterans' discharge which have been recorded pursuant to M. S. 386.20, have to be allowed by the county board, or may the county auditor pay the same immediately to the register of deeds without having the same presented to the county board and allowed as county bills?

Opinion

M. S. A. 375.18 gives the power to the county board to examine and settle all accounts of the receipts and expenses of the county, and to examine, settle, and allow all accounts, demands, and causes of action against the same, and, when so settled, to issue county orders therefor, as provided by law.

The account of the register of deeds is one to be audited by the board under this authority. I do not see that the section of the statutes first cited herein applies. That relates to fees for recording, not fees for certified copies of records.

CHARLES E. HOUSTON,
Assistant Attorney General.

Brown County Attorney.
October 21, 1949. 373-B-10

160

Register of Deeds—Recording—Contract for deed—Cancellation proceedings—Original contract for deed not entitled to record as part of cancellation proceedings without payment of taxes.

Facts

"The Vendor and the Vendee entered into a Contract for Deed on September 1, 1949. By the terms of the Contract for Deed the Vendee is entitled to possession on the date of the contract. Vendee agrees to

pay the taxes due and payable in the year 1950. Vendee defaults on a condition in the Contract for Deed and Vendor proceeds to cancel the contract, which necessitates * * * paying the mortgage registry tax thereon * * * . The taxes for the year 1949 due and payable in 1950 have not been paid and so the Treasurer and the County Auditor cannot certify on the Contract for Deed as required by Sections 272.12 and 272.13 of Minnesota Statutes 1945. The contract for Deed is presented to the Register of Deeds for record, with the endorsement of the County Treasurer and the County Auditor thereon showing payment of the required registration tax but without certificates by the County Treasurer and the County Auditor of the payment of the taxes on the property described in the Contract for Deed.

"There is presented at the same time, but not physically attached thereto a Notice of Cancellation of Contract for Deed, directed to the Vendee, with Return of Service by Sheriff, duly executed, and Affidavit of Failure to Comply with Notice, executed by the Vendor. This Notice, Return of Service, and Affidavit of Failure to Comply with Notice are in one instrument, on a form printed by a printer of legal form and stationery."

Question

"May the Register of Deeds accept the **Contract for Deed** for recording or must he refuse it until the certificates of the County Treasurer and the County Auditor showing payment of the taxes are endorsed thereon?"

Opinion

The register of deeds should refuse to receive or record the **contract for deed** (as distinguished from the notice of the cancellation proceedings of it) unless the contract for deed bears the auditor's certificate showing that the taxes have been paid.

M. S. A. 272.12 provides, in substance, that, when "a deed or **other instrument conveying land** * * * is presented to the county auditor for transfer," it is the duty of the county auditor to certify " 'taxes paid and transfer entered'," if the taxes have been paid, or " 'paid by sale of land described within'; and, unless such statement is made upon such instrument, the register of deeds * * * shall refuse to receive or record the same."

M. S. A. 507.01 defines the word "conveyance." As so defined, it includes every instrument in writing "whereby any interest in real estate is created, aliened, mortgaged, or assigned or by which the title thereto may be affected in law or in equity, except wills, leases for a term not exceeding three years, and powers of attorney." A contract for deed is clearly a conveyance within the meaning of this statute and is "an instrument conveying land" within the meaning of M. S. A. 272.12. Prior to the consummation of the statutory cancellation proceedings the vendor held the legal title, and the vendee the equitable title. The equitable title of the vendee was conveyed to him by and through the contract for deed.

The difficulty presented by your question stems from the circumstance that, if the cancellation proceedings were valid and effective, the contract for deed and the equitable title of the vendee derived thereunder were terminated prior to the time that the contract for deed, together with the record of the cancellation proceedings terminating it, was tendered to your register of deeds for record, and at the time of such offering for record the contract for deed, if terminated, did not represent an "instrument conveying land." On the other hand, if the cancellation proceedings were invalid or ineffective, the contract for deed has not been terminated, nor the equitable title of the vendee thereunder extinguished. In that event, clearly the contract for deed was at the time it was offered for record, and still is, an "instrument conveying land." A violation by the register of deeds of the provisions of M. S. A. 272.12 is made a criminal offense. The register of deeds, in the face of such consequences incidental to violation, is not to be put in the hazardous position of judging whether the cancellation proceedings were or were not effective. We take it from the tenor of your inquiry that the cancellation proceedings by the vendor were had pursuant to the provisions of M. S. A. 559.21. That statute, so far as here pertinent, provides:

> " * * * A copy of the notice with proof of service thereof, and the affidavit of the vendor, his agent or attorney, showing that the purchaser has not complied with the terms of the notice, may be recorded with the register of deeds, and shall be prima facie evidence of the facts therein stated; * * * ."

The law permits the register of deeds to record only those instruments which under the law are entitled to record. The above quoted portion of M. S. A. 559.21 specifies what instruments may be recorded with the register of deeds in evidence of the statutory cancellation proceedings had under M. S. A. 559.21. Those instruments do not include the contract for deed which is the subject of the cancellation proceedings. It is to this statute that the register of deeds must look for his authority in the case presented by your inquiry. I do not mean to say that a contract for deed which is the subject matter of statutory cancellation proceedings under M. S. A. 559.21 may not be entitled to record; it is, when it bears the auditor's certificate prescribed by M. S. A. 272.12.

I have not overlooked the Attorney General's opinion dated July 13, 1927 (file 373b-9e), wherein it was held that, where a copy of a contract for deed was incorporated in and made a part of the affidavit of the vendor of default referred to in M. S. A. 559.21, the copy of the contract for deed as so incorporated in the affidavit of default was not a "deed or other instrument conveying land." That opinion, however, was expressly limited in its scope by virtue of the circumstance that there a copy of the contract was incorporated in and made a part of the vendor's affidavit of noncompliance.

In the situation presented by you the contract for deed itself is being tendered for record, and it was not, and is not, incorporated or made a part of the vendor's affidavit of noncompliance.

LOWELL J. GRADY,
Assistant Attorney General.

Kandiyohi County Attorney.
March 30, 1950. 373-B-9-E

161

Register of Deeds—Recording—Mortgage—Auditor's Certificate as to real estate taxes—M. S. 1949, §§ 272.12, 507.01.

Question

Whether or not a mortgage must have the auditor's certificate showing taxes as having been paid as a condition precedent to the recording of the mortgage.

Opinion

Minnesota Statutes 1949, Section 272.12, provides that "When a deed or other instrument conveying land * * * is presented to the county auditor for transfer, * * * he shall transfer the land upon the books of his office, and note upon the instrument, over his official signature, the words, 'taxes paid and transfer entered,' * * * ."

Any instrument which transfers title to land which the auditor is required to transfer upon the books of his office cannot under above quoted provision be recorded unless a statement of the auditor that taxes have been paid and transfer entered appears thereon.

The definition of the word "conveyance" in Minn. St. 1949, Sec. 507.01, applies to the use of that term in Chapter 507. The practical construction of many years has been to the effect that the words "conveying land" as used in Section 272.12 do not apply to mortgages. A contract for deed to which you refer transfers an equitable title to the purchaser of the land. A mortgage transfers no title.

In the case of **Krahmer v. Koch**, 216 Minn. 421, 423, 13 N. W. 2d 370, the court said:

"A real estate mortgage is a lien under our law; * * * ."

There is, therefore, through the execution of a mortgage, no transfer of title to the mortgagee that requires the auditor to transfer the land described therein upon the books of his office. A registration tax must, of

course, be paid prior to the recording of the mortgage, but payment of taxes on the real estate itself described therein is not, in my opinion, necessary prior to the recording thereof.

J. A. A. BURNQUIST,
Attorney General.

Kanabec County Attorney.
June 6, 1950. 373-B-16

162

Sheriff—Fees—Duty to report fees received under M. S. A. 382.05.

Questions

1. Whether, under M. S. A. 382.05, the sheriff must report fees received by him for services within his county of summonses and other papers in civil actions.
2. Whether M. S. A. 382.05 applies to fees received by the sheriff for services of papers in civil actions in counties in which he is not an officer.

Opinion

The first question is answered in the affirmative.

Under M. S. A. 382.05 the duty devolves upon **every county official** to make and file an annual written statement "showing in detail the amount of **all** fees, gratuities, and emoluments **of whatever nature** received by him **as such official, or in connection with his official work,** during the preceding calendar year."

Where proof of service of the papers served may be made by the sheriff's certificate, fees received for such services are within the purview of M. S. A. 382.05 and must be reported.

The second question is answered in the negative.

In serving a summons or other paper in a civil action in a county of which he is not an officer, a sheriff acts in an individual, and not an official capacity. The service of such papers under those circumstances is not provable by the certificate of the sheriff, but only by his affidavit. Fees received by him for such services outside the county of which he is the sheriff are not within the intendment of M. S. A. 382.05.

LOWELL J. GRADY,
Assistant Attorney General.

Yellow Medicine County Attorney.
March 23, 1949. 390-C-1

ORDINANCES

163

Building permits—State of Minnesota, in constructing through its contractor state buildings, is not amenable to local zoning ordinances — M. S. A. 645.27, L. 1947, ch. 534, § 1, subd. 1.

Facts

"The City of Hastings, Minnesota, has an Ordinance which provides that no building shall be erected or altered within the City unless a building permit is issued and provides for the sum to be paid for such permit and for penalties for not conforming with the ordinance.

"The Hastings State Hospital is within the City limits of the City of Hastings, and new buildings are being erected at the Hospital without a building permit in violation of the City Ordinance. The contractors take the position that the State has the power to do so and that the City has no power to regulate the building of State Buildings within the City limits, and that the Ordinance would not apply to State Buildings."

The pertinent provisions of the ordinance here involved are found in Article I, Section 2, thereof, as amended on March 7, 1949, reading as follows:

"No building permit or certificate of occupancy shall be issued except where the provisions of this ordinance are complied with. No building or structure shall be erected, added to or altered until there has been filed with the City Building Inspector a plan in duplicate drawn to scale showing the actual dimensions * * * of the building and accessory buildings to be erected and such other information as may be deemed necessary to determine and provide for the enforcement of this ordinance. One copy of such plans shall be returned when approved by the City Building Inspector to the owner upon the payment by him of a fee of $1.00 for the first $1,000.00 building valuation and 25 cents for each additional $1,000.00 of valuation."

The improvement and addition to the State Hospital at Hastings, involved in your inquiry, is being prosecuted by the State of Minnesota pursuant to direct authorization by the legislature. L. 1947, ch. 534, § 1, subd. 1. This construction work is being done pursuant to the Standard General Specifications for Contract Work prescribed by the Department of Administration of the State of Minnesota.

Question

Do the above quoted provisions of the Zoning Ordinance of the City of Hastings apply to the construction work now being prosecuted by the State of Minnesota, through its contractor, in the improvement and addition to the Hastings State Hospital?

Opinion

The question is answered in the negative.

Dispositive of the issue presented by your inquiry is the reasoning found in the case of **City of Milwaukee v. McGregor**, 141 Wis. 35, 121 N. W. 642. That was an action by the City of Milwaukee against the members of the Board of Normal School Regents of the State of Wisconsin, their contractors and architect, to prevent continuation of the erection of a normal school building in the City of Milwaukee which had been partially constructed by them, upon the ground that a building permit had not been obtained from the plaintiff pursuant to the ordinances of said city, without which such erection was claimed to be unlawful.

There the Supreme Court of Wisconsin said:

> "So the question comes down to whether the ordinary charter and ordinance regulations of a city requiring submission to local supervision, as regards the manner of constructing, altering and repairing buildings, have any application to state buildings. That must be answered in the negative. It is plainly so ruled by the familiar principle that statutes, in general terms, do not apply to acts of the state. Moreover, express authority to a state agency to do a particular thing in a particular way supersedes any local or general regulation conflicting therewith."

And, further:

> "The infirmity of appellant's position has been, from the first, in supposing that the state, in respect to constructing a building in the city of Milwaukee, has no more free hand than a private person or corporation, while the fact is that the people of the state in their sovereign capacity, except as restrained by some constitutional limitation, and there is none in this case, is as exempt from mere general or local laws as the king was of old in the exercise of his sovereign prerogatives as 'universal trustee' for his people. So it has been said, 'The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not' the sovereign 'in the least, if they may tend to restrain or diminish any of his rights and interests.' So general prohibitions, either express or implied, apply to all private parties but 'are not rules for the conduct of the state'."

The legislative act authorizing this particular improvement does not provide that the State of Minnesota should be bound by the local zoning ordinance. Cf. M. S. A. 645.27.

Applying the foregoing to your inquiry, it is plain that the State of Minnesota and its contractor in the construction of this state building are not amenable to the Zoning Ordinance of the City of Hastings.

See also **Salt Lake City v. Board of Education**, 52 Utah 540, 175 P. 654; **Kentucky Inst. v. Louisville**, 123 Ky. 767, 97 S. W. 402.

LOWELL J. GRADY,
Assistant Attorney General.

Hastings City Attorney.
July 5, 1949. 59-A-9

Note: Subsequent to this opinion there was filed in the office of the Clerk of the District Court of Ramsey County in case No. 273836 a decision of Judge Loevinger inconsistent with the foregoing opinion.

164

Zoning — Residential districts — Restrictions — Cities — Second class—May adopt zoning ordinance, which need not cover entire municipal area—such ordinance must be reasonable and not arbitrary — M. S. A. 462.05, 462.06, 462.07.

Questions

"Would it be necessary to impose the same restrictions upon all residential districts similarly situated so as to conform to the uniformity requirement? Also would it be necessary that the city be zoned so as to make these restrictions applicable to all such similar districts?"

Opinion

A categorical answer to these questions cannot be given. Certain well recognized legal principles will be stated for the guidance of the city, and by which the validity of any zoning ordinance enacted should be tested.

The city is authorized under §§ 462.05, 462.06, and 462.07, to adopt a zoning ordinance for the purpose of regulating the location, size, use, and height of buildings, the arrangement of buildings, and the density of population within the city. It may adopt different regulations for various districts within the city.

We believe that factual conditions such as lot sizes, topography, population, and other factors would justify the imposition of different restrictions and regulations within the entire residential area of the city. Whether such different restrictions and regulations within the residential area of the city would be valid can be determined only from all of the facts to which certain well recognized principles should be applied. The ordinance must be reasonable and not arbitrary. **Modern Box Makers, Inc.**, 217 Minn. 41, 49, 13 N. W. 2d 731, and cases cited.

The city may impose reasonable restrictions and make reasonable regulations in respect to the use which all owners may make of their property, which tend to promote the general well-being so as to secure to others that use and enjoyment of their own property to which they are lawfully

entitled. However, when the city, in the exercise of its legislative power, attempts to forbid the owner from making a use of his property which is not harmful to the public and does not interfere with the rightful use and enjoyment of the property of others, it then invades property rights secured to the owners by both the state and federal constitutions. **State ex rel. Roerig v. City of Minneapolis,** 136 Minn. 479, 162 N. W. 477, **State ex rel. Lachtman v. Houghton,** 134 Minn. 226, 158 N. W. 1017, **Meyers v. Houghton,** 137 Minn. 481, 163 N. W. 754.

The author in McQuillin Municipal Corporations, Vol. 3, Section 1031, states:

> "Zoning regulations, like the exercise of the police power in all respects, and, indeed, all action by the city under a general grant of power, must be reasonable, which means that no discriminations are permitted; all must be afforded equal protection of the law; and any classification adopted as a ground for different regulations must rest upon reason and the classification must treat all whose property is in the same, or substantially the same, condition alike, to the end that all will be accorded due process of law and equal protection of the laws as the Constitution requires. If the regulations are the same throughout the city no constitutional objection can be interposed, provided they are reasonable and within the range of the police power, but when they vary in different parts of the municipal area, they may or may not be constitutional. This will depend upon the facts of each particular case."

While the zoning plan and the classification adopted must be reasonable and not arbitrary, the zoning ordinance need not cover the entire municipal area. **Horan v. Koehler,** 282 N. Y. 573, 24 N. E. (2) 989.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

St. Cloud City Attorney.
March 30, 1949. 59-A-32

PUBLIC SAFETY

165

Fire Departments — Equipment — Relief association fund — Proceeds from insurance premium tax received under M. S. 1949, 69.03 or from tax levied under 424.30 may not be used for purchase of fire fighting equipment in municipality having organized firemen's relief association.

Facts

"The articles of incorporation of a volunteer firemen's relief association located within a village, provide that the general purpose shall be to pay to its members in case of sickness or disability, such benefits

and for such times as may be prescribed by its by-laws, and to pay death benefits in event of death of a member, to pay a service pension upon retirement, and to raise funds for such purposes, receive donations, and receive such sums as may be paid over from time to time by the State of Minnesota or the municipality. They contain no provision mentioning the purchase of equipment or trucks, etc."

Question

May the relief association involved use the two per cent insurance premium tax paid by insurance companies and received from the state auditor pursuant to M. S. 1949, Sec. 69.03, "for the purchase of fire fighting equipment, such as trucks, etc."?

Opinion

The question is answered in the negative.

M. S. 1949, Sec. 69.04, specifically directs that the amount received from the state auditor pursuant to 69.03 "shall be kept as a special fund, and **disbursed only**" for the purposes specifically enumerated in 69.04. It is only in municipalities "which have no organized firemen's relief association" that the funds derived under 69.03 may be used "for the equipment and maintenance of such department and for construction, acquisition, or repair of buildings, rooms, and premises for fire department use." See 69.04 (2). In the village involved in your inquiry, however, there is an organized firemen's relief association, and, consequently, 69.04 (2) is not applicable.

Prior to the enactment of L. 1943, c. 323, the funds received by any municipality pursuant to 69.03 could be disbursed, under 69.04, for "the equipment and maintenance of such department and for construction, acquisition, or repair of buildings, rooms, and premises for fire department use or otherwise." See M. S. 1941, Sec. 69.04 (2). M. S. 1941, Sec. 69.04 (2), next above quoted, was deleted by L. 1943, c. 323, Sec. 2. Notwithstanding the deletion so effected by L. 1943, c. 323, Sec. 2, the funds received by the municipality pursuant to 69.03, as well as the funds received from the taxes authorized to be levied under 424.30, could be disbursed, prior to the enactment of L. 1945, c. 206, by the board of trustees of the firemen's relief association under the provisions of M. S. 1941, Sec. 424.31 for "the equipment and maintenance of such department and for the construction, acquisition, or repair of buildings, rooms, and premises for fire department use or otherwise." See M. S. 1941, Sec. 424.31 (5). By L. 1945, c. 206, clause (5) of M. S. 1941, Sec. 424.31, next above quoted, was deleted, and since the enactment of L. 1945, c. 206, there is no authority for the relief associations **in municipalities having an organized firemen's relief association** to disburse funds received under 69.03 for the purchase of fire fighting equipment, such as trucks or other equipment of a fire department.

Question

May the relief association funds received from the tax levy for the fire department relief fund levied pursuant to M. S. 1949, Sec. 424.30, be used for the purchase of fire fighting equipment, such as trucks, etc.?

Opinion

This question is likewise answered in the negative.

The funds derived from the collection of the tax for the fire department relief fund authorized by M. S. 1949, Sec. 424.30, constitute a special fund and cannot be disbursed for any purpose except those specifically enumerated in M. S. 1949, Sec. 424.31. Use of such funds for "the equipment and maintenance of such department and for the construction, acquisition, or repair of buildings, rooms, and premises for fire department use" is not one of the purposes expressly enumerated in M. S. 1949, Sec. 424.31. The authority which existed under M. S. 1941, Sec. 424.31, to use the taxes received under 424.30 for equipment and maintenance purposes was taken away by the legislature in its enactment of L. 1945, c. 206.

Question

Whether an amendment of the articles of incorporation of the relief association involved so as to authorize the use of the proceeds from either the insurance premium tax received under M. S. 1949, Sec. 69.03 or the tax levied and received under 424.30 for the purchase of fire fighting equipment, such as trucks, etc., would be effectual to accomplish that purpose.

Opinion

This question is answered in the negative.

The purposes for which the proceeds from the insurance premium tax may be used are delimited by M. S. 1949, Sec. 69.04. The purposes for which the proceeds from the tax levied under Sec. 424.30 may be used are prescribed by 424.31. Any amendment to the articles of incorporation purporting to authorize a use or purpose different from that prescribed by the statutes would be wholly inoperative.

LOWELL J. GRADY,
Assistant Attorney General.

Wadena County Attorney.
December 13, 1950. 688-C-1

166

Police — Broadcasting station — When county may cooperate with a city therein in the erection and operation of a broadcasting station the services of which are to be made available to police of the city and the sheriff of the county—M. S. 1949, 387.03, 471.59.

Facts

The county of Washington and the city of Stillwater have been considering the purchase and maintenance of a joint police radio broadcasting station for the joint use of the patrol cars of the sheriff's office and the city police.

Question

Does the county of Washington have the right to purchase and maintain a broadcasting station for the use of the sheriff in policing the county, and if so, may this be done in cooperation with the city of Stillwater by a joint operation?

Opinion

It is the duty of the sheriff to keep and preserve the peace of the county for which purpose he may call to his aid such persons or power of his county as he deems necessary. He shall also pursue and apprehend all felons and "perform all of the duties pertaining to his office, including searching and dragging for drowned bodies and searching and looking for lost persons." M. S. 1949, 387.03.

In **In re Removal of Mesenbrink as Sheriff**, 211 Minn. 114, 300 N. W. 398, the court said:

> " * * * As sheriff he has a duty to be active and vigilant and to use all proper efforts to secure obedience to the law."

Again, it said:

> " * * * It is the duty of the sheriff and police officers generally to enforce those laws which the people have enacted for the protection of their lives, persons, property, health, and morals, including the laws for the observance of the Sabbath."

In an opinion dated July 14, 1947 (File 733), the Attorney General said:

> "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. Anyone may report a law violation to the sheriff, who should make such investigation and take such action as the case may require."

As civilization advances, the law changes. As conditions change, necessity requires that the law shall change to meet conditions. The use of motor vehicles has revolutionized transportation. Highways today bear little resemblance to the highways of fifty years ago. As Judge Mitchell, in **Cater v. N. W. Telephone Exchange Co.**, 60 Minn. 539, 543, 63 N. W. 111, said:

> " * * * In the most primitive state of society the conception of a highway was merely a footpath; in a slightly more advanced state it included the idea of a way for pack animals; and, next, a way for vehicles drawn by animals,—constituting, respectively, the 'iter,' the 'actus,'

and the 'via' of the Romans. And thus the methods of using public highways expanded with the growth of civilization, until today our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. * * * ."

And that decision was written in 1895, before general use of motor vehicles. With the changed highways and the changed means of transportation, with the duty imposed upon the sheriff to keep the peace of the county, to pursue and apprehend felons and to perform all the duties pertaining to his office, must he use tools identical to those in use by sheriffs at the beginning of the century? Do we, as individuals, use the same tools and implements in the prosecution of our business, which our grandfathers used? Today, when an escaping felon has the means available to him to escape from most any county in the state in less than an hour, must the sheriff use a means of pursuit such as his predecessors used at the beginning of the century?

We come then to the point whether it is reasonably necessary in the performance of the duties of the sheriff that he be afforded such reasonable facilities as will enable him to efficiently perform his duties. He cannot be expected to furnish equipment reasonably required for the performance of such duties at his own expense. So, if the equipment is reasonably required, it appears that the county board should furnish such equipment to him at the expense of the county. Whether the equipment is required to enable the sheriff to perform his duties is not a question of law but one of fact. It is a question for the county board to decide. If the county board shall decide that such equipment is necessary, then the board has power to provide it. M. S. 1949, 375.18, subd. 2. That would appear to dispose of the question whether the county can furnish a broadcasting station.

M. S. 1949, 471.59, is authority to two or more governmental units, by agreement entered into through action of their governing bodies, to jointly or cooperatively exercise any power common to the contracting parties or any similar powers, including those which are the same except for the territorial limits within which they may be exercised. So, if the city of Stillwater has the power to do the things proposed and if the county board of Washington County shall determine that it is reasonably necessary that the facilities mentioned be made available to the sheriff for his use in the discharge of his duties, then it is my opinion that your question requires an affirmative answer.

CHARLES E. HOUSTON,
Assistant Attorney General.

Washington County Attorney.
September 1, 1950. 785

PUBLIC UTILITIES

167

Bus lines — Villages — In the absence of statute, village is without authority to own and operate bus line within or without the village limits or to assist a private concern in the operation thereof.

Questions

1. Can the Village of Edina use public funds to own and operate a bus system within the limits of the village?
2. Can the Village of Edina use public funds to own and operate a bus system within the village and also within adjoining municipalities?
3. Can the Village of Edina use public funds to assist a privately operated bus system within the limits of the village?

Opinion

Each of the foregoing inquiries is answered in the negative.

Villages have only such powers as are expressly conferred by statute or which are necessarily implied from those powers which are expressly conferred. We are unaware of any statutory provision, either expressed or implied, which would empower the village to either own and operate a bus system or to contribute financially to the support of a privately operated bus system.

It may be most desirable that the Village of Edina provide a bus transportation system or use public funds to assist a private concern in providing the same. The question submitted, however, relates to the power of the village and in the absence of statutory authority, the village lacks the power regardless of the desirability of the undertaking. See McQuillin, Municipal Corporations, 3rd Ed., Vol. 12, § 35.11.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Attorney for Village of Edina.
December 18, 1950. 469-C

168

Electricity — Contract — Bid — Rates — Village code — Power of village to contract with public service corporation for furnishing electrical energy to village and inhabitants does not expressly include power to regulate rates, but regulation of rates may be reserved in contract — Bids need not be called for by village before granting contract involving franchise and rates with public service corporation for supplying elec-

trical energy — M. S. A. 300.03; 300.04; 412.221, subd. 7; 412.311 — Following opinions of Attorney General distinguished: Opinion 108, 1940 Report; Opinion 160, 1946 Report.

Facts

"The Minnesota Power and Light Co. of Duluth has been furnishing the Village of Aurora and its inhabitants electricity under a purported franchise which expires June 1, 1950. The Village and the company are now negotiating for the renewal of such franchise for another term of years.

"Upon reading of the new Village Code I find nothing therein which grants the Village Council authority to enter or grant franchises for the furnishing of electricity and power to the Village and its inhabitants. Section 29, Subd. 7, Chapter 119, Laws of Minnesota for 1949, provides: 'The Village council shall have power * * * to contract with anyone engaged in the business of furnishing gas or electric service for the supply of such service to the Village and its inhabitants.'

"The Village does not wholesale electricity but it is furnished direct to the inhabitants by the power company."

Question 1

"Has the Village council authority to grant a franchise by ordinance to the Minnesota Power and Light Co. for the furnishing of electricity and power to the Village and its inhabitants or must such authority be by contract as provided for in Chap. 119, Laws of Minnesota for 1949?"

Opinion

L. 1949, c. 119, § 29, subd. 7, to which you refer, is now coded as M. S. A. 412.221, subd. 7. This provision of the statute, pertinent to your inquiry, is:

"The village council shall have power * * * to contract with anyone engaged in the business of furnishing gas or electric service for the supply of such service to the village and its inhabitants."

Your attention is directed to the provisions of M. S. A. 300.03. This statute, in substance, authorizes the organization of corporations for the performance of public services, among which is the furnishing of light, heat, or power for public or private use. The statute then prescribes, so far as material to your question, that:

"* * * No corporation so formed shall construct, maintain, or operate * * * any * * * pipe line, or other conduit * * * in or upon any street, alley, or other public ground of a city **or village, without first obtaining from the city or village a franchise conferring such right and compensating the city or village therefor.**"

M. S. A. 300.04 provides in its part pertinent to your inquiry:

"* * * Every such corporation [public service corporation] obtaining a franchise from a city or village shall be subject to such conditions and restrictions as from time to time may be imposed upon it by such municipality."

The foregoing quoted portion of M. S. A. 300.04 is broad and general in its terms and would seem to have been intended to reserve to cities and villages broad general powers and supervision and control over public service corporations obtaining franchises from cities or villages. However, it is to be noted that, in the case of **Minneapolis General Electric Co. v. Minneapolis,** 194 Fed. 215, the Circuit Court of the District of Minnesota for the 4th Division held that the City of Minneapolis had no power, under the provision of M. S. A. 300.04 last above quoted, to regulate the rates of the plaintiff corporation. That decision is discussed in the following opinions of the Attorney General, to which you are referred: 1934 Report of Attorney General, Op. 148, p. 314; 1938 Report of Attorney General, Op. 72, p. 175.

M. S. A. 412.221, subd. 7, here considered, does not **expressly** confer upon the village council the power to regulate the rates to be charged by the public service corporation obtaining the franchise from the village. The power conferred upon the village council by the section of the village code here considered is "**to contract** with anyone engaged in the business of furnishing gas or electric service for the supply of such service to the village and its inhabitants." The franchise should be granted to the public service corporation by an ordinance enacted by the village council and accepted by the public service corporation. The power "to contract" with a public service corporation thus conferred upon the village council includes the power to prescribe by that contract the terms and conditions under which the franchise is granted. I see no reason why the village cannot in the ordinance-contract granting the franchise expressly reserve therein the right of the village at all times during the term of the franchise to regulate and control by ordinance the service rates to be charged by the public service corporation during the term of the franchise.

Question 2

"If such authority must be by contract must the Village call for bids for the furnishing of such electricity and power to the village and its inhabitants?"

Opinion

The question is answered in the negative.

M. S. A. 412.311 (L. 1949, c. 119, § 38), in its portion pertinent to this inquiry, provides:

"* * * Every contract for the purchase of merchandise, materials or equipment or for any kind of construction work undertaken by the village which requires an expenditure of $500 or more shall be let to the lowest responsible bidder, after ten days' public notice."

The purchase by the village from the public service corporation of electrical energy for lighting the public streets and for other public purposes is the

purchase of a service to be supplied by the public service corporation and is not the "purchase of merchandise, materials or equipment" within the meaning of the last quoted portion of the new Village Code.

In so concluding, I have not overlooked the case of **Casey v. Central Electric & Telephone Co.**, 202 Minn. 510, 279 N. W. 263, which held that villages organized under the 1905 act must comply with the then provisions of Mason's Minnesota Statutes 1927, § 1199, requiring that all contracts involving expenditure of $100 or more must be let to the lowest responsible bidder after public notice of time and place of receiving bids. The **Casey** case was decided on April 22, 1938. The statute (M. M. S. 1927, § 1199) there involved **then** provided:

> "* * * And all contracts involving an expenditure of one hundred dollars 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."

At the session of the legislature next following the date of the decision in the **Casey** case, M. M. S. 1927, § 1199, was amended so as to read as follows:

> "All contracts **for the purchase of merchandise, materials or equipment or for any kind of construction work undertaken by the village which requires** an expenditure of $100.00 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."

M. M. S. 1927, as so amended by L. 1939, c. 139, was carried forward into Minnesota Revised Statutes 1945 as § 412.21. L. 1949, c. 119, enacting the new Village Code effective July 1, 1949, expressly repealed c. 412. However, that portion of what formerly was § 412.21 was carried into the new Village Code without substantial change.[1] See L. 1949, c. 119, § 38, now coded as 412.311. The decision of the **Casey** case undoubtedly inspired the amendment of the statute here considered effected by L. 1939, c. 139, and I am of the opinion that the legislative amendment referred to was intended to, and did, except from the operation of the statute here considered a contract of the village for the furnishing to it by a public service corporation of a public service such as here involved.

Attorney General's opinion appearing in the 1940 Report of the Attorney General as Op. 108 was concerned only with a provision of the 1885 village laws, which was not involved in the **Casey** case. The reference in that opinion to the **Casey** case was made without regard to the legislative amendment effected by L. 1939, c. 139.

In the 1946 Report of the Attorney General, Op. 160, the question presented was this:

> "If a Village Council has power to purchase water for village purposes, does such a contract have to be approved by the voters or can the Village Council, **after notice for bids**, enter into such a contract?"

[1]The figure $100 was changed to $500.

That opinion held that the contract need not be approved by the voters of the village, and then unnecessarily referred to Minnesota Statutes 1945, § 412.21, and cited the Casey case as applicable thereto, without any reference to the circumstance that the statute involved in the Casey case was materially and substantially amended by L. 1939, c. 139.

Question 3

"What in your opinion is the proper procedure to follow so that the Minn. Power and Light Co. may furnish electricity and power to the Village and its inhabitants?"

Opinion

As indicated in the answer to your first question, the exercise of the power to contract should be by ordinance granting the franchise to be accepted in writing by the grantee. The ordinance-contract might well contain an express provision reserving unto the village the power and right at all times during the continuance of the franchise to regulate and to control the rates to be charged by the grantee. If the village should by inviolable **contract** established by agreement the rates to be charged by the grantee for a definite term, rather than reserving the right in such contract to **regulate** such rates, the **contract** rates would control during the life of the contract. See **St. Cloud Public Service Co. v. City of St. Cloud**, 265 U. S. 352, 44 Sup. Ct. 492, 6 L. ed. 1050.

LOWELL J. GRADY,
Assistant Attorney General.

Aurora Village Attorney.
April 25, 1950. 624-C-11

169

Electricity — Contract — Purchase — Purchase of electric power from the United States — Village has power to purchase electricity at wholesale from the United States.

Facts

A form of contract which the United States offers to the village of Adrian for the supplying of electrical current to that village is submitted.

The contract proposes to furnish electric service to the village for municipal purposes and for resale to ultimate consumers for a period commencing with the date of initial service and continuing until December 31, 1959.

Question

Whether the village of Adrian has the power to enter into this contract.

Opinion

The village is authorized to purchase electric power in these words: "It may, in lieu of providing for the local production of gas, electricity, water, or heat, purchase the same wholesale and re-sell it to local consumers." Laws 1949, Ch. 119, § 39, coded as M. S. A. 412.231, Subd. 1.

Therefore, authority exists for the village to purchase electricity at wholesale from another producer. The question might, however, be raised as to the term of this contract. It would be in force from the date of its execution even though service would not commence until sometime in 1955, and would then run until 1959. It is generally held that a municipality may enter into a contract for the furnishing to it of electric service even though the contract extends beyond the term of office of the officers making it. See McQuillin Mun. Corp., 2d ed., Rev. Vol. 3, p. 1284, from which I quote:

> "Generally, contracts for public utilities, such as water supply, gas, electricity, etc., are considered as relating to the business affairs of the municipality, rather than the legislative or governmental powers, and it is no objection thereto that they bind the municipality beyond the term of office of the officers making the contract. * * *"

It is my opinion that the village has authority to enter into the proposed contract. I do not pass upon the features of the contract that might be considered objectionable or as to the sufficiency of the contract in other respects. There are certain matters which should be considered by the village, however, before entering into the contract.

If executed at the present time there would be a period of five years before service was commenced under the contract. Many things might happen to change the situation during that interval. The village should consider whether it desires to tie its hands while awaiting service for that period of time.

The proposed form leaves certain matters for further agreement of the parties. There is no agreement on the precise terms of the contract in the following respects:

(1) The point of delivery of the current is left for further agreement.

(2) There is no agreement as to the rate to be paid by the United States for current purchased from the village (p. 11 of the proposed contract). This is left for further agreement of the parties.

(3) There is no agreement as to the resale price to be charged by the village. This is left for further agreement of the parties, although the United States seeks to control the sale price (see p. 1 of the exhibit accompanying the contract).

No rates are fixed by the contract. They are to be fixed by the United States. The village would be signing a contract to take electric service when it does not know what rate it will have to pay for that service.

The contract contains inconsistent paragraphs.

The council may also be influenced in its consideration of the matter by this fact: if a dispute should arise as to the interpretation of the contract which leads to litigation, the case would, in all probability, be tried in the federal court.

Finally, the whole agreement is contingent upon sufficient appropriations being made by the government to finance the production of the power.

These are some of the matters that should be considered by the village in exercising its discretion as to whether to enter into this contract.

RALPH A. STONE,
Assistant Attorney General.

Nobles County Attorney.
January 18, 1950. 624-C-2

170

Electricity — Plant — Cities of the fourth class — May acquire an electric generating plant under M. S. 1949, § 454.01 — No special election necessary unless full faith and credit of city is pledged toward payment of both principal and interest of bonds — When bonds are issued which are to be paid exclusively out of the earnings of the utility, no election is necessary — Williams v. Village of Kenyon, 187 Minn. 161, 244 N. W. 558 — The words "acquire" and "establish" imply the power to "construct" a generating plant.

Facts

St. Charles is a city of the fourth class organized under Special Laws 1879, Chapter 57. It now owns its electric distribution system, including poles, wires, meters, etc., and purchases electrical energy from a power company for municipal purposes and for resale to its inhabitants. The current contract expires some time late in 1950. The city owns land which is available for the construction of an electric power plant.

Questions

"May the City Council of the City of St. Charles, under Section 54.01 sic (454.01), M. S. A., or under any other law, purchase and construct a generating plant and generating equipment to be used in connection with the distribution system now owned, without putting the question to a vote of the electors?

"We would also like to know whether it would be legal for the City of St. Charles to finance the purchase and construction of such a plant by a conditional sales contract."

Opinion

We do not have a copy of your contract covering the purchase of electrical energy by the city, which contract, you advise, will expire some time late in 1950, and consequently our opinion does not take into consideration any terms, conditions, or provisions which are contained in such contract.

Minnesota Statutes 1949, § 454.01, applies to the city of St. Charles, and under this statute the city is authorized and empowered to acquire lands for furnishing gas, electricity, water, or either, any, or all thereof for municipal purposes, as well as for the use of the inhabitants of the city, and for such purpose may exercise the power of eminent domain pursuant to M. S. 1949, Ch. 117. Section 454.01 further empowers the city to take any and all property, including lands, manufacturing plants, or other property, wherever situated, either within or without the corporate limits, which may be necessary and convenient so as to acquire and establish such plants.

In an opinion of the attorney general dated June 25, 1943, file 624c-10, construing section 454.01, it was stated that no special election or vote is necessary unless it is necessary to issue bonds. The bonds therein referred to are bonds which pledge the full faith and credit of the city for the payment of the principal and interest. Bonds which are to be paid exclusively from the earnings of the electric light plant may be issued by the city without first being submitted to a vote of the people for approval. It was further stated in the opinion of the attorney general just referred to that the right of exercising the power of eminent domain is given in section 454.02, but that there is no requirement that acquisition be by those means.

The city may acquire an electric light plant by the exercise of the power of eminent domain as provided for in sections 454.01 to 454.04. However, such method is not exclusive. The city under these statutes is authorized to acquire and establish plants for furnishing electricity for the use of its inhabitants and for municipal purposes. It may, assuming that funds are available therefor, purchase or otherwise acquire an electric plant without submitting the question to the electors for their approval. If the cost of such plant is to be paid by the issuance of bonds, the payment of which the city pledges its full faith and credit, then the question of the issuance of such bonds must be submitted to the electors for their approval before the city is authorized to issue such bonds.

The city may finance the cost of the acquisition of the plant by issuing bonds or other evidences of indebtedness to be paid exclusively out of the earnings of the plant without submitting the question to the electors for their approval, and it may purchase a plant upon a conditional sales contract. See **Williams v. Village of Kenyon**, 187 Minn. 161, 244 N. W. 558; **Davies v. Village of Madelia**, 205 Minn. 526, 287 N. W. 1; **Hendricks v. City of Minneapolis**, 207 Minn. 150, 290 N. W. 427.

The authority and power granted to the city to acquire and establish a plant under the provisions of section 454.01 are broad enough so as to authorize the city to construct a generating plant. In our opinion the words "acquire" and "establish" should be construed so as to imply the power to "construct" a generating plant.

Sections 456.01 to 456.07 are applicable to the city of St. Charles. These statutes require a submission of the question of the acquisition of a plant to the electors for their approval.

Sections 455.23 to 455.25 are also applicable to your city, but under these statutes the question of the authority to proceed thereunder must be first submitted to the electors for approval.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

St. Charles City Attorney.
May 9, 1950. 624-C-10

171

Water and light commission — Funds — Under charter provisions all obligations authorized to be incurred by commission may be approved and paid by the commission without presentment to council for audit and approval.

Question

"Does this Chapter (X) give this Board of Water and Light Commissioners authority to audit the claims of the water and light department, or must these claims be presented to the City Council and audited under Chapter V, Section 15?"

Opinion

Several funds are provided for under chapter V of the charter including the water works and electric light fund. It is therein provided that all moneys received from water, light, rents and taxes shall be paid into this fund, and that no money shall be taken therefrom except for purposes connected with the water and light plant.

Chapter X of the charter pertains to the board of water and light commissioners and provides for the appointment of three resident electors who constitute the board. The city clerk is, by § 2, constituted as the clerk of the board, and the city treasurer is, by § 3, made the treasurer ex officio of the board.

The powers of the board are set forth in § 6 which in part reads as follows:

> "The board shall have charge of the construction, maintenance, repair and management of everything pertaining to the water works and light plant of said City, and shall have the supervision and direction of the working and operation of the same. The City Council shall make

and execute all contracts pertaining to the same; and said Board shall have the charge, care and supervision of the carrying out of all such contracts. Provided, that said Board shall have full authority to contract for, and incur, all expense for fuel to operate said water works and light plant and for necessary repairs for the same, and for such materials as shall be necessary for the installation of private connections, and also to provide and contract for, such skilled workmen and ordinary labor as it shall deem necessary to operate said works."

General powers to have control of everything pertaining to the water and light plants are conferred upon the board. The board is empowered to provide and contract for such skilled workmen and ordinary labor as it shall deem necessary to operate the water works and light plant. No power or authority is reserved or given to the city council to disapprove or approve any commitments or obligations made or incurred by the board within the scope of its powers except that the council shall make and execute all contracts, which contracts, when executed, shall be under the supervision of the board.

Section 7 provides that the clerk shall collect all money payable for water, light and power rates or other water works or light accounts, and shall deliver and pay the same over to the treasurer.

It seems clear that under these charter provisions plenary power is granted to the board to maintain, manage and control, as stated in § 6, "everything pertaining to the water works and light plant of the city," to have charge and control of all moneys payable for the use of these systems. Disbursement of such money can be made only by order or warrant drawn upon the treasurer, signed by the president of the board, and countersigned by the city clerk as the clerk of the board. No power or authority to control or supervise collections or disbursement of water and light funds is reserved to or conferred upon the city council. The powers of the board under these charter provisions to collect and disburse water and light funds and to supervise and control the business of the water works and light plant are analogous to the powers and authority of the water and light commission created by statute. **State ex rel. Briggs v. McIlraith**, 113 Minn. 237, 129 N. W. 377.

In our opinion Chapter V, § 15 of the city charter, which requires all money demands against the city to be audited and allowed by the city council, is not applicable to claims and obligations created or incurred by the board in the performance of its duties pertaining to the water works and light plant.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Benson City Attorney.
March 18, 1949. 624-A-6

172

Water mains — May be laid across a railroad crossing with or without consent of the railroad, and, if the railroad property is benefited by the improvement, it may be assessed therefor the same as other property — M. S. 1949, §§ 160.19, 412.221, 412.401, 429.08.

Facts

In the year 1872 the railroad platted into lots and blocks a tract of land which is now part of the Village of Albany. Said platted area lies northerly of what is the railroad's right-of-way. Ever since 1872, or thereabouts, the railroad has maintained a public crossing within the village, which lies southerly of and in direct line with a street known as Fifth Street of the Village of Albany and is, in effect, a continuation of said Fifth Street across the railroad tracks. There is no record of any dedication of this crossing for public use. It was not shown on the original plat dedicated by the railroad in 1872, even though said road has been in existence ever since that time. The road and crossing have been used by the public ever since 1872, not only to get to the railroad's depot, which lies southerly of the tracks, but also to get to other highways leading southerly from the Village of Albany.

The Village of Albany has now started proceedings to lay water mains under M. S. 1949, §§ 412.401 - 412.481, and proposes to lay such water mains underneath the railroad's tracks at said crossing. The railroad has requested the village to make an application for a permit to lay said water mains on form 1036, a copy of which is enclosed. If the village signs the application and agrees to the permit or lease, it will not be able to assess part of the cost of construction of said water main to the railroad, because the application and permit have a recital to the effect that the village shall pay the entire cost of construction. The village, however, wishes to assess part of the cost of construction to the abutting and certain other benefited property and feels that the railroad's right-of-way would be benefited property and should be assessed for part of the cost of said water main.

Question

"How could the village avoid signing the application and permit or lease, and still be authorized to construct said water main underneath the railroad tracks, and also be able to assess part of the benefits to the railroad?"

Opinion

From the facts submitted it appears that the road which crosses the railroad tracks is a continuation of Fifth Street in the village and that it has been used by the public as a public road or highway since about 1872. If this is so, then the road has undoubtedly been dedicated as a public street or highway by user. See **Keiter v. Berge**, 219 Minn. 374, 18 N. W. 2d 35 (common law dedication); M. S. 1949, § 160.19 (statutory dedication). See also Report of Attorney General 1934, Op. 489.

From the facts submitted it also appears that the tracks of the railroad have been laid over a traveled street or road used by the public as a highway, that the public has continued to use the crossing as a highway for many years without interference by the railroad company, and that the railroad has maintained the crossing and kept it in repair for such public use. If this is so, the crossing has been dedicated for public use as a street or highway. See **St. Paul, M. & M. R. Co. v. City of Minneapolis, 44 Minn.** 149, 46 N. W. 324.

In so far as is material to your inquiry, the village has jurisdiction of public ways within the village (see M. S. 1949, § 412.221) and has the authority to lay water mains therein for the purpose of supplying water to the inhabitants of the village (see M. S. 1949, § 412.401).

The village having a right to lay water mains in its public streets and roads, and a railroad crossing being a part thereof, it is our opinion that a railroad may not demand that the village sign a contract with it as a condition precedent to the right of the village to lay a water main underneath the tracks of the railroad and within the crossing. The village may proceed to lay the water main with or without the consent of the railroad company. In laying such water main, however, due care should be exercised in order that no damage be done to the property of the railroad and its business and to avoid the creation of hazards which would endanger traffic thereon. See opinion of this office to the Village Clerk of Onamia dated July 29, 1936 (file 624d-10). And we suggest that, before any work is undertaken at the railroad crossing, the railroad be duly notified thereof so that it may govern itself accordingly.

If the property of the railroad is benefited by the improvement undertaken by the village, we know of no reason why this property cannot be assessed the same as other benefited property. See M. S. 1949, § 429.08.

We believe the foregoing answers your inquiry.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Albany Village Attorney.
June 14, 1950. 624-D-10

173

Water services — City may construct water main without assessing water main benefited therefor; may accept prepayment of water bills from water customer; if agreement is made to furnish water and to accept prepayment of water bills, water user is not entitled to a refund upon discontinuing water services where city stands ready and willing to furnish water agreed upon.

Facts

"The X School, a private institution with a population of about 65 persons and an operating budget of about $65,000 per year, is located in the City of Faribault. The school has always had its own water

system, including a well. It has not had city water. Recently state authorities notified the school that their present well could be used only until they had an approved source of water supply. With that prompting them, the School Board has asked our Council and Water Commissioner to run a water main past or to the school property so they can connect a service.

"Running a water main to the X School property would cost about ten thousand dollars. Realizing this, and knowing the proposed main would for the present serve only the school, the School Board has offered to prepay about $3,000.00 of their water bill. They expect to use about $500.00 worth of water per year and would secure a receipted bill from the city each month until the prepayment had been used up. After that the school would pay for the water like any other user."

Questions

"Would there be any legal objection to our accepting the prepayment and laying the main, commingling the prepayment monies with the other water department monies that are used currently?

"Secondly, would there be any reason in law why the city could not enter into a contract with said school providing that in the event the school or its successor or successors ceased using our city water for 18 months or more, the Council could in its discretion declare the unused prepayment monies, if any, forfeited to the city?"

Opinion

You do not state, but we assume, that the city is operating under the home rule charter adopted by it on February 27, 1911. This charter empowers the city council to maintain water works and to lay water mains, pipes and hydrants in any street within or without the city (Section 258), and to establish rules and regulations by ordinance for the management of such water works and the supplying of water for the use of the inhabitants thereof (Section 261). When water mains are constructed as a part of a project for improving a street, the cost may be assessed against lands benefited (Section 193) but by appropriate resolution of the city council the cost and expense of all or any part of an improvement may be ordered paid out of the appropriate fund or general fund without an assessment of any property benefited (Section 166), and Section 260 of said charter makes an owner of private property liable to the city for the rents or rates for the city water used upon the owner's premises.

Under the foregoing charter provisions, it is within the discretion of the city council to extend the water main to X School without assessment of the property benefited. It is for the city to determine whether the necessity for the extension of the water main exists and whether the municipal treasury will warrant the expenditure. See opinion No. 165, Report of the Attorney General for 1946.

We are unaware of any reason why the city cannot accept prepayment of water bills from a water customer of the city. The prepayment presupposes that the water customer is paying in advance for water to be furnished by the city at rates in force as the water is furnished. If the city accepts prepayment of water bills, we know of no reason why the payment cannot be treated as any other water department income for water services.

From the facts submitted, it appears to us that the problems of the city are disposed of when it determines to build the water main and to accept prepayment of water bills under an agreement with X School that the water bills are being prepaid and that the city is under obligation to furnish water to the water user in the amount of the prepayment at the rates prevailing in the city as the water is furnished. If the water user, after having made a prepayment, discontinues its use of water, it is not entitled to any return of its prepayment because the city is still ready and willing to furnish water as it agreed to do when it accepted the prepayment of the water bills.

By reason of the views expressed herein, no specific answer to your second question is required.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Faribault City Attorney.
June 5, 1950. 624-D-3

174

Water supply — Liability — Municipally-owned water works system for sickness caused by impure water supply.

Question 1

Is the village liable for sickness or death caused by an impure water supply?

Opinion

In the operation of a municipally-owned water works utility, your village is acting in its proprietary, and not in its governmental, capacity. The same rules of negligence apply to your village in that operation as would apply to a private corporation or individual operating the plant.

In **Keever v. City of Mankato**, 113 Minn. 55, 129 N. W. 158, the complaint charged that the defendant city negligently allowed the supply in its water works system to become polluted with poisonous substances and large quantities of filth and sewage to escape into and saturate its water supply, by reason whereof plaintiffs' intestates contracted typhoid fever and died as a consequence. On demurrer it was held that the municipality was liable for its negligence in its private or corporate capacity. In that case we find the following quotation:

"When the municipality enters the field of ordinary private business, it does not exercise governmental powers. Its purpose is, not to govern the inhabitants, but to make for them and itself private benefit. As far as the nature of the powers exercised is concerned, it is immaterial whether the city owns the plant and sells the water, or contracts with a private corporation to supply the water. It is not in either case exercising a municipal function. * * * When a municipality engages in a private enterprise for profit, it should have the same rights and be subject to the same liabilities as private corporations or individuals."

The **Keever** case has been followed by several later Minnesota cases, one of which is **Borwege v. City of Owatonna**, 190 Minn. 394, 251 N. W. 915, wherein it is stated:

"When a city engages in activities which are of a nature ordinarily engaged in by private persons and which subject private persons to liability for negligence, the city is likewise liable for negligence."

The existence of negligence on the part of the village in any particular case is, of course, a fact question.

Question 2

If the village be liable, "is there any limit of liability in such a case"?

Opinion

If the claim be one for wrongful death, the limitation of the wrongful death statute would apply. If the claim be one for personal injuries and consequent damages, not involving a wrongful death, the ordinary rules of damages would apply.

LOWELL J. GRADY,
Assistant Attorney General.

Spring Valley Village Attorney.
August 15, 1949. 844-B-7

PUBLIC WORKS

175

Dumping grounds — Town has the right to provide public dumping grounds, purchase land for that purpose and employ an overseer or watchman therefor.

Question 1

Has a township the right to provide public dumping grounds?

Opinion

In an informal opinion written by Charles E. Phillips, file 434a-6, it was held that a town could purchase a tract of land for a dumping ground. The author of that opinion wrote:

"The town supervisors also constitute the board of health for the township and are chargeable with the duty of disposing of refuse and other disease-breeding rubbish. It would, therefore, seem that if it is reasonably necessary for that purpose, that the town may acquire a piece of property for dumping purposes if it is necessary to do so to conserve the health of the residents of the township; otherwise, they have no authority." .

This opinion was followed in an opinion dated April 2, 1927, to Dr. Chesley of the Department of Health, and in an opinion dated April 11, 1946, file 434a-6. I follow these opinions and hold that a town has the right to acquire land for public dumping grounds if consideration of public health makes it necessary to do so.

Question 2

Can the town purchase land to be used as a public dump?

Opinion

In view of the foregoing opinion, it necessarily follows that under the conditions stated the town has such power.

Question 3

After the town has a dumping ground, can the town employ a watchman or overseer to supervise the dumping of refuse and other material?

Opinion

The town has the right to take such steps and employ such means as may be necessary to make the public dumping grounds serve the purpose for which they were intended. It would have the right to employ a watchman or overseer if that is necessary and advisable in order to make the dumping grounds serve their intended purpose.

I think this answers your questions. I should, however, call your attention to the provisions of M. S. A. 368.79, which would be applicable in New Canada town when adopted by the voters.

RALPH A. STONE,
Assistant Attorney General.

Attorney for Town of New Canada.
August 16, 1949. 434-A-6

176

Sewers—Construction of sanitary sewer, without petition of property owners, under M. S. A. 429.21-429.26 and M. S. A. 431.01 et seq.

Facts

"The city of North Mankato is a city of the fourth (4th) class, organized under chapter 462, Laws of 1921.

"The city desires to install a Sanitary Sewer on the grounds of necessity in a certain area."

Question

Whether the term "sewer" as used in M. S. A. 429.21 is sufficiently broad to include a sanitary sewer.

Opinion

The question is answered in the affirmative.

M. S. A. 429.21 confers authority upon the "council of any city of the fourth class incorporated under the general laws of this state" to "construct * * * any * * * sewer" in the city in accordance with the procedure prescribed by M. S. A. 429.21-429.26. Under this law, the council may initiate the proceedings "acting on its own motion" without a petition of the proposed owners affected or has the alternative of acting upon a petition.

The phrase "any * * * sewer" in M. S. A. 429.21 seems sufficiently broad as to include a sanitary sewer. See generally **McQuillin, Municipal Corporations, Revised,** Vol. IV, § 1538; also **Anselmi v. City of Rock Springs** (Wyo.), 80 P. 2d 419, 116 A. L. R. 1250.

M. S. A. 429.21-429.26 originated in L. 1901, c. 167. Your attention is directed to **State v. Foster,** 94 Minn. 412, 103 N. W. 14, wherein our Supreme Court held that municipalities within the operation of that law had no power to construct or contract for the construction of sewers until the proposed owners had had an opportunity to perform the work themselves as provided by that law. Under these circumstances, it may be that your council may find it inadvisable to avail itself of the provisions of 429.21 et seq.

Your attention is directed to M. S. A. 431.01, which authorizes "any city of the fourth class in this state * * * to establish and maintain a general system of sewers" in accordance with the procedures set forth in 431.01 et seq. The authority to establish a general system of sewers includes the authority to install sanitary sewers. Under this law, no petition is necessary. The action is to be instituted by the council by the adoption of an ordinance or resolution.

LOWELL J. GRADY,
Assistant Attorney General.

North Mankato City Attorney.
July 1, 1949. 387-B-10

177

Streets — Parking meters — Use of for advertising purposes — City has no authority to rent advertising space on city parking meters as a private enterprise for profit.

Facts

The city has installed parking meters on posts placed along the sidewalks in the public streets. The meters are being paid for in installments by the city from the proceeds of the money taken in by the meters. The city will acquire full title when the meters are paid for.

The vendor now proposes to install neat signboards on each meter post, half of the cost to be paid by the city. This company would then sell advertising space on the signboards to merchants and others at contract rates, the city to receive 50 per cent of any profits realized from this program.

Questions

Is the city authorized to enter into any such contract? After the city acquires title to the meters, could it sell such advertising space?

Opinion

The city does not own the fee in the streets. All that the city owns is an easement for the use of the property as a street. The city is authorized by the charter, Chapter XVI, Sec. 114 (2), "To care for, supervise and control all bridges, streets, * * * and to prevent injury thereto or encroachment thereupon, whether upon, over or under the same, and remove such encroachments."

There is no authority granted to the city in the charter to engage in a private business enterprise not coming within the category of a public utility.

Of course the city has the right to allow the streets to be used for gas, water and sewer pipes, and permit telephone, telegraph and electric poles to be erected thereon. These are uses for which the streets are dedicated.

But here it is proposed to use the streets for a purpose which is not a public one and for a purpose for which the street was not dedicated, and for a business in which the city has no power to engage for profit.

In the case of **State ex rel. Belt v. St. Louis**, 161 Mo. 371, 61 S. W. 658, it appeared that the municipal assembly had passed an ordinance authorizing the board of public improvement to maintain boxes for the collection of waste paper along the streets, and authorizing the board of public improvement to enter into a contract with one B for the erection and maintenance of the same. B was to have the right to use the outside of all boxes for advertising purposes, and was to pay into the city treasury at the end of each quarter 15 per cent of the gross receipts. The court held that this was an unauthorized use of the public street and unlawful. The court said:

> " * * * It subjects the public streets to a purely private purpose, to-wit, the advertising of individual business and enterprises. Can the city devote its streets to such a purpose? We hold that it cannot. * * * In a word, the city has attempted to farm out its sidewalks and streets to a private person for advertising. B is free to make his own charges for advertising. No power is reserved in the city, even if it were a purpose to which it could devote the streets, to regulate the charges for advertisements. * * * But it is said that it is no objection to a public franchise that its owner may derive a private gain therefrom. This is unquestionably true when the use is public and the gain arises out of that use, such as street cars, telegraph and telephone

lines. In this case, however, the pecuniary profits to B arise from a source wholly distinct from any public use. They will not flow naturally from his right to erect and maintain boxes for waste paper, but solely from a distinct privilege in which the public are not interested, to-wit, his exclusive right to use the streets for advertising purposes, a purely private and collateral enterprise. We are clear that the streets cannot be devoted to such a private purpose."

The above case is cited in **People ex rel. Healy v. Clean Street Co.**, 225 Ill. 470, 80 N. E. 298, 9 L. R. A. (N. S.) 455. The facts in that case were these. The city council of Chicago passed an ordinance purporting to authorize the mayor, the chairman of the finance committee and the commissioner of public works to take such steps as they might deem effective to prevent the casting or leaving upon the streets waste paper and other litter. It authorized these officials to cause to be erected and maintained suitable boxes for the collection and temporary depositing of such waste paper and litter. The city advertised for proposals for the collecting and removal of waste paper and litter from the streets. There was some question about the validity of the publication. After such advertisement and some modification of the bid, a contract was entered into with J, wherein it was provided that J be given for a period of ten years the privilege of placing upon the highways of the city, at street intersections and other places, 4,000 boxes of suitable size. J was also given the right to utilize and employ for advertising purposes any space upon the boxes, except that used for the number of the box and the sign "City Waste Box," and J was given the exclusive right to contract for, and publish, advertising upon the boxes, and collect for such advertising. A portion of the proceeds from the advertising was to be paid to the city under the contract. The question arose as to the validity of such a contract for the use of the city streets. The court held:

" * * * By this contract he (J) was authorized to use the streets and public places of the city for the purpose of advertising the private business of any person or corporation, and have exclusive control over the same. The city authorities had no power to grant or delegate any such right or privilege. While the title to the streets and alleys of a city is vested in the city, and it has full power and control over them, yet this authority must be exercised according to well-established rules of law. The public authorities are merely the custodians or trustees for the public, which must be given the full use and enjoyment of all such streets without obstruction, and without authority of the city council to use or encroach upon them, or authorize others to do so for purely private purposes. By the ordinance and contract the city authorities sought and attempted to turn over the use of certain portions of the street for the exclusive benefit of private individuals, and their action in this regard must be held illegal and void."

In line with the authorities cited, I am of the opinion that the proposed contract with the seller of the parking meters would be invalid; further, that the city would have no right after it becomes the absolute owner of the meters to engage in the private business of selling advertising space on meters along its streets.

The implications of this opinion must not be extended beyond the use of parking meters on the city streets for advertising purposes. It applies only to city streets.

RALPH A. STONE,
Assistant Attorney General.

Faribault City Attorney.
March 2, 1949. 59-A-53

178

Streets — Trees growing thereon — no duty rests upon abutting property owner to remove trees from streets. Village is charged with the duty of supervising and maintaining its streets, including removal of trees, when necessary for public use, and when same constitutes an obstruction.

Facts

"A Village in this County has numerous large shade trees which are in the limits of the streets. The abutting property owners in some instances complain that the danger exists of these trees falling on their buildings."

Questions

"1. If a tree is in fact a danger to buildings and abutting property, whose duty is it to remove the tree? Is this incumbent upon the abutting owner or the Village?

"2. If the Village is under a duty to remove the tree, may the Village in some manner charge the cost of removal back against the abutting property owner?

"3. May the Village by ordinance require the removal of such tree by the abutting property owner under penalty?"

Opinion

1. The village has control over its streets and is charged with the supervision and maintenance thereof. No duty rests upon the abutting property owner to maintain village streets. The abutting property owner owns the

fee title to the center of the street, subject to an easement for highway purposes, but no duty results from such servient ownership to maintain a public street. We believe that the language of our Court in **Zacharias v. Nesbitt,** 150 Minn. 369, 185 N. W. 295, is controlling. At page 371 of the Minnesota report the Court said:

> "Where the tree stood, the public held a dominant easement and defendant the servient fee. He no doubt could have cut down and appropriated the tree at any time he saw fit. The timber belonged to him. Town of Rost v. O'Connor, 145 Minn. 81, 176 N. W. 166, 9 A. L. R. 1265. But the highway authorities could likewise have cut down the tree, if dangerous to travelers. When this tree fell across the road, the duty to remove it did not rest on defendant, but on the public authorities charged with the supervision and maintenance of the road. Blackwell v. Hill, 76 Mo. App. 46. While the abutting owner may remove from the highway material not needed or essential for the construction or repair of the same, there is no affirmative act required of him so to do in order to maintain the easement in condition for safe use. Defendant could not have been compelled by law to cut down and remove this tree upon proof that it was a menace to travelers. He was not bound to assume control over or appropriate any tree growing upon the right of way. He had not placed it there. The servient fee owner to a dominant highway easement is not supposed to patrol the road and examine the trees growing thereon to ascertain at his peril whether they or any limbs thereof are likely to fall in the often violent storms so frequent in this state. The authorities chargeable with the maintenance of streets and highways generally have been held to the duty of protecting against dangers from falling trees and branches. This negatives such duty on abutters or servient fee owners."

2. Upon the facts submitted, we answer this question in the negative.

3. The village may by ordinance provide for removal of trees growing within the limits of a public street where such trees cause an obstruction and removal is necessary for a public use. The ownership of the trees being in the abutting property owner, he is entitled to notice before such trees may be removed. See **Rost v. O'Connor,** 145 Minn. 81, 176 N. W. 166, **West v. Village of White Bear,** 107 Minn. 237, 119 N. W. 1064. See also M. S. A. § 160.28. An ordinance which has for its purpose the removal of trees from village streets should follow in the main the provisions of this section.

See also **Pederson v. City of Rushford,** 146 Minn. 133, 177 N. W. 943; **Powell v. Carlos Township,** 177 Minn. 372, 225 N. W. 296; Dunnell's Digest, Vol. 4, § 6641.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Mower County Attorney.
January 19, 1949. 643-F

179

Water mains—Extension—Petition—Signature of village—M. S. A. 432.11, 432.12 and 432.13, L. 1949, Ch. 119, §§ 50 and 51.

Facts

"The Village of Caledonia is desirous of extending a certain water main under Chapter 425, Laws of 1921.

"The Village is the owner of property along the street to be improved and is in favor of the improvement, but without the signature of the Village, there will not be a majority of the property owners signing the petition."

Question

"Is the Village an owner under Section 432.04?"

Opinion

M. S. A. 432.04 is not a part of Laws 1921, Ch. 425. Laws 1921, Ch. 425, is found in the following sections of M. S. A., to-wit: 432.01, 432.11 to 432.24.

Under Laws 1921, Ch. 425, §§ 1, 2 and 3, being M. S. A. 432.11, 432.12 and 432.13, and particularly under 432.13, the improvement can be made upon the adoption of a resolution determining the necessity of the work by a majority of the vote of the council at a meeting at which all property owners whose property may be assessed therefor have been notified to be present by a notice of the meeting publishd for at least two weeks in the official newspaper.

However, I think you should consider the provisions of the new village code, L. 1949, Ch. 119, and particularly Art. VII, §§ 50 and 51. Section 50 authorizes the council of the village to lay water mains and appurtenances, such as valves and hydrants and service connections, for the purpose of supplying water to the inhabitants of the village. Section 51 provides for the making of the improvement upon the majority vote of the council when petitioned for by 35 per cent in frontage of the real property abutting on the street, or **where there has been no such petition, a resolution may be adopted only by a vote of four-fifths of all the members of the council.**

If the village council is in favor of the laying of the water mains proposed, it no doubt can muster the four-fifths vote necessary so that it can proceed without a petition. Under this statute a public hearing is also required.

RALPH A. STONE,
Assistant Attorney General.

Caledonia Village Attorney.
June 10, 1949.

624-D-11

REAL ESTATE

180

Court House—Sale of former Ramsey County Court House and Saint Paul City Hall site: Only consideration of sale must be highest cash price obtainable—L. 1929, c. 397, § 20 controls and provides proceeds of sale be used to liquidate outstanding bonds—County must comply with provisions of M. S. 1949, § 373.01 (3) in offering tract for sale—Taxation: Neither city nor county has power to agree to deferment of taxes on property—Minn. Const., Art. IX, § 1.

Facts

"The City of Saint Paul and The County of Ramsey each own an undivided one-half interest in the remaining three-fourths of the former court house and city hall site in St. Paul one-quarter having been heretofore sold.

"The new court house and city hall was built pursuant to Laws 1929, Chapter 397, and that law directs the sale of the property which is not used for a new building, and also authorizes each governmental subdivision to issue its bonds to secure the necessary funds. Of the bonds that were issued by the city for this purpose over $1,000,000 are still outstanding, as are a little more than $150,000 in the bonds of the county.

"From time to time in the last five or six years numerous suggestions and inquiries have been made as to a possible sale of this property for a price part in cash and part upon the agreement of the purchaser to erect a building on the site.

"At a joint meeting of the City Council and the County Board held on Monday, August 21, 1950, the writer expressed his views as to the legal angles involved in the latest informal proposal submitted, as did the Corporation Counsel of the City of Saint Paul. The two expressions of opinion not agreeing in all respects, the County Board at such joint session instructed this office to submit the matter to your office for your opinion."

Question No. 1

"Can either the city or the county offer the property for sale to the highest bidder with the further offer that consideration will be given by the governmental subdivisions to the bidders' agreements to erect a building on the site?"

This raises the question of the authority of the governing bodies of the owner-governmental units to impose as a condition upon the sale of the property here involved the covenant of the purchaser "to erect a building on the site."

Question No. 2

"Can either the city or the county offer the property for sale to the highest bidder with the further offer that consideration will be given by these governmental subdivisions to the bidder's agreement to erect a building on the site, and in consideration of such agreement accept a sum of money less than the highest cash offer or less than the full market price?"

This raises the further question of the authority of those governing bodies, in consideration of such covenant of the purchaser, to accept as the purchase price "a sum of money less than the highest cash offer or less than the full market price" of the land involved.

Opinion

We consider both these questions together.

Ordinarily, where authority to sell and dispose of public property no longer needed for the purposes of the municipality is conferred, conditions of sale of such property, unless restrained by law, are within the reasonable discretion of the appropriate municipal authorities. See **Carter v. City of Greenville,** 175 S. C. 130, 178 S. E. 508. However, the disposition of the two questions here considered is controlled, in my opinion, by § 20, c. 397, L. 1929, to which you refer. The last cited section, in its entirety, provides:

"**In case any land or buildings owned and used by either said County or said City, or jointly owned and used by them shall not be required for the use** of said County or City or both of them after the completion of the new building, **said land and buildings shall be sold as soon as practicable and the proceeds placed in separate funds** of the said County and City to be used for the payment of bonds or certificates of indebtedness authorized hereunder and court house and city hall bonds issued by any such City. **The proceeds of such sales shall be paid into the County and City treasuries in the proportion of ownership of each in the real property so sold. So far as practicable the proceeds of such sales shall be used to pay a portion of the bonds or certificates of indebtedness maturing in each year after such sales in such manner as to make the annual payments from the proceeds of such sales** as nearly equal as may be in each of the years in which bonds or certificates of indebtedness mature. No part of the proceeds of such sale shall be used to pay interest charges on any bonds so issued, and no part thereof shall be used for any purpose other than the payment of maturing bonds or certificates of indebtedness unless there is a surplus after the payment of **all** bonds or certificates of indebtedness, in which case such surplus shall be paid into the general sinking fund of such City and County."

The above quoted provision of L. 1929, c. 397, is a clear and unambiguous legislative direction to both the County of Ramsey and the City of Saint Paul, not only to sell the old site and the buildings thereon, but also to apply the "proceeds of such sales" in the manner and for the purposes only

as prescribed by the statute. The authority and the purpose so directly expressed by the legislature in L. 1929, c. 397, prevail, in respect of the property here involved, over any general legislative authority conferred upon the county board as to the management and disposition of unneeded county property, and likewise over any similar provision of the charter of the City of Saint Paul in respect of unneeded property owned by the city. The direction of the statute is that the property "shall be **sold.**" The statute further directs that the "proceeds of such sales" shall be applied toward the liquidation of the county certificates of indebtedness and the city bonds, some of which are still outstanding, issued to obtain funds for the construction of the present courthouse-city hall. The governmental units are given by this statute the power **to sell.** They are not thereby given the power to exchange or to donate, nor **generally** to dispose of upon such terms and conditions, other than a cash consideration, as might be deemed economically or otherwise advantageous. The power to sell ordinarily means to sell for cash. This office has repeatedly held that, where a municipality is authorized to sell property owned by the municipality, the duty rests upon the appropriate municipal authorities to obtain the best price obtainable therefor. See opinions of the Attorney General dated November 19, 1946 (file 59a-40), September 30, 1947, and September 6, 1947 (file 469a-15). This requirement, while not expressly stated in M. S. 1949, § 373.01 (3), is implicit therein.

The legislative direction that, so long as any of the bonds issued for the erection of the new courthouse-city hall remain outstanding, the proceeds derived from the sale of the old site shall be applied only to the liquidation of those bonds compels the conclusion that the legislature intended that the old site shall be sold only for a cash consideration. If that be true, it is the duty of the proper municipal authorities to obtain the best price obtainable. If we were here dealing with a broad general power of the municipality to sell, convey, or otherwise dispose of its property as the best interests of the municipality require, it might be argued, as was held in **Quackenbush v. City of Cheyenne,** 52 Wyo. 146, 70 P. 2d 577, that the municipal authorities, in selling, have the right to take into consideration, in addition to the cash price offered, such factors as might promote the economic, financial, and industrial interests of the municipality. In those circumstances, it might well be argued that the imposition of the condition that a purchaser erect a building on the site would result, not only in added business interests, but also in an increase in taxes. But the statute here considered does not confer upon the municipal units involved the **broad general** power to sell, convey, and dispose of the property here involved. I find no suggestion in the statute considered which would warrant the inference that the proper authorities of the municipal units can take into account in selling this tract any consideration except to sell for the highest cash price obtainable. The requirement that the proceeds of the sales be used towards liquidation of the outstanding bonds compels that conclusion. If this site were to be sold for less than the highest cash price obtainable in consideration of increased tax revenue, it is quite obvious that the municipalities could not apply such tax increase upon the bond retirement. In that circumstance, the anticipated tax increase would, in effect, be part of the proceeds of the sale. Only

the cash price obtained from the sales can be applied towards the bond retirement. However desirable it may be that the sale of the property here involved be conditioned as indicated, the question is not one of desirability or feasibility, but rather one of power. See **Brockman v. City of Creston**, 79 Ia. 587, 44 N. W. 822. If the legislative grant of power in this instance be considered too narrow to permit of the advancement of the economic, financial, and industrial interests of the governmental units desired to be promoted, the remedy therefor lies only with the legislature.

In the light of the expressed direction of the legislature contained in § 20 of c. 397, L. 1929, your first two questions are answered in the negative.

Question No. 3

"Can these governmental subdivisions sell the site, taking as part of the consideration therefor the bidder's agreement to forfeit the full agreed sale price as liquidated damages if a building is not erected within one year, bidder's inability to complete due to strikes and inability to obtain materials excepted?"

Opinion

In view of our answer to your first two questions, a negative answer to this third question is required.

Question No. 4

"Can it be agreed that there shall be no tax upon the property until the completion of the new structure, and in order to obtain this result that the deed be dated at some time in the future, or that some other means be used to obtain such results? This question is asked as it is a consideration in the latest informal offer."

Opinion

Your question is answered in the negative.

Neither the County of Ramsey nor the City of Saint Paul has the power, either directly or indirectly, to surrender or bargain away the taxing power of the state. Minn. Const., Art. IX, § 1.

Question No. 5

"Must the county follow M. S. 373.01 (3) in offering this tract for sale?"

Opinion

This question is answered in the affirmative.

M. S. 1949, § 373.01 (3) empowers the county board "To sell * * * and convey any real * * * estate owned by the county," but, before the board may legally sell it, it must adopt a resolution (1) fixing a time for considering the sale, (2) setting out the terms and conditions thereof, and (3) the

resolution must be published in the official proceedings, and the publication must be made not less than 30 days and not more than 60 days prior to the time the board acts upon the offer. Likewise, the reservations in that statute specified must be inserted in the deed of conveyance.

There is no suggestion in L. 1929, c. 397, § 20, that these mandatory requirements may be dispensed with by the county board in the sale of its interest in the old courthouse site.

LOWELL J. GRADY,
Assistant Attorney General.

Ramsey County Attorney.
September 15, 1950. 125-A-20

181

Park — Possession — Statute of limitations — Legislature may shorten the time within which action may be brought to recover possession of the property deeded to village for park purposes and afterwards sold by the village—Laws 1949, c 99.

Facts

The Village of Hawley acquired certain property in 1920 by deed. It was conveyed to the Village of Hawley with the condition that it be used as a public park. Subsequently the village sold and conveyed the property to a number of individuals, who have since that time built residences on the property.

It is my understanding that the several individuals who bought the property from the village have received quitclaim deeds from the original owner. I am not certain as to this, and you do not mention the fact.

It is also my understanding that the Village of Hawley was paid what the property was considered worth when it was sold to the several occupants.

Question

Is Laws 1949, Chapter 99, approved March 8, 1949, constitutional?

Opinion

Laws 1949, Chapter 99, provides as follows:

"Section 1. Limitation of actions affecting real estate. Where real property was deeded to a village prior to January 1, 1921, for use as a public park or playground, and the deeds therefor recorded prior to January 1, 1921, and thereafter such property was sold and conveyed by the village to individuals who built houses or made other improvements thereon, and the conveyances thereof have been heretofore

recorded, no action may be commenced by any person, partnership, or corporation, or by the state or any political subdivision of the state, after January 1, 1950, to enforce any right or claim of right to the use of such property for any public purpose, or to compel such property to be devoted to the purpose of a public park or playground or any other public purpose.

"Sec. 2. Application. This act shall not apply to any action commenced before January 1, 1950."

It will thus be seen that the legislature passed a general law providing a statute of limitations in such situations in reference to villages. It is generally conceded that such a law is within the power of the legislature to enact. Here the several individuals to whom the property was sold are in possession of the property and there is presently existing a right of action to recover possession of the same from the several occupants upon the ground that the sale was illegal and beyond the authority of the village.

No reason occurs to me why the legislature may not adopt a statute of limitations providing the time within which an action to recover possession of the property for the village must be brought.

I refer to 34 Am. Jur., title Limitation of Actions, § 18, p. 27, reading thus:

"* * * The legislative body may, without violating constitutional guaranties, enact statutes which limit the time within which actions may be brought to enforce demands where there was previously no period of limitation, or which limit, change, and vary existing rules as to limitation of actions either by shortening or extending the time within which a cause of action may be asserted. Such a provision ordinarily does not impair the obligation of contracts; it does not violate a constitutional provision prohibiting the taking of life, liberty, or property without due process of law; nor, if it operates prospectively, does it impair vested rights."

I also note the following from the same text on page 28:

"It is generally conceded to be within the power of the state, within certain limits, to alter or modify, according to its will and the way it deems best calculated to promote the ends of justice, the remedies which parties may have for the enforcement of their rights, provided that in so doing it does not impair the obligation of contract. Ordinarily, statutes of limitation do not have this effect, because they act only on the remedy. Accordingly, the legislature may, without violating the constitutional guaranty against impairing the obligation of contract, enact a statute which limits the time within which actions may be brought to enforce demands where there was previously no period of limitation, and make such operate upon existing contracts. Likewise, the legislature may validly shorten or lengthen the statutory period, or suspend the operation of the statute. * * *"

Again from the same text on pages 33-34 I quote the following:

"Unless forbidden by the State Constitution, the legislature may constitutionally shorten the periods of limitation fixed by previously existing statutes, and make the amendment applicable to existing causes of action, provided a reasonable time is left in which such actions may be commenced. The question as to what shall be considered such a reasonable time is for the determination of the legislature, and is in no sense a judicial question. Unless the time allowed is so manifestly insufficient that it becomes a denial of justice, the court will not interfere with the legislative discretion.

"The reasonableness of each limitation prescribed by a statute shortening the period of limitation must be separately judged in the light of the circumstances surrounding the class of cases to which it applies, and if the time is reasonable as regards the class, it will not be deemed unreasonable because it may operate harshly in some particular or exceptional instance."

Assuming that the period of limitation stated in Section 2 of the Act is a reasonable one (and on this point I express no opinion), and relying upon the authorities cited, I am of the opinion that the statute in question is good, and that it operates to bar an action for the recovery of the real estate by the village after the first day of January, 1950.

I have not overlooked M. S. A. 541.01, which provides that "no occupant of a public way, levee, square, or other ground dedicated or appropriated to public use shall acquire, by reason of his occupancy, any title thereto."

While the occupants of this land may not acquire by reason of their occupancy any title, nevertheless, any action to remove them therefrom is barred by the 1949 statute.

RALPH A. STONE,
Assistant Attorney General.

Hawley Village Attorney.
September 14, 1949. 605-A-13

182

Parking lot — Land dedicated as a public park cannot be used as an automobile parking place under the facts submitted.

Facts

In 1937 X, for and in consideration of his interest in and desire for the improvement of the City of Moorhead, and for the well-being of its people, conveyed to said city a tract of land. The deed is in the usual form, and following the description of the lands conveyed and the habendum clause are the following words:

"Said property is hereby expressly granted to the said City of Moorhead, and is accepted by it, for the use of the people, forever, as a public park, to be known as the X Memorial Park, to be landscaped and properly maintained by it;

"* * * That if the building now standing on said premises, and known as 'The Old Courthouse,' be not razed, then that it be renovated and remodeled for the use of the Women's Clubs of the city, in harmony with the landscaping scheme of the Park Board."

The property so conveyed is situated adjacent and contiguous to other lands owned by the city and acquired by purchase for park purposes, most of which lands comprise a river bank, and are used by the public for picnics and general recreation. The public makes little use of the tract conveyed to the city by X because it is adjacent to a heavily traveled street, the grass thereon is covered with dirt, it is without buildings, and it is not fit for recreational purposes.

In order to relieve the traffic congestion along Center Avenue in Moorhead, the main business street of the city, it is desired to use the lands given the city by X as an automobile parking place, and for that purpose the tract would have curbs, gutters and hard surfacing constructed thereon, would be landscaped and sodded, and would be named the "X Memorial Park."

Question

Does the city have authority to establish a parking place or parking lot upon the property received by the city from X for park purposes?

Opinion

The deed to the city did not convey an absolute title in fee to the city so that the city could use the property conveyed for any lawful public purpose. The language of the instrument plainly evinces an intent to limit or qualify or to attach a condition to the land. It is similar to the language in the deed construed in **Flaten v. City of Moorhead**, 51 Minn. 518, 53 N. W. 807, wherein the city of Moorhead was restrained from erecting a prison on property conveyed to the city to be forever held and used as a public park.

It is the rule that parks held by a municipal or other local authority under a grant whereby a private donor has dedicated the tract for a public park or for park purposes cannot be used for any purpose which is inconsistent with the purposes of the dedication as determined by the intention of the dedicator. See the annotations in 63 A. L. R. 484; 145 A. L. R. 489. See also **Headley v. City of Moorhead**, 227 Minn. 458, 35 N. W. 2d 606, relating to the inconsistent use of lands dedicated as a public square.

A municipal park has been defined as "a tract of land set apart and maintained for public use, and land used, planted and ornamented in such a way as to afford pleasure to the eye, as well as opportunity for open air recreation." 4 Dunnell's 2d Ed., Municipal Corporations, § 6608; see also 31 Words and Phrases (Park), p. 86; 35 Words and Phrases (Public Park) 254.

An automobile parking space or parking lot in common understanding implies a place where automobiles may be driven by the owner, left parked or standing, and removed by the owner at his pleasure. See 31 Words and Phrases (Parking Place) 98; 24 Am. Jur. 481.

From your letter we assume that the city proposes to use the entire tract given to it by X for parking facilities to be constructed pursuant to M. S. 1949, § 459.14, in order to relieve traffic congestion from the main street of the city. If this is so, it is our opinion that such use of the land in question is inconsistent with its use as a public park as dedicated by the donor. Your inquiry is therefore answered in the negative.

The views expressed herein are limited to the facts submitted. You do not ask, nor do we pass upon, the right of the city to establish parking space within a public park for the purpose of accommodating the patrons of the park. See 39 Am. Jur., Parks, Squares and Playgrounds, § 24.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Moorhead City Attorney.
June 15, 1950. 59-A-40

183

Village fire hall and school district garage — Village and school district may build a building to be used by both and owned in common and may by their joint action acquire a site therefor — M. S. A. 471.59, subd. 1. (Distinguishing opinion No. 159, 1948 report.)

Facts

It is proposed that the Village of Edina and Independent School District No. 17 of Hennepin County join in acquiring a tract of land and constructing a building thereon, which would be used by the village as a fire station and by the school district as a garage for its buses.

Question

May such village and school district by their joint action acquire a site and construct thereon a building to be used by the village as a fire station and by the school district as a garage?

Opinion

M. S. A. 471.59, subd. 1, reads:

"Two or more governmental units, by agreement entered into through action of their governing bodies, may jointly exercise any power common to the contracting parties. The term 'governmental unit' as used in this section includes every city, village, * * * and school district."

See **White v. City of Chatfield,** 116 Minn. 371, 133 N. W. 962. In that case the City of Chatfield and the Town of Chatfield, by joint action, purchased a lot and constructed thereon a building to be used by the city as a city hall and by the town as a town hall, the cost to be borne equally by the city and town. The power of the city and town to take such action was questioned. The trial court held that they had such power.

The Supreme Court said that the question which it had for consideration was whether or not the city was without authority to join with the town in the undertaking. In disposing of this question, the court said:

> "The city is partly in the town of Chatfield and partly in the town of Elmira. Its relations with both towns are necessarily close. As provided in the act of 1889, 'all that part of said city of Chatfield lying and being within the county of Fillmore shall be and constitute a part of the town of Chatfield.' The lot and building were owned and maintained by the city and town in common; each used the building for its corporate purposes. The city had power to build a city hall, and the town had power to build a town hall, and each had power to issue bonds to pay the cost. Had they built separate halls, the burden on the taxpayers of both city and town would have been heavier. That the arrangement was economical and beneficial is quite clear. We can perceive no sound reasons of public policy why the city and town could not unite in doing what either could do separately, and unless joining in such enterprise is contrary to law, it should be upheld.
>
> "There is no statutory prohibition, but there is some warrant in our decisions for the claim that such arrangement is illegal. We think, however, that the illegality of two municipal corporations uniting in constructing a building, under circumstances like those in this case, has been assumed, rather than decided."

No good reason occurs to me for saying that the Village of Edina and Independent School District No. 17 should not do exactly as they contemplate.

Based on the case of **White v. City of Chatfield,** supra, an opinion of the Attorney General dated February 27, 1948, File 469-c-5, concluded that a village and school district might agree to build a building to be used by them in common.

Accordingly, I conclude that the village and the school district have authority based upon the statute and based upon the decision of the Supreme Court to do that which is contemplated.

CHARLES E. HOUSTON,
Assistant Attorney General.

Edina Village Attorney.
October 20, 1949. 469-C-5

TOWNS

184

Dissolution — Reorganization of dissolved town—M. S. A. 368.47, 379.01, 645.28, 645.39, 645.40.

Facts

The county board of Koochiching County dissolved the town government of the towns of Bridgie and another under authority of M. S. A. 368.47. Each town had an assessed valuation less than $40,000.

These towns brought an action in the district court challenging the constitutionality of the law mentioned. The case was reported as **Town of Bridgie v. County of Koochiching**, 227 Minn. 320, 35 N. W. (2d) 537. The trial court sustained a demurrer to the complaint. The plaintiffs appealed to the Supreme Court. The trial court was affirmed.

Questions

1. May a township thus dissolved again organize under M. S. A. 379.01, while the assessed value of the property of the town proposed is still less than $40,000?
2. If the answer to question 1 is yes, is it discretionary with the county board whether it will organize the town, or is it mandatory that the board permit the organization?

Opinion

It is noted that the language contained in Sec. 368.47 is permissive, not mandatory. When the county board found as a fact that a town had an assessed valuation less than $40,000, the board had the power by resolution to declare the town dissolved. Nothing in the section required it to dissolve the town, but it had the power and right to do so.

M. S. A. 379.01 is a statute granting a right. A specified number of legal voters in a specified area have a right to petition the county board to be organized as a town. Sec. 368.47 does not deprive them of that right by any language therein contained. Sec. 379.01 appears to have been enacted by express authority of Art. XI, Sec. 3, of the Minnesota Constitution. It appears to me that your question involves the further question whether a town dissolved by the county board under authority of Sec. 368.47 may not again be reorganized under Sec. 379.01 because of an implied repeal of Sec. 379.01 by Sec. 368.47. In M. S. A. 645.28, we read:

> "Except as provided in section 645.39, laws in force at the time of the adoption of any revision or code are not repealed by the revision or code unless expressly repealed therein."

And in Sec. 645.39, we read:

> "When a law purports to be a revision of all laws upon a particular subject, or sets up a general or exclusive system covering the entire subject matter of a former law and is intended as a substitute for such former law, such law shall be construed to repeal all former laws upon the same subject. When a general law purports to establish a uniform and mandatory system covering a class of subjects, such law shall be construed to repeal preexisting local or special laws on the same class of subjects. In all other cases, a later law shall not be construed to repeal an earlier law unless the two laws are irreconcilable."

In the consideration of these statutes, I fail to see that they are irreconcilable. One law relates to organization and the other relates to dissolution.

In Sec. 645.40, we read:

> "A law shall not be deemed repealed because the reason for its passage no longer exists."

We know that repeals by implication are not favored. It is only when the implication is necessary that the courts say that a statute is repealed by implication.

The 1934 Report of the Attorney General in opinion 856 considered the problem herein and quoted from **Clark v. Baxter**, 98 Minn. 256, 108 N. W. 838.

> "While repeals by implication are not favored, it is also true that even if the subsequent statute be not repugnant in all its provisions to a prior statute on the same subject, yet if the former was **clearly intended** to prescribe the only rule which should govern in the case provided for it repeals the original act by implication."

In the Attorney General's opinion, the writer says:

> "We do not believe, therefore, that a township which has been dissolved pursuant to Chapter 377, Laws of 1933, may reorganize pursuant to said Section 787, Mason's Minnesota Statutes of 1927, so long as the conditions exist in such township or territory so dissolved pursuant to Chapter 377. However, if and when the conditions under which such township was so dissolved, pursuant to said Chapter 377, no longer exist, then we are of the opinion that such territory may be reorganized into a township, pursuant to said Section 787 of Mason's Minnesota Statutes of 1927."

That opinion was written when Sec. 368.47 made the dissolution of a town under conditions therein stated mandatory.

An amendment by L. 1937, c. 419, makes it optional with the county board to dissolve the town or refuse to do so.

Accordingly, it is my opinion that upon the facts stated, if a petition made under authority of Sec. 379.01 is presented to the county board, the

county board is required to act thereon as in that section stated, but that under Sec. 368.47 it is optional with that board to dissolve a town that fails to meet the requirements contained in the last cited sections.

CHARLES E. HOUSTON,
Assistant Attorney General.

Koochiching County Attorney.
April 1, 1949. 441-B

185

Licenses — Roller skating rinks — Under M. S. 1949, § 366.01, town board has no authority to license, regulate, or prohibit roller skating rinks.

Question

Has the town board power to license and regulate a roller skating rink located in the town?

Opinion

Prior to 1935 a town board was authorized under L. 1929, c. 143, to prohibit or license and regulate roller skating rinks. When the law was amended by L. 1935, c. 120, the words "roller skating rinks" were omitted.

Notwithstanding this omission, it was held in an opinion of this office dated July 29, 1938 (file 802c), that the 1935 law did not repeal the authority to license and regulate roller skating rinks and that the 1929 law authorizing the town to license and regulate or prohibit roller skating rinks was still in effect. However, since that time we have had the Minnesota Revised Statutes as compiled in Minnesota Statutes 1945, including Sec. 366.01. This compilation omits the words "roller skating rinks."

In the case of **State ex rel. Bergin v. Washburn**, 224 Minn. 269, 274, 28 N. W. 2d 652, it was held that the "Minnesota Revised Statutes," referring to Minnesota Statutes 1945, must be given effect as "the latest expression of the legislative will." If that decision is to be followed, and it must be followed until the legislature makes a change or the Supreme Court modifies the **Washburn** case, the answer to your question is governed by M. S. 1949, Sec. 366.01, whereunder there is no authority in a town board to license, regulate, or prohibit roller skating rinks.

Inasmuch as the present statute confers upon town boards no authority to license, regulate, or prohibit roller skating rinks, that power does not exist in the town board.

RALPH A. STONE,
Assistant Attorney General.

Moose Lake Town Attorney.
July 3, 1950. 802-C

186

Officers — Clerk — Road Record Book — The word "recording" found in M. S. 1949, § 163.13, subd. 6, means with the town clerk and not with the register of deeds.

Facts

Reference is made to the word "recording" found in M. S. 1949, § 163.13, subd. 6, and in connection therewith you submit this

Question

"Does this mean recording with the register of deeds, or does it just mean proper filing with the town clerk of the township where the road change has been properly made?"

Opinion

The word "recording" as therein used means a recording of the final order in the proper book by the town clerk, and not with the register of deeds. It is our understanding that a road record book is kept by the town clerk wherein the final order affecting a town road is entered. Reference to such road record book is made in section 163.20.

The duties of the town clerk are set forth in section 367.11, and in part are as follows:

"It shall be the duty of the town clerk:

"(1) To act as clerk of the town board, and to keep in his office a true record of all of its proceedings.

"(2) To have the custody of the records, books, and papers of the town, when no other provision is made by law, and to file and safely keep all papers required by law to be filed in his office.

"(3) To record in the book of town records minutes of the proceedings of every town meeting, and to enter therein at length every order or direction and all rules and regulations made by the town meeting."

Under this statute it is the duty of the town clerk to record the final order of the town board made in a town road proceeding. No statutory provision exists for recording such final order with the register of deeds.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Iron Range Town Attorney.
May 1, 1950. 377-B-10

187

Officers — Supervisor — Term of office to commence on first secular day in April following the election—M. S. A., § 212.20. Opinions dated April 4, 1933, April 28, 1933, and March 27, 1940, modified.

Opinion

When the opinion dated April 4, 1933, file 437-a-20, was written the provision of Mason's Minnesota Statutes 1927, § 1074, was controlling. This statute has since been superseded by Laws 1939, c. 345, Part I, c. 1, § 20, now comprising M. S. A., § 212.20. This section contains, in the last sentence thereof, this pertinent language:

> "All terms, except as herein otherwise provided, shall commence on the first secular day of April following the election."

which quoted language was not a part of Mason's Minnesota Statutes 1927, § 1074.

It is our opinion that under § 212.20 the term of office of town supervisor commences on the first secular day in April following the election.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Bloomington Town Attorney.
March 17, 1949. 437-a-20

188

Purchases — Land — Town may buy tax-forfeited land for use as a dumping ground.

Question

Whether a town has the right to purchase tax-forfeited land to be used as a dump ground.

Opinion

This office has heretofore held that a township has the right to provide public dumping grounds. Opinion dated August 16, 1949, file 434a-6.

Tax-forfeited land could be sold to the town for such a purpose.

Furthermore, under M. S. A. 282.01, the commissioner of taxation could convey any tract of tax-forfeited land held in trust in favor of the taxing districts to any governmental subdivision for any authorized public use. This is done by application therefor to the commissioner, with the statement of facts as to the use to be made of the land and the need therefor, and the favorable recommendation of the county board.

RALPH A. STONE,
Assistant Attorney General.

Aitkin County Attorney.
January 20, 1950. 434-a-6

189

Purchases — Road equipment — Town has power to purchase road equipment — Under L. 1949, c. 682, may issue bonds for the purchase of road equipment.

Question

May a town expend public funds for the rental or purchase of a road grader for use upon the town roads?

Opinion

The question is answered in the affirmative. M. S. A. 163.01 provides as follows:

> "The town board of each town shall have general care and supervision of all town roads therein and such care and supervision of county roads therein as is prescribed by the provisions of this chapter, **and shall procure machinery, implements, tools,** stone, gravel, and other material required for the construction and repair thereof; * * *."

Question

May the town, if it has not sufficient funds on hand for the cash purchase, raise funds by issuing bonds to finance the purchase of a road grader?

Opinion

It has heretofore been held by this office that Laws 1905, Chapter 64, authorizes the issuance of bonds for the purchase of road machinery for the building of new roads only. Laws 1905, Chapter 64, is still an effective statute, and has never been repealed, although it is not included in Minnesota Statutes Annotated.

However, after July 1, 1949, there will be no further doubt upon this question. Laws 1949, Chapter 683, amending M. S. 1945, § 475.14, as amended by Laws 1947, Chapter 296, provides as follows:

> "Any town may issue bonds for the acquisition and betterment of town halls, town roads, bridges; and for acquisition of equipment for snow removal, road construction or maintenance, and fire fighting."

Therefore, after July 1, 1949, a town will have authority to issue bonds for the purchase of a road grader, whether it is to be used for the construction of new roads or for maintenance and repair work.

RALPH A. STONE,
Assistant Attorney General.

Wadena County Attorney.
May 19, 1949. 382-B

190

Real estate — Town hall — Chairman of town board and town clerk, when authorized by town meeting, may convey real estate owned by town and not needed—M. S. A. 365.02, 365.05, 365.10. Proceeds realized by town from sale of real estate should be credited to general revenue fund — Town may sell its interest in real estate to anyone able and willing to buy. Both partition and the law of eminent domain apply.

Facts

The village of Chatfield was situated within the boundaries of the town of Chatfield. The town and the village owned a town hall in common. The people of the village adopted a charter and became a city. I find that in the charter of the city of Chatfield, Chapter 1, Sec. 1, it is stated:

> "* * * said City of Chatfield shall constitute an election and assessment district separate and distinct from any town, and all such lands and properties (thereinbefore described) are hereby specifically separated from the town of Elmira in Olmsted County and the town of Chatfield in Fillmore County."

Chapter 9, Sec. 38, of the charter states that:

> "The City shall have full power to acquire by purchase, gift, devise, or condemnation, any property corporeal or incorporeal, including public utilities either within or without its corporate boundaries which may be needed by the City for any public use or purpose, * * *."

Questions

1. May the town board without formally giving notice of special election and holding a special election to vote on the question whether or not this half interest in the building should be sold deal with the city and sell its interest in the building to the city?
2. If the town sells its interest in the building to the city, does the cash received go into the general revenue fund?
3. May the town board sell its interest in the building to an individual?
4. If the parties are unable to agree on the purchase price by the city from the town of the town's interest in the building, is the remedy of partition applicable?

Opinion

It should be clearly understood at the outset that we are not considering the establishment of a separate assessment and election district in a village, the procedure for which is authorized in M. S. A. 413.05 and in which the following sections deal in the property rights of the village and town.

The town is a body corporate. It may convey and dispose of real estate for which it has no need. It may make contracts necessary for the exercise of its corporate powers. M. S. A. 365.02. An opinion of the Attorney General, July 8, 1939, File 229D-13, stated that the chairman of the town board and the town clerk may execute a conveyance of real estate after being authorized to do so by the electors at their annual town meeting, but not otherwise. This conclusion was based on the statute which is now found in M. S. A. 365.05.

In M. S. A. 365.10, paragraph (8), we read that the electors of each town have the power at their annual town meeting to authorize the town board to sell and convey any real or personal property belonging to the town, not conveyed to and required to be held by the town for a special purpose. The opinion of the Attorney General, December 7, 1945, File 437B-8, copy enclosed, is in accordance with the procedure outlined as necessary.

A special town meeting may be called under authority of M. S. A. 212.03 for this purpose.

In the event that the town sells its interest in this building to the city, the proceeds received from the sale should be credited by the town to its general revenue fund.

The general propositions hereinbefore stated are broad enough to warrant the town selling its interest in the building when authorized by the town meeting to any purchaser able and willing to buy.

It seems clear that under the powers hereinbefore quoted from the charter the city has authority to acquire the interest of the town in the building through eminent domain proceedings. This would only be necessary in the event that the parties are unable to agree upon the purchase price.

In **Gould v. City of St. Paul**, 120 Minn. 172, 139 N. W. 293, the court said:

> "There can be no serious question of the liability of a municipality holding title to real property in common with an individual to a suit in partition. So far as concerns the property rights of a municipal corporation, the general rules and principles of law apply to controversies between itself and an individual, the same as between individuals."

So, I think that the law of partition applies.

CHARLES E. HOUSTON,
Assistant Attorney General.

Attorney, Town of Chatfield.
March 31, 1949. 440-B

191

Zoning — Trailer camps — Regulations concerning control of trailer camps may be incorporated in by-law on subject of zoning.

Questions

1. Does the town board have power to pass and enforce a resolution relating to trailer camps?
2. Does a special town meeting have such power?
3. If a zoning ordinance establishing building regulations were passed, might it contain enforceable provisions relating to trailer camps?

Opinion

No towns shall possess or exercise any corporate powers except such as are expressly given by law, or are necessary to the exercise of the powers so given. M. S. 1949, 365.03.

The town of Inver Grove is located in Dakota County. Dakota County borders on Ramsey County. Ramsey County contains a city of the first class. Accordingly, the board of supervisors of the town of Inver Grove, under authority of M. S. 1949, 366.10, is authorized to submit to the voters of the town for their approval or rejection at an annual or special town meeting the question whether the board shall adopt building and zoning regulations and restrictions in the town. If at such election the proposition carried, as provided in Sec. 366.12, the board may establish zoning districts as provided in Sec. 366.13. The purpose of such regulations is stated in Section 366.14. You will observe that Sec. 366.15 provides for public hearings before adoption of such resolution. It would seem that Sec. 366.13 is broad enough so that regulations could be embraced within the zoning resolution to cover trailer camps.

Since your letter does not state facts which would bring this town within the provisions of M. S. 1949, C. 368, I do not consider that chapter herein.

The town board has certain limited powers in the matter of legislation. M. S. 1949, 366.01. But this authority does not mean that the town board may legislate generally on subjects not specified in this section.

I am of the opinion that the town board is without power to adopt such a resolution as you mention in your letter for the regulation of trailer camps.

I am also of the opinion that a special town meeting could not adopt such a resolution for the reason that there is no specific statutory authority therefor. The only method by which I believe the result may be accomplished is by zoning in the manner hereinbefore stated.

CHARLES E. HOUSTON,
Assistant Attorney General.

Attorney for Town of Inver Grove.
August 29, 1950. 441-H

SOCIAL WELFARE

CHILDREN

192

Dependent — Aid — May be paid only when application therefor has been made as required by M. S. A. 256.74, subd. 2.

Question

"Whether or not there is any law which either requires or permits our Welfare Board to make the application" for aid to a dependent child "or whether it must be made under subd. 2 of Section 256.74 by 'the person with whom the child will live.' "

Opinion

The application for aid to a dependent child must be made under subd. 2 of M. S. A. 256.74 "by the person with whom the child will live." There is no provision in the Aid to Dependent Children Act[1] which either requires or permits a county welfare agency to make the application thereunder required by M. S. A. 256.74, subd. 2.

The Aid to Dependent Children Act is coded as M. S. A. 256.72 to 256.87, although the statutory definition of "Dependent child" is found in M. S. A. 256.12, subd. 14.

M. S. A. 256.72 prescribes the duties of county agencies under M. S. A. 256.72 to 256.87.

M. S. A. 256.73 provides that assistance shall be given under M. S. A. 256.72 to 256.87 to any "dependent child" having the qualifications of **eligibility** therefor as such qualifications are stated in M. S. A. 256.73. It is here important to note that one of the qualifications so prescribed by that section is that the "dependent child" must have "resided in the state for one year **immediately preceding the application for such assistance;** or who was born of a mother who has so resided." The county responsible for the payment of that assistance, if granted, is by that same section determinable by reference to the dependent child's residence **"for the year preceding the application for assistance."** See M. S. A. 256.73 (1).

M. S. A. 256.74, subd. 1, prescribes the amount of assistance which may be granted, and subd. 2 of that section, so far as here pertinent, provides:

> "Application for assistance under sections 256.72 to 256.87 **shall** be made to the county agency of the county from which the dependent child is entitled to receive assistance as provided in section 256.73. The application shall be in writing or reduced to writing in the manner and upon the form prescribed by the state agency and verified by the oath of the applicant. **The application shall be made by the person with**

[1]See M. S. A. 256.87, subd. 3.

whom the child will live * * *. One application may be made for several children of the same family if they reside with the same person."

Thus, M. S. A. 256.73 and 256.74, subd. 2, contemplate that before any assistance is granted under the Act an application therefor must be made, and 256.74 specifically requires that that **"application shall be made by the person with whom the child will live."** One of the elements of eligibility included within the definition of "Dependent child" contained in M. S. A. 256.12, subd. 14, requires the child to be "living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, or aunt in a place of residence maintained by one or more of such relatives as his or their home." Unquestionably, the phrase "by the person with whom the child will live" means and refers to any of the relatives named in the foregoing quoted portion of M. S. A. 256.12, subd. 14. The child will not live with the county welfare board. The Attorney General has heretofore held that the Aid to Dependent Children Act "must be construed as being intended to enable dependent children to live with and be cared for by their mother, a responsible mother, in her own home," or, if there be no responsible mother, "to live with and be cared for" by the relatives named in the statute which was the predecessor of that portion of M. S. A. 256.12, subd. 14, hereinabove quoted, "rather than have the home broken up and the child taken care of in other ways." Op. No. 21, Atty. Gen. 1938 report, dated April 12, 1938.

Nor is there anything contained in M. S. A. 256.75, to which you refer, which militates against the clear legislative mandate contained in M. S. A. 256.74, subd. 2, that the **"application shall be made by the person with whom the child will live."**

M. S. A. 256.75, in its entirety, provides:

> "When a county agency receives a notification of the dependency of a child or an application for assistance an investigation and record shall be made within a reasonable time of the circumstances to ascertain the dependency of the child or the facts supporting the application made under sections 256.72 to 256.87 and such other information as may be required by the rules of the state agency."

This statute imposes upon the county agency the duty to make **investigation and record within a reasonable time** after receipt of "a notification of the dependency of a child or an application for assistance." It neither imposes the duty, nor confers the right, upon the county agency to **make the application** required to be made by M. S. A. 256.74, subd. 2, and thereby specifically directed by the legislature to be **"made by the person with whom the child will live."**

The 1937 Aid to Dependent Children Act has its origin in L. 1937, c. 438. What is now M. S. A. 256.74, subd. 2, was § 6 of the original 1937 Act; what is now M. S. A. 256.75 was § 7 of the original 1937 Act. Thus, both provisions were passed on and enacted by the same legislature.

Reference to the provisions of M. S. A. 256.76 and 256.77 fortify the conclusion herein expressed.

M. S. A. 256.76 provides, in substance, that upon completion of its investigation the county agency shall decide the questions of eligibility of the child for assistance, the amount of such assistance, and the date when such assistance shall begin. This section then provides that the **"county agency shall notify the applicant of its decision in writing."** Surely, the legislature did not intend that the county agency should be both applicant and judge of the application.

M. S. A. 256.77 provides for appeal to the state agency from the decision of the county agency and for judicial review of the determination of the state agency on the appeal to it. Subd. 1 of this section requires the county agency to report its decision on each application to the state agency, and this same subdivision then specifically provides that:

> "Any **applicant or recipient aggrieved** by any order or determination of the county agency may appeal from such order or determination to the state agency * * *,"

upon compliance with the procedures therein prescribed, one of which is that, before making such appeal, the **"applicant or recipient shall give written notice to the county agency that he is not satisfied with its decision."**

The administrative appeal from the order of the county agency to the state agency is a **prerequisite** to the judicial review authorized by other provisions of M. S. A. 256.77.

The Director of Social Welfare advises us that this opinion is in complete harmony with the long-established practical administrative construction placed upon the statutes here considered by the state agency and that such has been, and still is, the directive of the state agency to county agencies.

LOWELL J. GRADY,
Assistant Attorney General.

Ramsey County Attorney.
December 15, 1949. 540

193

Illegitimate — Paternity proceedings — Expenses incurred by mother in connection with her confinement and care and maintenance of child prior to judgment may be included in judgment against adjudicated father — M. S. A. 257.23; L. 1943, c. 201.

Question

May "the expense of hospital and doctor bills in care of an illegitimate child, and confinement of the mother delivering said illegitimate child, as contracted by the mother, be fixed by the order of Court in an illegitimacy case as a part of the judgment against the adjudicated father?"

Opinion

The question is answered in the affirmative.

M. S. A. 257.23, so far as here material, provides, in substance, that, where a defendant in a paternity proceeding is adjudged to be the father of the illegitimate child involved, such father shall be subject to all the obligations for the care, maintenance, and education of such child, and to all the penalties for failure to perform the same, which are or shall be imposed by law upon the father of a legitimate child of like age and capacity and, further, that judgment shall also be entered against him for all expenses **incurred by the county** for the lying-in and support of and attendance upon the mother during her sickness, and for the care and support of such child prior to such judgment of paternity. M. S. A. 257.23 specifically provides:

> "The court shall further fix the amount, and order the defendant to pay all expenses necessarily incurred by, or in behalf of, the mother of such child, in connection with her confinement and the care and maintenance of the child prior to judgment."

The above quoted portion of M. S. A. 257.23 was first introduced into our paternity laws by L. 1921, c. 489. See G. S. 1913, § 3218, as amended by L. 1921, c. 489. That section of G. S. 1913, as so amended, was carried into M. M. S. 1927 as § 3265. The last above-quoted portion of the statute continued as a part of the statute from the enactment of L. 1921, c. 489, until the enactment of L. 1941, c. 152, which latter session law, in amending M. M. S. 1927, § 3265, omitted that quoted provision.

By L. 1943, c. 201, that quoted provision was restored to the statute, which is now M. S. A. 257.23.

Attorney General's opinion dated October 1, 1942 (file 840c-3), to which you refer, holds that, as the statute **then** read, there was no provision "for the entry of a judgment in the proceeding to determine paternity requiring the defendant to pay the expenses incurred and paid by the mother in connection with her confinement and care and maintenance of the child prior to judgment." That opinion must be read with reference to the language of the pertinent statutes at the time of rendition of the opinion. That opinion is not applicable to the situation here dealt with for the reason that the requirement that the defendant be ordered to pay the expenses necessarily incurred by or on behalf of the mother in connection with her confinement and the care and maintenance of the child prior to judgment was restored to the statute by L. 1943, c. 201.

You might find **State v. Eichmiller**, 35 Minn. 240, 28 N. W. 503, and **State v. Zeitler**, 35 Minn. 238, 28 N. W. 501, of some interest on the question of including in the judgment the lying-in expenses of the mother where the same appear not to have been incurred by the county.

LOWELL J. GRADY,
Assistant Attorney General.

St. Louis County Attorney.
July 13, 1949. 840-C-3

OLD AGE ASSISTANCE

194

Liens — Enforcement — Statutory mode of enforcement contemplated — Liens are not enforced through probate court procedure — County cannot become purchaser at an administrator's sale of real estate.

Facts

An old age assistance recipient died leaving a residence in North Redwood of the probable value of $500. There is an old age assistance lien thereon for about $4,000. The heirs of the deceased initiated proceedings in the probate court for the settlement of the estate. The probate court issued a license authorizing the administrator to sell the residence property.

Since the death of the decedent, a recipient of aid to dependent children has resided in the house. To provide housing for such children would require the payment of $35 to $40 a month rent if they did not occupy this property.

Question

Would it not be more feasible to have the administrator sell and convey the residence to the county and have the county pay the United States and the state their respective shares of the old age assistance lien recovery?

Opinion

Of course, the administrator would convey the property under this plan subject to the lien. You do not say from what source the county would pay the purchase price to the administrator. I know of no funds available for the purpose. I do not see how the plan could be carried out. The law is plain that there is a remedy available for the collection of the old age assistance lien. That is foreclosure. It does not appear that that remedy has been used in this case.

Questions of expediency are not for the County Attorney nor the Attorney General. If the proposed plan went through, assuming that the county had the right to purchase the property on the sale (although there is no expression of opinion herein that it has such right), the purchase would be subject to the lien held by the United States and the state. The county has no authority in law to pay off the United States and the state and from a legal standpoint it is hard to conceive that anything would be accomplished by the purchase.

On the other hand, if the lien were foreclosed as the law contemplates, M. S. A. 256.26, subd. 8, no expenditure by the county for a payment to the administrator or the heirs would be involved.

CHARLES E. HOUSTON,
Assistant Attorney General.

Redwood County Attorney.
April 18, 1950.

521-P-4

RELIEF

195

Hospital care — Rate — Ancker Hospital, St. Paul, and Minneapolis General — M. S. A. 158.01-158.19 — M. S. A. 261.03, 261.07, 261.21-261.24.

Facts

"We would like the opinion of your office with respect to an existing arrangement between Ramsey County and the City of Minneapolis for the care of poor persons at Ancker Hospital and Minneapolis General Hospital.

"Ancker Hospital in St. Paul is a city-county hospital maintained and operated pursuant to special statutory authority. Minneapolis General Hospital is maintained and operated pursuant to the authority of the Minneapolis city charter.

"For several years Ramsey County and the City of Minneapolis have had a reciprocal agreement for the hospital care of poor persons which has worked out to the general satisfaction of both political subdivisions. Poor persons living in St. Paul, but having relief settlement in Minneapolis, are given seventy-two hours of care at Ancker Hospital without billing Minneapolis, in order to give a reasonable time for the investigation of their relief settlement status. The same arrangement is carried out at Minneapolis General Hospital for poor persons living in Minneapolis but who have Ramsey County settlement. Thereafter, if such persons cannot be removed to their respective places of legal settlement for hospital care, each political subdivision pays the other the actual cost of hospitalizing their respective relief charges. Both hospitals are fully equipped for all types of emergency care and operate at a substantially higher cost per patient per day than the rates established at Minnesota General Hospital pursuant to M. S. A., Sec. 261.22-24.

"Some question has recently been raised with respect to whether Ancker Hospital or Minneapolis General Hospital has a right to bill Minneapolis or St. Paul, respectively, or other political subdivisions, for the care of poor persons receiving hospitalization in these instiitions at a rate higher than the charges established at Minnesota General Hospital."

Question

Where, pursuant to the Poor Relief Laws, Ramsey County or the City of Minneapolis provide hospitalization to a poor person in Ancker or Minneapolis General Hospitals, or in private hospitals, are such hospitals, in their charges therefor, restricted to the rates established at the University of Minnesota Hospitals?

Opinion

In answering your inquiry it is necessary to consider the "Poor Law," the "University of Minnesota Hospital Law," enacted in 1921, and the "General Hospitalization Law," enacted in 1935.

The Poor Law

The general provisions of the Law relating to the relief of the poor are found in M. S. A., c. 261; M. S. A., c. 262, relates to the county system of poor relief. M. S. A., c. 263, relates to the town system of poor relief.

M. S. A. 261.07 defines the place of settlement of a poor person.
M. S. A. 261.03, so far as here material, provides:

> "When any such **poor person** has none of the relatives named in section 261.01, or they are not of sufficient ability, or refuse or fail, to support him, he shall receive such support or relief as the case may require from the county, town, city, or village in which he has a settlement at the time of applying therefor, as hereinafter provided. * * *"

The long established policy of this state that the duty of administering poor relief is like the duty of carrying on strictly governmental functions is reflected in the case of **Robbins v. Town of Homer** (1905), 95 Minn. 201, 103 N. W. 1023, wherein the supreme court said:

> "The duty to provide for the poor thus imposed by statute was undoubtedly intended to regulate the obligation, rather than to permit an evasion of it. This goes upon statement. Neither the county commissioners, where the county system prevails, nor the town supervisors, where they are the superintendents of the poor, can turn their backs upon the proper claim of the poor person. The officials may and should exercise their judgment to prevent improper persons from having relief, but for those who require it they are required to perform this function honestly and efficiently. But a case may arise where such officials cannot, in the nature of things, perform the trust. Under such circumstances, it does not seem just or consistent with sound public policy that the duty should not be performed at all, nor can it be said that the unfortunate pauper who has met with an accident requiring instant succor is to be remediless. The county or town must provide for him as soon as may be. To decline this mandate of humanity and duty wilfully by those upon whom it is imposed would subject such officials to prosecution for misconduct in office."

From the foregoing language, as well as from language of other decisions of our supreme court, it must be apparent that the duty of making provision for the poor under the "Poor Law" is mandatory and not discretionary.

University of Minnesota Hospital Law

The laws relating to the University of Minnesota Hospitals are found in M. S. A. 158.01 to 158.19, inclusive.

These laws had their origin in L. 1921, c. 411.

M. S. A. 158.02 provides in substance that the "University Hospital"[1] "* * * shall be primarily and principally designed for the care of legal residents of Minnesota **who are afflicted with a malady, deformity, or ailment of a nature which can probably be remedied by hospital service and treatment and who are unable, financially, to secure such care;** * * *."

M. S. A. 158.03 provides for the filing with the county board of the county of residence of the applicant, an application for admission to the University Hospital, and investigation thereof and action thereon by such county board.[2] It is here significant to note that under M. S. A. 158.03, the county board may approve or reject the application. This Law gives the county board a wide discretion in acting upon the application for admission to the University Hospital by one who is "unable, financially, to secure such care." Yet, persons charged with the administration of the Poor Law **must** provide hospitalization for **poor persons**, pursuant to the Poor Law, if they be in need thereof.

Also significant to note at this point is that the University Hospital Law is no part of the Poor Law. While a poor person, within the meaning of the Poor Law, may, upon application made pursuant to M. S. A. 158.02, be admitted to the University Hospital, yet, the Poor Law does not govern or control the right of a person to be admitted thereto. See 1936 Attorney General's Report, Op. No. 252; 1938 Attorney General's Report, Op. No. 131.

The rates or charges for the treatment of patients admitted to the University Hospital pursuant to this Law are determined by the Board of Regents of the University. See M. S. A. 158.05.

The General Hospital Law

This Law had its origin in L. 1935, c. 359, and is now found in M. S. A. 261.21 to 261.23, inclusive.

M. S. A. 261.21 authorizes the county board of any county in this state to provide for hospitalization in hospitals within the county or elsewhere within the state of **indigent** residents of such county:

"* * * who are afflicted with a malady, injury, deformity, or ailment of a nature which can probably be remedied by hospitalization and who are unable financially to secure and pay for such hospitalization * * *."

M. S. A. 261.22 provides for the filing with the county board of an application for admission to such hospital and for investigation thereof and action thereon by the board. The board may approve or reject the application. This Law, like the University Hospital Law, so far as the functions of the county board are concerned, is permissive and not mandatory. See 1942 Attorney General's Report, Op. No. 275.

The language of this Law, thus far considered, bears a suspicious resemblance to the language of Secs. 158.02 and 158.03 of the University Hospital Law.

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[1]Formerly known as, and sometimes called, "Minnesota General Hospital."
[2]The county board was substituted for the "judge of probate" and given the same powers and duties by L. 1943, c. 31.

The General Hospitalization Law was evidently enacted as supplementary to the University Hospital Law. The provisions of the General Hospitalization Law are as applicable to counties operating under the town system of poor relief as to those operating under the county system; the same rules that govern with reference to the right of admission to the University Hospital are also applicable with reference to the right of a person to be admitted to a hospital pursuant to the provisions of the General Hospitalization Law. See 1938 Attorney General's Report, Op. No. 131.

The General Hospitalization Law was unquestionably enacted for the purpose of giving any county, electing to take advantage of the provisions thereof, the **option** of sending persons within the classification of that Law to "hospitals within the county or elsewhere within the state" or to the University Hospital. In giving that option to the counties, the legislature saw fit to attach one condition to the exercise of the option. That condition is found in M. S. A. 261.23 which, so far as here material, provides as follows:

> "The costs of hospitalization of **such indigent persons** * * * shall not exceed in amount the full rates fixed and charged by the Minnesota general hospital under the provisions of sections 158.01 to 158.11 for the hospitalization of such indigent patients. * * *"

The phrase **"such indigent persons"** in the above quoted portion of the statute refers back to "the indigent residents of such county who are afflicted with a malady, injury, deformity or ailment of a nature which can probably be remedied by hospitalization and **who are unable financially to secure and pay for such hospitalization** * * *." M. S. A. 261.21. The Poor Law, instead of using the term "indigent person" consistently uses the phrase "poor person." cf. e. g., M. S. A. 261.01, 261.02, 261.03, 261.08.

Although coded in M. S. A., c. 261, the General Hospitalization Law is no more a part of the Poor Law than is the University Hospital Law.

Accordingly, I conclude:

1. Where a county board provides hospitalization in hospitals within the county or elsewhere within the state to any person pursuant to the provisions of the General Hospitalization Law, then the hospital furnishing such hospitalization is restricted in its charges therefor in an amount not to exceed the full rates fixed and charged by the University Hospital, but

2. Where a **"poor person"** is furnished hospitalization pursuant to the Poor Law, the hospital furnishing such hospitalization is not restricted in its charges therefor to the rates fixed and charged by the University of Minnesota Hospital.

Your specific inquiry, therefore, is answered in the negative.

LOWELL J. GRADY,
Assistant Attorney General.

Minneapolis City Attorney.
June 17, 1949. 339-G-2

196

Housing — Cities — Authority to buy or condemn property for housing a family.

Facts

"The City of Fergus Falls has for more than one year been supporting a family of poor persons who are unable to earn a livelihood, and among other things has contributed toward the payment of rent for housing for this family. However, the house in which they have been residing has been sold and the new owner has notified this poor family to vacate the premises. The poor family have attempted to locate another rental dwelling without success and the City Poor Commissioner has also thoroughly canvassed the town in an attempt to locate another place which could be rented for this poor family. However, the family is of such a character and rental housing is so scarce in this area, that the City Poor Commissioner has been unable to locate rental housing for the family. He states that the only solution that he can see for providing housing for this family is the purchase of a house by the City to be utilized by this family and later for other poor families under similar circumstances.

"There are a number of such houses for sale by their owners but the owners will not rent the same to this poor family."

Question

"Does the City of Fergus Falls have the power to purchase a dwelling house for the purpose of housing a poor family?"

Opinion

Although you do not so specifically state, our information is that the County of Otter Tail, in which the City of Fergus Falls is located, operates under the town system of poor relief. If this be true, it is the duty of the City of Fergus Falls to furnish poor persons, within the meaning of the poor law, with such support or relief as the case may require. See M. S. A. 261.03.

The long-established policy of this state that the duty of administering poor relief is like the duty of carrying on strictly governmental functions is reflected in the case of **Robbins v. Town of Homer** (1905), 95 Minn. 201, 103 N. W. 1023, wherein the supreme court said:

"The duty to provide for the poor thus imposed by statute was undoubtedly intended to regulate the obligation, rather than to permit an evasion of it. This goes upon statement. Neither the county commissioners, where the county system prevails, nor the town supervisors, where they are the superintendents of the poor, can turn their backs upon the proper claim of the poor person. The officials may and should

exercise their judgment to prevent improper persons from having relief, but for those who require it they are required to perform this function honestly and efficiently. * * *"

The city charter of the City of Fergus Falls, so far as here material, provides:

"Section 150. The city of Fergus Falls is hereby empowered to acquire, by purchase, condemnation proceedings or otherwise, any property, corporeal or incorporeal, wheresoever situated, either within or without the limits of the city, which may be needed by the city or any board or department thereof, for any public purpose whatever."

If your city council, in the reasonable exercise of its discretion and judgment, determines that it is necessary to purchase a dwelling house in order to discharge the city's duty to furnish shelter to the poor persons involved, it may do so.

You ask this further

Question

"Would the City of Fergus Falls have the power of eminent domain to condemn a house for the purpose of providing a dwelling for a poor family?"

Opinion

The above quoted provision of your city charter authorizes the acquisition by the city through condemnation proceedings of property needed "for any public purpose." Article I, Section 13, of Minnesota Constitution, provides that:

"Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured."

The term "public use" is difficult of exact definition, and most courts have avoided giving one. In cases where the power of eminent domain is being exercised in respect of private property for any given use the courts have confined themselves to a declaration of whether the given use in that particular case is a public or a private use. See generally 2 Dunnell's Minn. Dig., § 3024, and supplements. See also (1947) 31 Minn. Law Review 197.

Whether in eminent domain proceedings instituted by your city "to condemn a house for the purpose of providing a dwelling for a poor family," that use would be a "public use," within the meaning of the constitutional provision quoted, would be a matter for judicial determination upon all the facts adduced in evidence in support of the petition at the time of the hearing thereon. We are not advised, nor have we any way of knowing what that evidence might be, and accordingly we cannot and do not offer any categorical answer to this question.

LOWELL J. GRADY,
Assistant Attorney General.

Fergus Falls City Attorney.
August 19, 1949. 59-A-34

197

Settlement — Married woman deserted by husband — M. S. 1949, §§ 261.07, 261.08.

Facts

B's husband, A, has failed to furnish her support, and his conduct is such that it has affected her health, and she believes it dangerous to continue to live with him. She has, therefore, left A and his county of settlement and has resided in a new county for more than two years, apart from her husband and supporting herself.

Questions

1. Has B gained a new settlement in her own right for support as a poor person in the county where she now lives?
2. Would the conduct of A, if the facts are assumed to be true, constitute a constructive desertion on the part of the husband?

Opinion

The legal settlement of paupers is controlled by M. S. 1949, § 261.07. In subd. 3 this statute deals particularly with married women in the following language:

> "* * * provided that a married woman abandoned or deserted by her husband for a period of one year continuously shall thereafter have the same right to acquire a new settlement as a single person."

By § 261.08 the mechanics are provided for a determination by the district court of the place of settlement when disputed. This determination is on the basis of facts, upon which this office cannot undertake to express an opinion. We can, however, point out certain rules of law which may be helpful.

The matter was dealt with in opinion No. 321, Attorney General's 1930 Report, file 339-O-2. Since that time, in the case of **In re Settlement of Baalson**, 211 Minn. 96, 300 N. W. 204, our Supreme Court has stated that the single exception to the general rule that the settlement of a wife is that of her husband is added by the statute above quoted.

In the reference which you give us to 17 Am. Jur., § 101, p. 201, there seems to be considerable authority on the proposition that the conduct of the husband in this case is such that the district court might find, if it so chose, that the husband is guilty of a constructive desertion, thereby permitting B to establish a settlement apart from him.

In Vol. 2 of Nelson on Divorce & Annulment, c. 2124, we find some relevant material which holds that a wife can obtain a separate domicile or residence for divorce purposes if the husband abandons her or she leaves upon sufficient provocation. **Curry v. Curry**, 122 S. W. 2d 677. While we note that the domicile or residence for divorce purposes is not the same as a

poor settlement, we are following this line of thought because we do not find any cases on the exact point in Minnesota. It is not certain what would constitute sufficient provocation for the wife's departure, but it seems clear that misconduct by the husband sufficient to constitute a ground for divorce is generally so regarded. **Torlonia v. Torlonia,** 108 Conn. 292; **Zinko v. Zinko,** 204 La. 478, 15 So. 2d 859; **Aspinwall v. Aspinwall,** 40 Nev. 55, 184 P. 810. By the general rule, conduct less than sufficient to amount of itself to grounds for divorce or judicial separation will not support acquisition by the wife of a separate domicile. **Rinaldi v. Rinaldi,** 94 N. J. Eq. 14, 118 A. 685. The Minnesota rule appears to be less stringent. **Stocking v. Stocking,** 76 Minn. 292, 79 N. W. 172; **Wulke v. Wulke,** 149 Minn. 289, 183 N. W. 349; **Hoffmann v. Hoffmann,** 174 Minn. 159, 218 N. W. 559. Where it appears that the wife is practically forced to seek a new home by the husband's misconduct or failure to provide support, there is not much tendency to quibble about her right to establish a new domicile. **Rector v. Rector,** 186 N. C. 618, 120 S. E. 195; **Edmundson v. Edmundson,** 133 Fla. 703, 182 So. 824; **Chisholm v. Chisholm,** 105 Fla. 402, 141 So. 302.

The rule also appears to be that the wife carries the burden of establishing that her domicile is different from that of the husband.

As to pauper settlement, she has the additional burden of showing a year of continuous desertion and the acquisition of a new settlement thereafter.

G. L. WARE,
Special Assistant Attorney General.

Pope County Attorney.
June 14, 1950. 339-O-2

WELFARE BOARD

198

Executive secretary — Powers and duties — Executive secretary is county employee.

Questions

"1. Is the Executive Secretary of a County Welfare Board an employee of the County or of the state?

"2. Does the Executive Secretary of a County Welfare Board receive directions from the Welfare Board, or is such a secretary an independent employee, free to define an independent policy?

"3. What part of the records properly found in a County Welfare Office are confidential to a point where the County Attorney and Juvenile Judge are denied access to such records?"

Opinion

The county welfare board appoints an executive secretary under authority of M. S. A. 393.04. The county welfare board fixes his salary and the county board approves the salary in the cases specified.

The executive secretary is responsible to the county welfare board and the county welfare board directs his activities. Sec. 393.09.

It appears therefrom that the executive secretary of the county welfare board is a county employee.

The executive secretary is appointed to perform the work of the board which the board does not do at its meetings. He is not a policy maker. The board itself determines questions of policy. These policies are in conformity with the laws and rules promulgated by the director of social welfare.

No answer to your third question is offered because of its very general nature. If a specific question is submitted, bearing upon particular facts, an opinion might be given which would be of some value. Where the statute specifically withholds records in a public office from public inspection and such statute is not inconsistent with other statutes making records in public offices open to the public for inspection, the one statute might be considered an exception to the other. But before attempting to give an opinion, it is considered better practice to have a specific question bearing upon a specific state of facts.

CHARLES E. HOUSTON,
Assistant Attorney General.

Watonwan County Attorney.
March 7, 1949. 125-A-64

199

Expenses — Attending conference — If board has administration expense funds on hand and expenditure thereof has been authorized by county commissioners, they may be used for per diem allowance to members for time spent on business of board — Whether attendance at conference constitutes "transacting business of board" is question for determination of board — M. S. A. 393.03; 393.08.

Facts

"Assuming that a member of the Board of Public Welfare of a county is appointed by the County Welfare Board to attend a Social and Medical Conference in St. Paul and assuming that it is proper that he be reimbursed for his expenses to attend such a conference";

Question

"Is there any authorization under the statute for an allowance of per diem in any amount?"

Opinion

We assume, for the purposes of this opinion, that by "Board of Public Welfare" you mean the Kandiyohi County Welfare Board. M. S. A. 393.03, so far as here pertinent, provides:

> "* * * the members of the county welfare board shall receive * * * the sum of $5.00 per day for time actually spent in transacting the business of the board not exceeding a maximum of 25 days a year. Members shall be reimbursed by the county for expenses actually incurred in the performance of their official duties."

The county welfare board is charged by statute with the administration of all forms of public assistance and public welfare under rules promulgated by the director of social welfare. Except in certain counties referred to in M. S. A. 393.08, an estimate of the amount needed by the county welfare board to perform its duties, including expenses of administration, must be submitted by the welfare board to the board of county commissioners.

If the county welfare board has administration expense funds on hand, the expenditure of which has been authorized through submission of the budget to the county board and approved thereby, such funds may be used to the extent necessary for the payment of legitimate claims for per diem allowance to members of the board for time actually spent in transacting the business of the board, not exceeding the maximum of 25 days a year. Whether the attendance upon the social and medical conference referred to in your inquiry by the member of the county welfare board constitutes "transacting the business of the board" is a question for the determination of the county welfare board. If that board determines that such attendance was necessary for the transaction of the business of the board, the per diem allowance prescribed by the statute may be allowed, provided funds therefor are available, and subject, of course, to the 25-day maximum provision of the statute.

Question

> "Am I correct in my assumption that such expenses are properly paid out of the Welfare Fund?"

Opinion

Yes, provided the county welfare board has administration expense funds on hand, the expenditure of which has been authorized through submission of the budget to the county board and approved thereby. See Attorney General's opinion of May 26, 1944 (file 125a-64).

LOWELL J. GRADY,
Assistant Attorney General.

Kandiyohi County Attorney.
October 3, 1949. 125-A-64

200

Funds — Payment for office equipment — Opinions Nov. 20, 1947, and Oct. 13, 1944, superseded — M. S. A. 393.07, subd. 2, subd. 5; 393.08.

Facts and Questions

Does the opinion of this office dated November 20, 1947, preclude the payment for equipment from the administration fund, hereinafter referred to, as distinguished from the purely aid funds?

Opinion

It is clear that, as stated in that opinion, direct aid funds, such as old age assistance, aid to dependent children, and general relief, cannot be used for the purchase of furniture or equipment for use by the welfare board but that such direct aid funds must be used only for the relief of recipients of public assistance.

However, the creating of a separate administration fund or account, for which the levying of taxes is authorized by the board of county commissioners, out of which it is intended that equipment for use of the welfare board may be purchased, presents another question based on facts not heretofore submitted.

The statutory sections herein cited are those of Minnesota Statutes Annotated, unless otherwise noted.

The question that you submit requires consideration of the facts stated in your communication, statutes pertaining to the duties of the county welfare boards and the state director of social welfare, together with the federal requirements in the granting of social welfare aid.

From § 393.07, subd. 2, it is apparent that "the duties of the county welfare board shall be performed in accordance with the standards, rules and regulations which may be promulgated by the director of social welfare in order to comply with the requirements of the federal social security act and **to obtain grants-in-aid available under that act.**"

In subd. 5 of the same section is found the following provision:

> "The director of social welfare shall have authority to require such methods of administration as are necessary for compliance with requirements of the federal social security act, as amended * * *."

Section 393.08, so far as here material, provides as follows:

> "On or before the first day of July each year the county welfare board * * * shall submit to the county board of commissioners an estimate of the amount needed by it to perform its duties, **including expenses of administration,** and the county board of commissioners shall consider the estimates so submitted and, if approved, shall levy a tax as provided by law for the purposes."

By reason of the above cited subd. 2, it is clearly the duty of the county welfare boards to comply with rules and regulations adopted by the director of social welfare in order to comply with federal requirements and to obtain grants-in-aid available under the federal act; and, under the above cited § 393.08, it is the duty of the county welfare boards to submit to the county boards of commissioners a budget, including expenses of administration.

By above cited subd. 5, the director of social welfare is granted authority to require such methods of administration as are necessary for compliance with requirements of the federal social security act. For the purpose of complying with federal rules and regulations promulgated under the federal act and to secure the federal aid as required by the state law in § 393.07, subd. 2, it appears that you have prescribed the system of accounts referred to in the quotations from your communication which read as follows:

"One of the procedures prescribed by the Director of Social Welfare is the preparation of a budget for submission to the Board of County Commissioners with a formal request for tax levies to support such expenditures as are incorporated in this budget.

"There are four funds set up, each of which is separate and distinct and tax levies are calculated for each in the same manner as for other county funds. For convenience the four in total are called the 'Welfare Fund' but each subdivision is a separate fund and considered individually in accounting, the levying of taxes and in various reports rendered by the county agency to the state agency.

"These four funds are: Old Age Assistance
Aid to Dependent Children
General Relief
Administration

"Incorporated in the aid funds, OAA, ADC and General Relief are only those proposed expenditures which cover aid to recipients, except that in the General Relief fund such items as operation of a poor farm and payments to the various institutions are included. None of these three funds are concerned with administration. The administration fund takes into consideration all items of administrative cost and the items of cost which are prescribed by the Federal Social Security Board as matchable items are incorporated therein.

"The breakdown of administrative expense accounts as set up in the present accounting system are:

4651 Personal Service
4652 Travel Expense
4653 Communication
4654 Supplies
4655 Rental of Space
4656 Rental of Equipment
4657 Heat, Light, Water, and Power
4658 Other Current Expense
4659 Purchase of Equipment

"You will note that the cost of equipment purchased for use by the welfare office is included as a matchable item and is intended to be part of the cost of administration paid from the Administration fund."

It is, therefore, clear that among the items of administrative expense for which federal funds are available is that for "purchase of equipment." Such an item, I understand, is allowed by the federal social security board as a matchable item. Because, under the above referred to state law, it is the duty of the director of social welfare to establish standards, rules, and regulations for the purpose, among others, of obtaining grants-in-aid available under the federal act, and it is the duty of the county welfare boards to comply with such rules and regulations in submitting the required budget to the board of county commissioners, it would appear inconsistent with statutory intent to require the boards of county commissioners to purchase furniture and other equipment for use of the county welfare boards out of the general revenue fund and not enable them to pay for such equipment out of the account set aside therefor.

It is my opinion that, where, as here, a fund or account is created and known as the administration fund or account, as distinguished from the direct aid funds, and recognized by the federal social security board as containing matchable items, such as purchase of equipment, which is approved by the board of county commissioners as part of the budget of the county welfare board, and for which thereafter taxes are levied by the county commissioners, equipment purchased by the latter for use of the county welfare board may be paid for out of the administration fund or account so established and intended to be used for such purpose. Of course, the decision whether taxes shall be levied for such equipment or whether it shall be purchased rests wholly with the board of county commissioners, and title to such equipment, if purchased, is in the purchasing county. If there be no funds available in the administration fund of the welfare board, such furniture and equipment purchased by the county board for use of the county welfare board may be paid by the county from the county revenue fund.

Other opinions of the office of Attorney General where the question or questions submitted did not disclose the creation of a separate account for purchase of equipment as prescribed by rules of the director of social welfare, approved by the county commissioners, and allowed by the federal government, with which the state law requires cooperation by the state director of social welfare and other state agencies, are hereby superseded to the extent, if any, that previous opinions may be inconsistent herewith.

J. A. A. BURNQUIST,
Attorney General.

Director of Social Welfare.
April 27, 1949. 125-A-64

STATE

COMMISSIONS

201

Aeronautics — Public records — Reports of investigations — M. S. 1945, § 360.015, subd. 12.

Question

In connection with the investigation of aircraft accidents made by representatives of your department you ask:

"1. Are the reports of these investigations which are made by our representatives and which are kept on file in the office of the Commissioner permitted to be open for public inspection, and is the Commissioner allowed to furnish copies of these reports to those who may desire to use them in connection with civil actions arising out of the accident?

"2. What position or action should be taken by the Commissioner or by his inspector in the event the inspector is subpoenaed to testify regarding an aircraft accident in a civil case?"

Opinion

Minnesota Statutes 1945, Section 360.015, subd. 11, authorizes the commissioner of aeronautics, his assistant, and employees of the department designated to hold investigations, inquiries and hearings covered by the provisions of Laws 1945, c. 303, and orders, rules and regulations of the commissioner and concerning accidents in aeronautics within this state. Subd. 12 of said statute reads as follows:

> **"In order to facilitate the making of investigations by the commissioner, in the interest of public safety and promotion of aeronautics, the public interest requires,** and it is therefore provided, that the reports of investigations or hearings, or any part thereof, shall not be admitted in evidence or used for any purpose in any suit, action, or proceeding growing out of any matter referred to in said investigation, hearing, or report thereof, except in case of criminal or other proceedings instituted in behalf of the commissioner of this state under the provisions of Laws 1945, Chapter 303, and other laws of this state relating to aeronautics, nor shall the commissioner, his assistant, or any employee of the department be required to testify to any facts ascertained in, or information gained by reason of his official capacity, or be required to testify as an expert witness in any suit, action, or proceeding involving any aircraft. Subject to the foregoing provisions, the commissioner may in his discretion make available to appropriate federal and state agencies information and material developed in the course of such hearings and investigations."

The purpose of the statute above quoted is stated in the underlined portions thereof, and expresses a policy of the legislature to keep confidential certain information obtained by the department of aeronautics in the course of its official duties.

The statute, in our opinion, is clear and free from ambiguity. The commissioner, in the exercise of his discretion, is authorized to furnish information concerning aircraft accidents, ascertained in the course of investigations and hearings, to appropriate federal and state agencies. The statute is silent about giving such information to anyone else. It is, therefore, our opinion that the commissioner is without authority to give such information to members of the public generally.

Except as otherwise expressly provided by law, public records may be inspected, examined, abstracted, or copied at reasonable times under the supervision and regulation of the custodian of public records. See M. S. 1945, § 15.17. M. S. 1945, § 360.015, subd. 12, in our opinion is a law which expressly prohibits the furnishing of the information about which you inquire to anyone other than state and federal agencies and, as to them, in the discretion of the commissioner.

In view of the foregoing it is our opinion that your first inquiry should be answered in the negative.

With reference to your second inquiry, if the commissioner of aeronautics or an inspector is served with a subpoena to testify in a matter concerning an aircraft accident which either or both investigated pursuant to M. S. 1945, § 360.015, a recommended course of procedure to be followed is as follows: He should obey the command of the subpoena, and if the subpoena is a subpoena duces tecum he should take with him to court the report named in the subpoena. When called as a witness and asked to produce the report he should notify the court that he refuses to produce the report unless ordered to do so, and he should then explain to the court that he considers the report confidential and he should not be required to produce it because it is privileged under M. S. 1945, § 360.015, subd. 12. If the witness is asked to testify as to the same subject matter covered in the report he likewise should refuse to do so except upon the direct order of the court, because such testimony is likewise privileged under the statute mentioned. (See Lowen v. Pates, 219 Minn. 566, 18 N. W. 2d 455.

If, notwithstanding the objections which the witness makes to the court as suggested herein, the court still orders that the report be produced and that the witness proceed to testify, the witness should obey the order of the court.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Commissioner of Aeronautics.
April 19, 1949. 851-i

202

Athletic — Boxing license — Under M. S. A. 341.05, only holder of boxing license may put on a private boxing exhibition for television purposes.

Question

"Can an individual, or an organization who has not been issued a license by this commission to promote boxing and sparring exhibitions, put on private boxing exhibitions simply for the purpose of televising them?"

Answer

M. S. A., § 341.05, provides in part as follows:

"The state athletic commission shall have charge and supervision of all boxing and sparring exhibitions held in the state and have power:

"(1) To make and publish rules and regulations governing the conduct of boxing and sparring exhibitions and the time and place thereof;

"(2) To issue licenses to individuals or organizations desiring to promote or conduct boxing or sparring exhibitions, and to suspend or revoke such licenses at its pleasure; * * *."

The word "exhibition" is defined in Funk & Wagnall's Standard Dictionary as "the act of exhibiting, presenting to view, or manifesting; manifestation; display." This definition is not limited to cases where the onlooker is there in person. It is broad enough to include presenting to view by television as well. Neither does the statute require those viewing the boxing or sparring exhibition to be present in person.

It is therefore our opinion that an individual or organization not licensed by your commission to promote boxing and sparring exhibitions cannot put on private boxing exhibitions simply for the purpose of televising them.

IRVING M. FRISCH,
Special Assistant Attorney General.

State Athletic Commission.
September 12, 1949. 596-B

LEGISLATURE

203

Legislation — Constitutional provisions — Providing funds to pay for proposed soldiers bonus — Taxing railroad corporations — Effect of repeal of Article 20, Sec. 2 — Article 9, Secs. 1, 1(a), 6, 7, 10; Article 4, Sec. 32 (a).

Question

"Whether or not Article 20 of the Constitution in effect abrogates the provisions of the constitution with reference to taxation and the dedication of funds thereunder. In other words, does this recent amendment to the constitution for the purpose of paying a soldiers bonus open the gates so that the legislature may enact any type of taxation and dedicate the funds derived from taxation solely for the purpose of paying the bonus?"

As the question so submitted is sufficiently broad to include the three specific questions contained in your communication as to the taxation of railroad corporations and the constitutional provisions relative thereto, the answer to these specific questions will be included in the opinion that you request on the above quoted general inquiry.

Opinion

It is clearly and specifically provided in Section 1 of the recent amendment known as Article XX that the constitutional provisions of Article IX, Section 5, shall not apply to the legislative powers conferred by Article XX, Section 1. The specific provisions of Article IX, Section 5, made inapplicable to the powers conferred by Article XX, Section 1, are those pertaining to limiting the state debt to $250,000, the necessity of a vote of two-thirds of the members of each house before a public debt shall take effect, and the levying of a sufficient tax to pay principal and interest in ten years. Article XX, Section 1, adopted at the last general election, empowers the legislature to levy taxes for adjusted compensation to persons who have served in the armed forces of the United States and appropriate moneys therefor, and, in that connection, to contract debts, issue and negotiate bonds or certificates of indebtedness, or both, to pledge the public credit, and "to provide money therefor." As above stated, in the carrying out of such enumerated powers, it is specifically provided in Article XX, Section 1, that the provisions of Article IX, Section 5, shall not apply. There appears to be no specific clause in Article XX that any other tax provision of the State Constitution shall be inapplicable to the provisions of the new amendment.

However, Article XX, Section 2, provides as follows:

"Any and all provisions of the Constitution of the State of Minnesota inconsistent with the provisions of this article are hereby repealed, so far, but only so far, as the same prohibit or limit the power of the Legislature to enact laws authorizing or permitting the doing of the things hereinbefore authorized."

Article IX, Sections 6, 7, and 10, not referred to in Article XX as inapplicable to that article, are clearly inconsistent with the powers conferred upon the legislature in Section 1 of the recent amendment. Article IX, Section 6, provides that all debts authorized by Section 5 shall be contracted by loan on state bonds of amounts not less than $500 each, payable in ten years. Section 7 of that article prohibits the state from contracting any public debt, unless in time of war, to repel invasion, or suppress insurrection, except in the manner provided in the fifth and sixth sections. Section 10 of the same article provides that the credit of the state shall never be given nor loaned to any individual, association, or corporation except to establish a system of rural credits. In so far as any of the above cited provisions of Article IX, Sections 6, 7, and 10, are inconsistent with the legislative powers granted in Article XX, Section 1, for the purpose of providing for adjusted compensation to service men and women, such inconsistent provisions are clearly repealed by reason of the above quoted first paragraph of Article XX, Section 2.

Article IX, Section 1, of the Constitution provides for exemption of "public burying grounds, public school houses, 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 same section also provides "that nothing herein contained shall be construed to affect, modify or repeal any existing law providing for the taxation of the gross earnings of railroads."

Article IV, Section 32 (a), prohibits any law for the repeal or amendment of any law which provides that railroad companies shall, in lieu of all other taxes and assessments upon their real estate, roads, rolling stock, and other personal property, pay into the state treasury a certain percentage of their gross earnings from going into effect before it is submitted to a vote of the people and adopted by a majority of the electors voting at an election at which it is submitted to the people. Article XVI, Section 2, creates a fund to be known as the trunk highway fund and provides that said fund shall consist of the proceeds of any tax imposed on motor vehicles as therein authorized. It is also provided in the last cited section that the trunk highway fund shall be used solely for the purposes specified in Article XVI, Section 1. Article IX, Section 1A, provides for an occupation tax and that the funds derived therefrom shall be apportioned 40% to the permanent school fund, ten per cent to the permanent university fund, and 50% to the state general revenue fund. Article VIII, Section 2, provides for a permanent school trust fund which "shall forever be preserved inviolate and undiminished," and which now amounts to more than $130,000,000 and, together with other permanent trust funds, in excess of $170,000,000.

It appears inconceivable that the legislature in proposing, and the people in voting for, the amendment granting to the state the power to levy taxes and to appropriate moneys for an adjusted compensation to persons who served in the armed forces intended to give the legislature the authority to tax for such purpose the property of the charitable, religious, educational, and other institutions constitutionally exempt from taxation. It is

also inconceivable that the people intended by the adoption of Article XX that the funds set aside as a permanent school trust fund and those raised by the motor vehicle and occupation taxes and dedicated to the purposes hereinbefore stated may be used for any other purpose than as provided in the Constitution. It is likewise inconceivable that the people, in adopting the new amendment, intended to repeal the constitutional provisions and limitations with reference to the taxing of railroad corporations. In addition, a construction that Article XX, Section 2, repeals such constitutional provisions as those last referred to would render Laws 1947, Chapter 642, submitting the amendment, unconstitutional by reason of Article XIV of the Constitution, which provides, in the last sentence of Section 1 thereof, that

> "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."

However, there is nothing in the revenue or bond provisions of the Constitution such as those pertaining to exemptions from taxation, providing a gross earnings tax on railroads, levying taxes for the state trunk highway fund, occupation taxes, or the dedication of such funds that is inconsistent, antagonistic, or repugnant in a constitutional sense to the provisions of Article XX or which in any way limits the power of the legislature conferred by that article to provide for payment of adjusted compensation by constitutional methods of taxation other than those which were prohibited or limited by the Constitution before the adoption of the last amendment. To hold that Article XX abrogates all provisions of the Constitution with reference to taxation and the dedication of funds thereunder except as in Article XX specifically provided and in such cases as those hereinabove referred to, where the inconsistency with older sections of the Constitution is obvious, would, in my opinion, be wholly unwarranted. To constitute a repeal of any particular provision of the State Constitution by the adoption of a constitutional amendment providing for repeal of any and all provisions of the Constitution inconsistent with the provisions of the amendment, such repeal, even if it were not contrary to the last sentence of the above cited Article XIV, Section 1, prohibiting the submission of two or more alterations or amendments at the same time without the voters being given the privilege to vote for or against each separately, must be so clearly inconsistent with other constitutional provisions that they cannot stand together. In my opinion, in the matter under consideration it does not clearly appear from the wording of the amendment in question, or otherwise, that the railroad and other provisions of the Constitution concerning taxation and dedication of funds were intended to be repealed by Article XX or that they are so inconsistent with the provision of Article XX that the latter constitutes a negation of the former.

In what has heretofore been said I have endeavored to answer the various questions that you have submitted. However, in your first question you inquire as to whether Section 2 of Article XX gives the legislature "the right to levy a tax on railroad corporations of 5% and dedicate the tax so levied for the purpose of paying the soldiers' bonus." In answer to that question, it might be further said that, if such tax is intended to be

an increase of the present 5% gross earnings tax, the proposal, before it goes into effect, must be voted upon by the people of the state, as the constitutional provision requiring such approval is not, in my opinion, in any manner repealed as heretofore stated by the above cited Section 2 of the new amendment. If the proposed tax is intended to be one on the net taxable income of railroads, it might be said that your Attorney General tried years ago to collect such a tax from the railroad companies under M. S. A., Sec. 290.02, but, after extended litigation, the Supreme Court in 1939, in the case of **State v. Duluth, M. & N. Ry. Co.**, 207 Minn. 618, 292 N. W. 401, held that such a tax was, in effect, a personal property tax and, therefore, invalid in so far as railroads were concerned, as it was not approved by the people as required by Article IV, Section 32 (a).

Therefore, in view of the fact that, in the providing of funds to pay for the proposed adjusted compensation, there are available so many different methods of taxation that are not based on an unjustified or questionable assumption that Article XX repeals any and all time-tested constitutional provisions and limitations as to the raising of revenues and the dedication of special funds, I feel that the best legal advice that the Attorney General is in a position to give your committee is to suggest that no attempt be made to enact legislation intended to authorize the levying of a tax of such doubtful constitutionality as any that would be proposed on the assumption that constitutional provisions in effect prior to adoption of Article XX have been thereby repealed except as herein stated, and by such legislation create a situation that may result in many years of litigation.

J. A. A. BURNQUIST,
Attorney General.

Soldiers' Welfare and Soldiers' Home Committee.
March 21, 1949. 82-L

204

Legislation—Enactment—When two or more laws passed at different sessions, the law latest in date shall prevail. Placing of statue of Maria L. Sanford in National Statuary Hall, Washington, D. C.—L. 1943, c. 448; L. 1947, c. 507; M. S. A. 645.26, subd. 4.

Question

As to the status of the legislation pertaining to the placing of a second statue by the State of Minnesota in the National Capitol in the City of Washington, D. C., under an act of congress by which each state is invited to designate two of its deceased citizens for such commemoration.

Opinion

As the statue of Henry M. Rice is now, and has for many years been, in the so-called National Statuary Hall pursuant to proper legislation of this state, Minnesota is now entitled, under the federal act in question, to provide only one additional statue for the purpose stated in that act.

In 1905 the legislature of the State of Minnesota enacted a law (L. 1905, c. 249) designating Alexander Ramsey, the first territorial and second state governor, as the Minnesota citizen whose statue should be provided by the state and placed in the National Statuary Hall. The act named three commissioners for the designing, making, and installing of such statue but authorized the incurring of no public liability until after report to and approval by the legislature.

In 1925 the legislature passed an act (L. 1925, c. 58) empowering the governor to appoint a commission of three citizens to obtain designs for "a statue of Alexander Ramsey in marble to be presented to Congress for installation in the National Statuary Hall" but again provided that nothing in the act should be construed to commit the State of Minnesota to any expense in connection with said statue unless specifically authorized by later enactment.

There appears to have been no further specific legislation with respect to the providing and furnishing by the state of a statue of any of its citizens under the congressional enactment here considered until the 1943 session of the legislature, by which, in L. 1943, c. 448, one of the two places provided by act of congress for the State of Minnesota was reserved for a statue of Maria L. Sanford. In 1947, by L. 1947, c. 507, the governor of Minnesota was authorized to appoint a commission of seven citizens for the designing, making, and installing in the National Statuary Hall of a statue of Maria L. Sanford and the raising of funds therefor.

M. S. A., § 645.26, subd. 4, provides as follows:

> "When the provisions of two or more laws passed at different sessions of the legislature are irreconcilable, the law latest in date of final enactment shall prevail."

Therefore, L. 1943, c. 448, and L. 1947, c. 507, supersede former legislation in the matter here considered. The commission appointed by the governor pursuant to the last cited chapter 507 has now the authority to raise the necessary funds and provide a statue of the citizen therein named and as therein authorized. When such funds are raised and such statue is provided, unless the legislature again changes the law, it is my opinion that there has been a sufficient compliance with both state and federal statutes to entitle the state to have placed in the space in the National Capitol, provided therefor, the statue of Maria L. Sanford.

J. A. A. BURNQUIST,
Attorney General.

Maria L. Sanford Statue Commission.
March 11, 1949. 280-B

205

Legislature — Reapportionment — Reapportionment act in effect will continue to be in force until supplanted by a subsequent valid act.

Question

"In the event that a new reapportionment act is enacted which subsequently is declared unconstitutional by the Supreme Court, would the present law then become again effective so that the subsequent elections would be on the basis of the old or present law, or would the State Representatives and State Senators then be elected at large over the state?"

Opinion

Your question, I believe, is answered in the opinion of the Supreme Court of this state in the case of **Smith v. Holm,** 220 Minn. 486, 19 N. W. 2d 914, where, on page 491, the court says:

"It is our opinion that a reapportionment act, valid when enacted, * * * continues in force until superseded by a valid act."

By reason of the decision in the above cited case, it is my opinion that, if any reapportionment act is passed during the present session and is found invalid by the Supreme Court of this state, the reapportionment act now in effect will continue to be in force until supplanted by a subsequent valid act.

If, notwithstanding the decision herein referred to, you feel it advisable to safeguard the situation further, there could, of course, be added to the bill in question another section, providing that, if it shall be found to be unconstitutional, the reapportionment act now in effect shall continue in force.

J. A. A. BURNQUIST,
Attorney General.

Chairman, Reapportionment Committee.
March 3, 1949. 280-M

OFFICERS

206

Department of Conservation — Commissioner should reappoint his deputy and the directors of the department divisions upon his reappointment — The commissioner, deputies and division directors should file new bonds upon reappointment.

Question

"1. In view of the fact that the deputy commissioner of conservation and the division directors serve at the pleasure of the commis-

sioner, will it be necessary for the commissioner, upon reappointment and qualification for a new term, to reappoint the deputy commissioner and directors who are to continue in the same positions?"

Opinion

The rule of law on the subject of the term of a deputy was stated by our Supreme Court in **State ex rel. Hawes v. Barrows**, 71 Minn. 178, 73 N. W. 704, as follows:

> "The general rule seems to be well settled that the appointment of a deputy continues no longer than the term of office for which the principal was elected. 'A deputation expires with the office on which it depends, and if the principal is reappointed the deputy must be reappointed also.' Throop, Pub. Off. § 304. See, also, section 582 of the same authority, where the rule is laid down as follows:
>
> "'A deputy's commission, in the absence of any statutory provision to the contrary, runs only while the principal's term lasts. If the principal is re-elected or re-appointed, the deputy must be appointed anew.'"

We have not found any authorities making a distinction on this point in the case where a deputy serves at the pleasure of the appointing officer. It is our opinion, therefore, that upon the reappointment and qualification for a new term of the commissioner of conservation it is necessary for him to reappoint a deputy commissioner and directors who are to continue in the same positions.

Question

"2. Upon qualifying for the term which expired March 1, 1949, the commissioner filed a bond containing no limitation of term. Please examine this bond in the office of the secretary of state and advise whether or not it will be necessary for the commissioner, upon reappointment and qualification for a new term, to furnish another bond?"

Opinion

The general rule on the subject of the obligation of an official bond of an officer reelected or reappointed is stated in 22 R. C. L., Public Officers, § 201, pp. 514 to 515, as follows:

> "The obligation of an official bond extends only for the period named therein or for the term fixed by law, and does not cover any extension of the time by a future appointment, or subsequent election, although the language of the provisions as to time is general and unlimited, where the appointment is for a limited period, which is recited in the bond or is fixed and determined by law, when not so recited. The re-election or reappointment of the principal for a second term does not have the effect of increasing the liability of the surety or extending his obligation, although no time is specified in the bond, and although he should be elected several years in succession."

We have found no Minnesota cases directly in point on this question. It is our opinion, therefore, that it will be advisable for the commissioner, upon reappointment and qualification for new term to furnish another bond, even though the original bond contained no limitation of term.

Question

"3. Upon reappointment and qualification of the commissioner for the new term, will it be necessary for the deputy commissioner and division directors to file new bonds?"

Answer

In view of the fact that in our answer to the first question we held that it is necessary for the commissioner to reappoint his deputy and directors of the divisions of the conservation department, it is clear that upon such reappointment they will be serving new terms. It will, therefore, be advisable for them also to file new bonds.

IRVING M. FRISCH,
Special Assistant Attorney General.

Commissioner of Conservation.
March 8, 1949. 983-L

207

Fire marshal—Dry cleaning plant—Permit—Change of ownership—M. S. A. 76.26, 76.27 (Opinion No. 275, 1944 Report, dated February 29, 1944, file 197-b reversed).

Facts and Question

Under date of February 29, 1944, opinion of Attorney General, No. 275, 1944 Report, file 197-b, was issued. The opinion construed M. M. S. 1927, Sec. 6013. It considered other relating statutes pertaining to the licensing of dry cleaning establishments, the statutes construed having been originally enacted by L. 1921, c. 459. In said opinion you were advised that if a building was used for dry cleaning purposes on the effective date of Chapter 459 (April 24, 1921) and thereafter was used for the same purpose by the then owner, he was entitled to a permit even though the building did not comply with the various provisions of said Chapter 459, but that if the building was later sold to another person who then made application for a permit, the state fire marshal had the right to determine whether or not the building conformed to the requirements of the law and his rules and regulations, and that if it did not so comply he had the right to decline to issue the permit.

Recently, in accordance with said opinion, you issued an order requiring that a purchaser of premises excepted from the operation of Chapter 459 make certain changes in the building so that it would comply with the requirements of said chapter. Such purchaser acquired the building here involved on January 1, 1945. He contends that inasmuch as the building was used for the purpose of a dry cleaning establishment on the effective date of said Chapter 459, and was used for that purpose continuously thereafter, he is entitled to the permit even though there has been a change in ownership. In view of the contention raised by his attorney, you request that we review our opinion of February 29, 1944, and advise you as to whether or not we feel that you are justified in refusing to issue a permit to such present owner.

Opinion

It is our understanding that the building here involved has been continuously used as a dry cleaning establishment since prior to the effective date of Chapter 459. It is also our understanding that the present owner has made no changes or alterations in the building and that the order requiring him to comply with the various sections of the law in question was issued because of a change in ownership and in accordance with the above mentioned opinion of this office.

When Chapter 459 was enacted into law, it was "An act providing for the construction, maintenance and inspection of dry cleaning and dry dyeing buildings and establishments * * *." It was a complete act. The purpose was to establish standards of construction for the building in which the business would be carried on and also to regulate the general conduct of the business. In respect to construction of buildings, the act included a number of requirements which sought to establish fire safety conditions.

A reading of the entire act indicates that in its adoption the legislature took cognizance of certain rules that had been enunciated by the courts in construing that type of legislation. The courts often have applied and often do apply the rule as to whether or not the legislation is unreasonable, arbitrary and confiscatory in its application to the property and the property owners. Some courts have adopted the rule that laws of this type could not operate retroactively to deprive a property owner of his previously vested rights. That is to say, the law could not deprive the owner of a use to which the property was put before the enactment of the law. **Cassel Realty v. City of Omaha**, 14 N. W. (2d) 600 (Neb. 1944).

Thus, Chapter 459, Section 30, now appearing as M. S. A. 76.26, contains the following provision:

> "The provisions of this act shall not be held to apply to any building, business or establishment now in use, so as to cause the same to be rebuilt, remodeled, or repaired so as to conform to the provisions hereof, but should any building or establishment, or part thereof, be reconstructed, rebuilt or repaired, the same shall be so constructed, built or repaired in conformity to the provisions hereof. Nothing in this act shall be held to in any manner limit the laws which provide against

fire hazards in this state. Nothing in this section shall permit any person to operate a business or establishment mentioned in this act without first securing a license as provided herein, for so doing, but the provisions of this section shall be given full consideration by the state fire marshal in issuing licenses to persons now engaged in said business."

The question here for reconsideration is whether or not the exemption or exception provided by the last quoted section is intended to inure only to the benefit of the individual who was conducting the business at the time Chapter 459 became law.

The decisions on questions relating to the interpretation and application of zoning laws are analogous.

In construing a zoning ordinance which authorized the lawful use of premises existing at the time of the adoption of the ordinance, even though it was a nonconforming use, the court in the case of **In re Civic Ass'n of Dearborn Tp. v. Horowitz**, 318 Mich. 333, 28 N. W. (2d) 97, at page 99, said:

> "This section is directed to the use of lands and buildings at the time of the adoption of the ordinance and not to the person occupying the same at the time."

See also **North American Building & Loan Ass'n v. Board of Adjustment of the City of New Brunswick** (N. J.), 186 Atl. 727; **Wood v. District of Columbia** (D. C.), 39 Atl. 2d 67; and **Town of Blooming Grove v. Roselawn Memorial Park Co.** (Wis.), 286 N. W. 43.

Furthermore, a consideration of M. S. A. 76.27 confirms the conclusion that the legislature intended the exception provided for in § 76.26 to apply to the building notwithstanding a change in its ownership. M. S. A. 76.27 provides:

> "Should any building, business, or establishment of dry cleaning or dry dyeing be discontinued or not carried on in any building which does not conform to the provisions herein set forth for a period of 90 days the business shall be considered as having been abandoned and, before the same can again be carried on in this building, the building must be so constructed, repaired, or rebuilt as to conform to the provisions of this chapter.
>
> "The period of 90 days herein stated is not to be construed as such period when the plant is under construction or repair or operated in its regular capacity as a going business. Operation of the plant for short periods of time within the period of 90 days with the intent to evade the provisions of this section shall be considered as an attempt to interfere with the operation of this chapter."

The first paragraph of the quoted statute is substantially the same as it appears in Chapter 459, Section 31. The same was amended by L. 1937, c. 225, Sec. 7, by adding the second paragraph.

For reasons stated above, it is herein held that M. S. A. 76.26 renders M. S. A., c. 76, formerly known as L. 1921, c. 459, inapplicable to the building and business in use at the time of the passage of said chapter, unless the building or establishment, or part thereof be thereafter reconstructed, rebuilt or repaired and that change in ownership does not of itself require that the building in question be altered so as to conform to the provisions of said Chapter 76. Therefore the opinion of this office dated February 29, 1944, No. 275, 1944 Report, is hereby superseded to the extent that it is inconsistent herewith.

J. A. A. BURNQUIST,
Attorney General.

Commissioner of Insurance.
July 7, 1949. 197-B

208

Railroad and Warehouse Commission — Jurisdiction — Agency service — Authority to curtail on Saturdays.

Facts

"The Commission has before it a number of applications filed by various railroad companies requesting an order of this Commission authorizing the discontinuance of agency service on Saturdays at a large number of railroad stations throughout the State of Minnesota.

"These applications were filed by the railroad companies pursuant to M. S. 1945, Section 219.85."

Question

Does the Railroad and Warehouse Commission under M. S. 1945, Section 219.85, have authority to grant an application for the discontinuance of agency service on Saturdays?

Opinion

M. S. 1945, § 219.85, reads as follows:

"When the annual business from outgoing and incoming traffic at any station amounts to $8,000 or more, such company shall keep an agent at such station during the business hours of each business day; and no station shall be abandoned, nor the depot removed, nor an agent withdrawn therefrom without the written consent of the commission. **The commission may by written order authorize the withdrawal of such agent at stations where the business is periodical, during such time as there is no business thereat,** or the abandonment of any station where the business from outgoing and incoming traffic is less than $1,500 for any consecutive three months."

In so far as is necessary for a consideration of your inquiry, the emphasized part of the foregoing statute expressly authorizes the Railroad and Warehouse Commission to order the withdrawal of an agent at stations where the business is periodical, during such time as there is no business thereat.

In construing the emphasized portion of the statute, it is our opinion that the legislature intended that an agent at a station could be withdrawn upon order of the Commission when there was "no business" at the station sufficient to justify agency service. This intention is evident when the last clause of the quoted statutory provision is examined along with the emphasized portion thereof. The last clause authorizes the abandonment of a station when its business is less than $1,500 for any consecutive three months. In our opinion, the legislature did not intend that a station could be abandoned under circumstances where an agent could not be withdrawn. Any other conclusion would be irrational and absurd. See M. S. 1945, § 645.17 (1).

The general powers of the Commission are expressed in M. S. 1945, § 216.12. As stated in 5 Dunnell's Minnesota Digest (2d Ed.), § 8075:

> "The Commission may make such orders applicable generally to the railroad service as public interest from time to time requires. It is authorized to require a railroad to make any reasonable change in the operation of its road and the maintenance of stations and depots which will promote the security and convenience of the public."

And, our Supreme Court has said the intent and purpose of the lawmakers evidenced in the statutes relating to railroads was to

> "* * * confide to the sound discretion and good judgment of its members the rights and welfare of the people, as well as the interests and prosperity of the corporations. * * *"

State v. St. Paul, Minneapolis & Manitoba Ry. Co., 40 Minn. 353, 42 N. W. 321. The Commission has ample authority under its general powers to require agency service on Saturdays or at any other time where such service is reasonably necessary in the public interest.

It is manifest that the provisions of M. S. 1945, § 219.85 relating to agency service, must be considered in connection with the general powers of the Commission. Section 219.85 authorizes the curtailment of agency service under certain conditions and § 216.12 authorizes the furnishing of agency service when public convenience and necessity so require.

It is therefore our opinion that a discontinuance of agency service at stations on Saturdays may be authorized where the business is periodical, during such time as there is insufficient business at such stations to justify

agency service. And, if, after agency service has been curtailed, public convenience and necessity require its restoration, the Commission has ample authority to so order.

Your inquiry is therefore answered in the affirmative.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Minnesota Railroad and Warehouse Commission.
August 24, 1949. 371-B-9

209

Railroad and Warehouse Commission — Jurisdiction — Rate cases — Authority of Commissioner newly appointed to decide rate case from records of proceedings where a member has not heard the witnesses personally testify—M. S. A. 216.16, 237.15.

Facts

The Governor has recently appointed you to fill a vacancy in the Minnesota Railroad and Warehouse Commission. You have duly qualified. Prior to your appointment and prior to the occurrence of the vacancy which you were appointed to fill, there were pending before the Commission rate proceedings concerning a street railway company, a telephone company and an auto transportation company.

Prior to the occurrence of the vacancy in the Commission all of the testimony had been adduced in each of the pending matters and there had been oral arguments in the auto transportation company and street car company proceedings. Since your appointment there have been oral arguments in the telephone company case.

All of the pending proceedings have been submitted to the Commission for decision. Stenographic transcripts of all the testimony comprise a part of the record in each of the cases and stenographic transcripts of the oral arguments comprise a part of the record in the telephone company and street car company proceedings. No stenographic transcript was made of the oral argument in the auto transportation case.

Question

May the person appointed to fill a vacancy in the Commission who fully considers all of the evidence and the entire record in the three rate proceedings above referred to participate in the decisions thereof?

Opinion

Minnesota Statutes 1945, Chapter 236, relates to the jurisdiction of the Commission over telephone and telegraph companies; Chapter 220 thereof relates to the jurisdiction of the Commission over street railway companies;

and Chapter 221 thereof, in part, relates to the jurisdiction of the Commission over auto transportation companies. We assume that the rate proceedings referred to herein are pursuant to the provisions of said chapters.

Your inquiry discloses that there is available for the consideration of the entire Commission, including yourself, transcripts of the evidence, the exhibits, and the entire record in each of the proceedings and in addition, transcripts of the oral arguments comprising part of the record in the telephone company and street car company cases. It also discloses that two of the present members of the Commission have heard the examination of the witnesses in person and the third member of the Commission has not.

Statutory provisions and the rules of the Commission do not require the members of the Commission to hear personally all the testimony in rate cases which they are required to decide. Evidence may be adduced before one or more members of the Commission or before an employee thereof who has been designated for that purpose. See Minnesota Statutes 1945, Sections 216.16 and 237.15. See also Rule X of the Rules of Practice of the Commission.

In rate cases before the Commission most of the evidence is usually documentary in character as contained in the records of the utilities, in the accounts of their receipts and expenditures, in the records of the passengers carried and the services rendered, in inventories, and in valuations based thereon. The usual conflict arises from proper deductions which accountants, engineers, and rate experts attempt to draw therefrom. Material of this character is best presented, not by the transitory oral utterances of witnesses but in the form of written documents and reports which the Commission analyzes and appraises for relevancy and cogency in arriving at its determinations. See Public Service Commission Procedure, 87 University of Pennsylvania Law Review 139, 159-162 (1938). The material presented at the hearings, including the oral utterances of the witnesses, is all contained in the records of the proceedings before the Commission. The Monograph of the Attorney General's Committee on Administrative Procedure in the I. C. C., S. Doc. No. 10, 77th Congress, First Session (1941) Part 11, Pages 28-29, in commenting on demeanor evidence in rate cases states:

> "Demeanor evidence is of little consequence in rate cases. One who studies the cold record is in substantially as good a position to appraise the evidence as one who has presided at the hearing. This fact is recognized by all the parties as well as the Commission."

It is the duty of the Commission to fix rates to be charged by the public utilities in the proceedings pending before it. Its duty is to see that the rates fixed are fair not only to the public that uses the services but to the utility as well. In fixing such rates it acts as an administrative body regardless of the personnel comprising the body. In **Bowles v. Indianapolis Railways, Inc.**, 64 Fed. Supp. 865 (1946), a proceeding was commenced by the price administrator to enjoin the railway company from charging fares in excess of those in force in 1942, new fares having been set by the Public Service Commission of Indiana after said date. This Indiana Commission charged with the duty of fixing rates had begun an investigation of the

rates in 1943 and had held numerous hearings extending over a period of eighteen months during which the entire personnel of the Commission had changed. The rate order fixing the new rates was entered by the Commission in 1945. The court, in speaking of the duties of the Commission and the validity of its order, after a change in personnel, said in part as follows:

> "* * * the Public Service Commission is charged with the duty of approving schedules of rates for all public utilities. * * * As such Commission it may proceed to examine rates upon its own motion or upon petition of the utility, or any other person authorized to begin an investigation. Its duty is to see that rates are approved that are fair not only to the public that uses the services of the utility but to the utility, as well. * * *. * * * the Indiana Commission did * * * begin an investigation in December, 1943, looking to a determination of the question as to whether the schedule of rates of defendant then in effect was a fair schedule from the standpoint of both the public and the defendant. Numerous hearings were had during the following eighteen months and, as a result, the Commission entered the order heretofore referred to. **True, the personnel of the Commission had completely changed during the progress of the investigation and hearings, but that, in no manner, affected the validity of the order entered on September 5.** It must be presumed that the Commission, acting as an administrative body regardless of the personnel comprising that body, acted wisely and justly as it construed the facts in the interest of all concerned.
>
> * * * "

See also **Lake Superior District Power v. Public Service Commission,** 244 Wis. 543, 13 N. W. 2d 89; **Visceglia v. United States,** 24 Fed. Supp. 355.

In **Eastland Co. v. Federal Communications Commission,** 92 Fed. 2d 467 (certiorari was denied in 302 U. S. 735, 58 Supreme Court 120), the decision was made by three members of the Commission only one of whom had been present personally at the hearing at which the testimony and the exhibits were received. The three commissioners, however, had reported that they had fully considered the entire evidence and record of the case. One of the contentions of the appellant was

> "that they were entitled to have their case passed upon by the identical members of the Broadcasting Division who sat at the presentation of all of the evidence in the case, and that the procedure followed amounted to a denial of a lawful hearing and trial of the case, inasmuch as two members who joined in the decision did not hear the oral evidence when delivered by the witnesses in person."

The court said in part as follows:

> "* * * In our opinion the partial change in the personnel of the Division which decided the case did not invalidate its decision, for it was nevertheless the decision of the Division which acted upon the evidence. * * * It is plain that much of the testimony in such cases must be received by the Commission in stenographic reports, inasmuch as the Commis-

sion's jurisdiction extends throughout the entire country and it would often be very expensive for witnesses to come to Washington to testify orally and impossible for the Commission personally to go to various different parts of the country to hear oral evidence."

Under the facts submitted, the answer to your inquiry, in our opinion, is governed by the rule appearing in 42 Am. Jur.—Public Administrative Law, Section 141, which reads in part as follows:

> "Due process of law does not require that the actual taking of testimony be before the same officers as are to determine the matter involved. A hearing is not inadequate or unlawful merely because the taking of testimony is delegated to less than the whole number, or even to a single member, of the administrative tribunal, or to an examiner, hearer, or investigator employed for this purpose, even though such procedure has not been expressly authorized by the legislature."

See also **Vogeley v. Detroit Lumber Co.**, 196 Mich. 516, 162 N. W. 975; **Twin City Milk Producers v. McNutt**, 122 Fed. 2d 564.

In view of the foregoing and under the facts submitted, your inquiry is answered in the affirmative.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Minnesota Railroad and Warehouse Commission.
July 26, 1949. 371-a-5

210

Railroad and Warehouse Commission — Jurisdiction — Train service — Discontinuance of intrastate trains and interstate trains rendering intrastate service.

Facts

The X Railway Company has ordered the discontinuance of passenger trains Nos. 41 and 42 and the re-routing of passenger train No. 24. These trains render service between Rochester, Minnesota, and McIntire, Iowa, and, to some extent, between Rochester, Minnesota, and Kansas City, Missouri. These trains also furnish passenger train service between Rochester, Stewartville, Racine, and LeRoy, Minnesota.

Questions

1. Does the Commission have jurisdiction over the discontinuance of interstate passenger trains where no intrastate service is involved?
2. Does the Commission have jurisdiction over the discontinuance of interstate passenger trains which afford both interstate and intrastate service?

Opinion

The Railroad and Warehouse Commission possesses only the authority given to it by the legislature and cannot exceed the bounds to its power fixed by the legislature. **State v. Duluth & N. M. Ry. Co.**, 150 Minn. 30, 184 N. W. 186. Its authority with reference to the discontinuance of passenger train service is prescribed by Minnesota Statutes 1945, Section 216.62, as amended by Laws 1947, Chapter 3, which reads as follows:

> "No company operating any line of railroad in this state as a common carrier of passengers shall discontinue the operation of any of its regularly scheduled intrastate passenger trains unless written application has been filed with the commission for authority so to do and an order has been made by the commission granting such authority. No such order shall be made until a hearing has been had and the commission finds that by the discontinuance of such passenger train the public will not be deprived of reasonably adequate service."

By limiting the authority of the commission to the discontinuance of the operation of regularly scheduled intrastate passenger trains, we are of the opinion that the legislature did not intend the commission to have jurisdiction over the discontinuance of interstate passenger trains. It is, therefore, our opinion that the Minnesota Railroad and Warehouse Commission does not have jurisdiction over the discontinuance of interstate passenger trains where no intrastate service is involved.

The state, in the exercise of its police power, directly or through an authorized commission, may require railroad carriers to provide reasonably adequate and suitable facilities for the convenience of the communities served by them. **Mississippi R.R. Commission v. Mobile and Ohio R.R. Co.**, 244 U. S. 338, 390, 391. But the power of the states, as expressed in this rule, is subject to the limitations of the Federal Constitution against the taking of private property without just compensation or without due process of law.

Par. (17) of § 1 of the Transportation Act of 1920 (49 U. S. C. A., § 1, Par. 17), after referring to the sections giving the Interstate Commerce Commission authority to give orders as to car service, provides:

> "* * * **That nothing in this chapter shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable * * * passenger service for intrastate business**, except in so far as such requirement is inconsistent with any lawful order of the commission made under the provisions of this chapter."

Par. (22) of the same section reads:

"The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State * * *."

The extent to which a state may require just and reasonable passenger service for intrastate business under the power reserved to the state in the foregoing quoted provisions of the Transportation Act of 1920 is limited only in so far as the requirement of the state is not inconsistent with lawful orders of the Interstate Commerce Commission in the interests of interstate commerce. **State of Florida ex rel. v. Seaboard Air Line R. Co.**, 89 Fla. 419, 104 So. 602, 39 A. L. R. 1362. **Chicago R. I. & P. Ry. Co. v. State**, 90 Okla. 73, 217 Pac. 147. **New York Cent. R. Co. v. Public Utilities Commission of Ohio**, 119 O. S. Ct. 381, 164 N. E. 427.

The state having the power to require just and reasonable passenger service for intrastate business, we are of the opinion that the statute, M. S. 1945, Sec. 216.62, as amended, conferred upon the commission jurisdiction over the discontinuance of the operation of regularly scheduled passenger trains engaged in intrastate service, even though the trains were also engaged in interstate service. Although interstate commerce is without the regulation of a state, there are instances when the state, in the exercise of its police power, may affect that commerce. Whether interstate commerce is affected to an illegal extent under state regulation depends on the facts in each case. There is no inevitable test. **St. Louis - San Francisco Ry. Co. v. Public Service Commission of the State of Missouri**, 261 U. S. 369, 43 S. Ct. 380.

From the foregoing, it is our opinion that with reference to trains Nos. 41 and 42 the commission has jurisdiction over the discontinuance of the intrastate service rendered by these interstate trains.

With reference to train No. 24, which has been re-routed, there are not sufficient facts contained in your letter to furnish us a basis to pass upon any questions of law involved; and, therefore, in the absence of additional information, we are unable to advise whether or not the commission has jurisdiction over the re-routing of this train.

JOSEPH J. BRIGHT,
Assistant Attorney General.

Minnesota Railroad and Warehouse Commission.
March 21, 1949. 365-a-12

TAXATION

CLASSIFICATION

211

Homestead—Effect of M. S. 1945, Sec. 510.02.

Facts

A taxpayer in your county who owns five lots in the Village of Grand Rapids upon which he has constructed tourist cabins, in one of which he resides, is claiming that all five lots are entitled to the homestead classification for ad valorem tax purposes because the lots total less than one-third of an acre and therefore come within the definition of a homestead for purposes of exemption for execution (Minnesota Statutes 1945, Sec. 510.02).

You refer to the following opinions of this office to the contrary:

Opinion No. 798, 1934 report

Opinion dated June 19, 1935, File No. 232-D

Opinion No. 425, 1938 report

Question

Whether these opinions are still controlling.

Opinion

In addition to the opinions referred to, we call to your attention the following opinions to the same effect:

Opinion No. 796, 1934 report

Opinion No. 308, 1940 report

Opinion No. 309, 1940 report

We believe that these opinions correctly state the law, and adhere to them.

CHARLES P. STONE,
Assistant Attorney General.

Itasca County Attorney.
March 22, 1950. 232-d

212

Homestead — Erroneously classified as non-homestead — Reductions of Assessed Valuation — Power of County Board to abate penalties — Laws 1949, Chapter 485 (M. S. A., Sec. 375.192), Construed.

Facts

Laws 1949, Chapter 485 (M. S. A., Sec. 375.192), authorizes the county board of each county upon written application by the owner of the property, to grant such reduction for the current year, of the assessed value of any real property in that county, which erroneously has been classified, for tax purposes, as non-homestead property, as is necessary to give it the assessed valuation which it would have received if it had been classified correctly.

Chapter 485 does not specifically give the county board authority to abate or cancel any penalties which may have accrued. A penalty of three per cent attaches to the first one-half of the current real estate tax if it is unpaid on June 1st of the current year. An additional one per cent attaches each succeeding month thereafter on the unpaid first half of the current tax, until the last day of October of the current year. On November 1st the penalty has reached eight per cent and is charged on the total unpaid current tax.

In view of the fact that applications will be received by the county boards where penalties already have accrued or will accrue before the applications can be acted upon, you offer the following example:

> "Mr. A. is taxed on his property for the year 1948, payable in 1949, in the amount of $100. He has failed to pay the first half prior to June 1. A penalty of 3% has accrued on June 1 to the first half of his tax, amounting to $1.50.
>
> "On June 15, Mr. A. files a written application with the County Board, requesting that his property be reclassified to homestead. The facts being substantiated, the County Board, on July 1, grants Mr. A.'s application to reclassify his property to homestead. This, in effect, changes Mr. A.'s tax from $100 to $60 and at this time, namely, July 1, the penalty accrued to the unpaid first half of the tax is 4% instead of 3%. The penalty on the first half of the original tax of $100 would now be $2.00; however, on the first half of the reduced re-classified sum of $60, said penalty would be $1.20.
>
> "Mr. A. now wishes to pay his tax, but the Treasurer does not know whether to collect 4% penalty on the original first half tax or on behalf of the reduced tax, or whether to collect any penalty, at all."

Questions

"1. Is the penalty accrued to the original tax to the time of re-classification to homestead to be charged?

"2. Is the penalty to be charged on the first half as re-classified to the time of the granting of the application?

"3. If No. 2 is answered in the affirmative, how is the difference in penalty, between that which accrued to the original tax and that which accrued to the reduced tax, to be accounted for?

"4. Does such application and the granting thereof effect a stay or abatement and cancellation of penalties which accrue prior to the granting of such application?"

Opinion

Question No. 1

Chapter 485 does not authorize the county board to abate penalties. In this respect it differs from Minnesota Statutes Annotated, Section 270.07, which vests in the Commissioner of Taxation the power not only to grant reductions or abatements of assessed valuations or taxes but also to grant abatements of costs, penalties and interest. It is therefore the opinion of this office that if the county board does not act upon the application prior to June 1st, the applicant will have to pay whatever penalty has accrued upon the original tax at the time he makes payment of the tax as it has been adjusted as a result of the county board's order granting the reduction of assessed valuation.

Of course, if enough penalty is involved to make it worthwhile, there is nothing to prevent the applicant, after his application is granted by the county board, from making a separate application, under Section 270.07, addressed to the Commissioner of Taxation, for the abatement of the penalty.

As a practical matter, most owners whose properties have been classified erroneously as non-homestead property, either will make their applications in time for the county board to act upon them before June 1st, or will pay the first half of their taxes as originally extended before June 1st and then make their applications for reductions of assessed valuations in time for the adjustments to be made before the second half of the taxes are due. The cases where it will be necessary for the applicant to pay a penalty or submit a separate application to the Commissioner of Taxation for abatement thereof, should be relatively few in number.

Question No. 2

If the application is granted by the county board after June 1st, and the applicant does not make a separate application to the Commissioner of Taxation for abatement of the penalty, and the applicant then pays the first half of his tax upon the corrected basis, he will also have to pay whatever penalty has accrued on the first half of the original tax to the date of payment. Using the example stated, if Mr. A.'s application is granted by the county board on July 1, 1948, and on that date Mr. A. pays one-half ($30.00) of his tax ($60.00), computed upon the reduced valuation, he will also have to pay a four per cent penalty on one-half ($50.00) of the original tax ($100.00), or $2.00.

Question No. 3

In view of our answer to Question No. 2, this question does not require an answer.

Question No. 4

This question is answered in the negative.

This office has ruled that the pendency of an application for abatement of taxes under Section 270.07 will not operate to prevent forfeiture.

See Opinion dated May 29, 1941, File No. 407-F.

Applying the same reasoning to the instant situation, it is our opinion that the pendency before the county board of an application for a reduction in assessed valuation under Chapter 485 will not operate to prevent the accrual of penalties provided for by Section 279.01.

In your letter you also ask whether the county board may refund 1948 taxes already paid, where it orders reductions in assessed valuations under Chapter 485.

This question is also answered in the negative. Chapter 485 does not authorize the county board to make refunds. As in the case of a penalty, it will be necessary for the applicant to make a separate application, addressed to the Commissioner of Taxation, under Section 270.07, in order to obtain a refund in such case. Section 270.07 vests in the Commissioner of Taxation the power to order the refundment, in whole or in part, of any taxes, costs, penalties or interest thereon which have been erroneously or unjustly paid.

CHARLES P. STONE,
Assistant Attorney General.

Ramsey County Attorney.
July 8, 1949. 505-J

213

Homestead—Farm not occupied by owner during incumbency in county office.

Facts

Prior to his election, the Sheriff of Aitkin County resided on his farm located about two miles north of Aitkin. At the commencement of his term of office he moved with his family into the residence provided by the county in connection with the county jail. He and his family have continued to reside there since that time. He has continued to operate his farm, has not rented out the house upon the farm, and has kept some of his household and personal belongings there.

Question

Is the farm entitled to the homestead classification provided by Minnesota Statutes Annotated, Section 273.13?

Opinion

M. S. A., Section 273.13, Subdivision 6, provides in part as follows:

> "All real estate which is rural in character and devoted or adaptable to rural but not necessarily agricultural use, * * * , and which is used for the purposes of a homestead, shall constitute class three 'b' and shall be valued and assessed at 20 per cent of the full and true value thereof * * * "

This office previously has ruled that the word "homestead" as used in Chapter 273 means the premises occupied by a person as his home or place of abode, and that the question of whether premises are occupied by any person as his home or place of abode, for purposes of taxation, is one of fact, to be determined in the first instance by the officials charged with the duty of assessing such property.

Opinion 424, 1938 Published Opinions of the Attorney General

As a guide to those officials in making that determination, we quote the following language from Opinion 310, 1940 Published Opinions of the Attorney General:

> "If the owner ceases to occupy the premises as his home, he loses his homestead rights therein for purposes of taxation.
>
> * * * * * * *
>
> Mere temporary absence of the owner will not terminate his homestead rights, provided he maintains his living quarters upon the premises in condition for continued occupancy by himself or his family, showing his intention to return presently, and provided he does not establish another home elsewhere or otherwise manifest an intention to abandon the actual occupancy of the premises as his place of abode. However, if the owner moves and actually establishes his regular home elsewhere, he thereby terminates his homestead rights in his former home, for taxation purposes, even though he may intend to return there at some future time. * * * "

We also point out that the Sheriff's term of office is four years, and that a temporary absence hardly could be construed to include that period of time.

CHARLES P. STONE,
Assistant Attorney General.

Aitkin County Attorney.
February 9, 1949. 232-d

214

Homestead—Farm operated by owner, but dwelling on farm rented to third party; owner residing on adjoining farm—Minn. Stat. 1945, Sec. 273.13, Subd. 6.

Facts

A and B are father and son, respectively. A owns a farm upon which there are a dwelling and farm buildings. He rents out the dwelling to a third party, but keeps livestock in the farm buildings and farms the land. B owns a farm which adjoins A's farm. A lives with B on the latter's farm.

Question

Is A entitled to the homestead classification on his farm or any part thereof?

Opinion

Minnesota Statutes 1945, Section 273.13, Subd. 6, provides that the first $4,000 full and true value of any tract of real estate which is rural in character and devoted or adaptable to rural use, "and which is used for the purposes of a homestead," shall be valued and assessed at 20 per cent of that full and true value.

In order to qualify for this homestead classification two elements must be present: (1) ownership, and (2) occupancy by the owner for the purposes of a home.

Opinion No. 202, 1948 Published Opinions of the Attorney General

The second element is lacking in the instant case. A is not occupying the dwelling on his farm for the purposes of a home, and since he is making his home with his son on the latter's farm, it hardly can be said that he is occupying the balance of his own farm for the purposes of a home. The fact that A keeps livestock on his farm and spends a part of each day working there does not, in our opinion, constitute occupancy for the purposes of a homestead.

We therefore answer your question in the negative.

CHARLES P. STONE,
Assistant Attorney General.

Wadena County Attorney.
April 14, 1950. 232-d

215

Homestead—Farm rented out on share basis—M. S. A., Sec. 273.13, Subd. 6.

Facts

Minnesota Statutes Annotated, Section 273.13, Subd. 6, provides that all real estate which is rural in character and devoted or adaptable to rural but not necessarily agricultural use, **and which is used for the purposes of a homestead,** shall constitute class 3 "b", and that the first $4,000 full and true value thereof shall be valued and assessed at 20 per cent and the excess over $4,000 at 33⅓ per cent. There are several cases in Wilkin County where elderly farmers continue to reside on their farms but have the fields cultivated by share croppers under ordinary farm contracts.

Question

Are these farms each entitled to the homestead classification up to the first $4,000 of full and true value, or must that classification be limited only to the buildings occupied by the owners, together with sufficient land to constitute yards therefor?

Opinion

The wording of Section 273.13, Subd. 6, lends little assistance to the determination of when in each particular instance property is "used for the purposes of a homestead." Obviously, that is a fact determination resting essentially with the assessor and subsequent tax reviewing authorities.

This office has ruled that where a farmer owns 360 acres of contiguous rural real estate, 80 acres of which he occupies as a homestead and the balance of which he has leased out, only the 80 acres upon which he resides and which is used by him for the purposes of a homestead are entitled to the homestead classification, and that the other 280 acres which he has leased out are not entitled thereto.

Opinion No. 393, 1944 Published Opinions of the Attorney General.
Upon the same reasoning, it seems clear that if a farmer-owner leases his entire farm to a third party for a stated cash rental, reserving for his own use and occupancy only the farm house, only the farm house and sufficient land to constitute a yard therefor would be entitled to the homestead classification, and the portion of the farm leased to the third party would not be entitled to such classification.

Where the farmer-owner rents out the major portion of his farm on a share basis, whether that portion of the farm so rented out is entitled to the homestead classification depends upon the control which the farmer-owner retains over the operation of the entire farm. If he continues to have management control over the entire farm, over what crops are to be planted and when, when the crops are to be harvested, what items of livestock are to be kept on the farm and when they are to be sold, and if he holds all crops and produce subject to completion of the contract, then it is the

opinion of this office that the assessing officials would be justified in determining that the farmer-owner has retained sufficient control over the operation of the farm to entitle the entire farm to the homestead classification, assuming that he is residing in the farm house on the farm. On the other hand, if under the terms of his share contract, the farmer-owner merely receives a share of the crop as rent and has nothing to say about the management of the farm, and is occupying only the farm house, then, in our opinion, the assessing officials would be justified in limiting the homestead classification to the house itself and so much of the land as is necessary to constitute a yard therefor, since in such case that is all which is being used by the farmer-owner for the purposes of a homestead. Each case, of course, will have to be decided on its own facts.

CHARLES P. STONE,
Assistant Attorney General.

Wilkin County Attorney.
July 11, 1949. 232-D

216

Homestead—Improper classification in past years—Whether county entitled to recover taxes lost by reason thereof—M. S. 1945, Sec. 273.02, Subd. 2.

Facts

Some time prior to 1936 G. K., who owned four lots in the Village of Mahnomen upon which an implement building was situated, the first floor of which building housed the implement business and the second floor of which was divided into living apartments, delivered a quitclaim deed of the property to W. K. During the years 1936 to 1944, inclusive, W. K. lived in one of the apartments on the second floor of the building with his family, and claimed the property as his homestead. The property was given the homestead classification during all of said years, and the taxes for said years were paid on that basis.

In a lawsuit involving the property, which lawsuit was decided November 15, 1949, it developed that W. K. had paid no consideration for the property and actually had no interest in it. As of this date G. K. is still the owner of the property.

Question

What right, if any, does the county have to recover the taxes lost during the years in question because of the improper classification, and what is the proper procedure for exercising that right, if any?

Opinion

We are not aware of any statutory provision authorizing a correction of an improper classification of real estate as far back as 1944. Minnesota Statutes 1945, Section 273.02, authorizes the county auditor to correct the classification of real property which has been classified erroneously as a homestead, but Subdivision 2 of that statute limits the time within which the county auditor may do so to one year after December 1st of the year in which the property was assessed.

Since proceedings to collect real property taxes are in rem and not in personam, absent any statutory authorization for correction of the assessments for the years in question, we know of no way in which the taxes lost because of the improper classification can be recovered.

CHARLES P. STONE,
Assistant Attorney General.

Mahnomen County Attorney.
February 10, 1950. 232-D

217

Homestead—Life tenant—M. S. 1945, Sec. 273.13.

Facts

A life tenant resides in a dwelling house in Stillwater. The remainderman does not live on the property.

Question

Is the property entitled to the homestead classification?

Opinion

We answer your question in the affirmative. A life estate is a freehold interest.

2 Dunnell's Minnesota Digest, Estates, Sec. 3164.
It is the duty of a life tenant to pay the taxes on the property.

Idem, Sec. 3170

We therefore conclude that a life tenant who occupies property as his home has a sufficient interest in that property to entitle it to classification as property "which is used for the purposes of a homestead," under Minnesota Statutes 1945, Section 273.13, as amended.

CHARLES P. STONE,
Assistant Attorney General.

Stillwater City Attorney.
December 5, 1949. 232-D

218

Homestead—Property occupied by vendee under contract for deed—right to reclassification in odd numbered year—M. S. 1949, Secs. 273.17 and 375.192.

Facts

On May 1, 1948, A owned a farm which he was not occupying as a homestead. In the fall of 1948 A sold the farm to B by contract for deed. B moved onto the farm with his family and occupied it as his homestead all during the year 1949. The local assessor was not informed of the fact that B was occupying the property as his homestead on May 1, 1949, and did not list the property as being entitled to the homestead classification for that year. B defaulted in his payments and in the payment of his taxes and the contract for deed was cancelled in April, 1950. A is now applying for a homestead classification for the farm for the year 1949.

Question

Is A entitled to a homestead classification of the farm for the year 1949?

Opinion

Minnesota Statutes 1949, Section 273.17, provides that every assessor shall list, without revaluing, in each odd numbered year, all parcels of land which shall have become homesteads for taxation purposes since the last real estate assessment, and the county auditor shall vote upon the tax lists the change in assessed valuation caused by the change in classification and shall calculate the taxes for the odd numbered year on such changed valuation.

This office has previously ruled that real estate owned by a vendee under a contract for deed and occupied by him as his home is entitled to the homestead classification.

Opinion dated November 9, 1935, File No. 232-D

Opinion dated November 12, 1935, File No. 232-D

Opinion No. 351, 1936 Published Opinions of the Attorney General

So if B actually was occupying the farm as his home on May 1, 1949, the farm was entitled to the homestead classification for 1949, and if the local assessor had notice of the situation he should have so listed it.

But the statute is not self-executing, and in the absence of actual notice and a demand upon the assessor, the local board of review, the county board of equalization or the state board of equalization to have the property reclassified, there was no absolute duty upon the county auditor to make the change.

State ex rel. Hendrickson v. Strom (1936), 198 Minn. 173, 269 N. W. 371.

It remains to consider whether at this late date any course of action is open to the present owner of the farm to obtain relief. Minnesota Statutes 1949, Section 375.192, provides that upon written application by the **owner** of the property, the county board shall have power to grant such reduction, for the **current year**, of the assessed valuation of any property which erroneously has been classified, for tax purposes, as non-homestead property, as is necessary to give it the assessed valuation which it would have received if it had been classified correctly. Since A is the owner of the property and the 1949 tax is the tax for the current year, it is our opinion that A may proceed under this section of the statutes. If the county board is satisfied that the property was erroneously classified, it has the power under this section to grant a reduction in the 1949 assessed valuation of the property sufficient to give the property the assessed valuation which it would have received if it had been given the homestead classification for 1949.

CHARLES P. STONE,
Assistant Attorney General.

Benton County Attorney.
June 13, 1950. 232-D

219

Real property—"Rural" and "all other"—M. S. A., Sec. 273.13, Subd. 4.

Facts

A tract of unimproved real estate containing 65.07 acres lies immediately to the south of the built-up portion of the City of West St. Paul, within the city limits. The tract is not the habitation of the owner. The tract has been classified as urban property and assessed accordingly.

Question

Is such a tract entitled to be classified under M. S. A., Sec. 273.13, Subdivision 4, Class 3, as "All real estate which is rural in character and devoted or adaptable to rural but not necessarily agricultural use"?

Opinion

Prior to 1945 Section 273.13 provided that all "unplatted" real estate which was not used for the purposes of a homestead should be assessed at 33⅓ per cent of its full and true value, and that all "platted" real estate which was not used for the purposes of a homestead should be assessed at 40 per cent of its full and true value. The Minnesota Supreme Court, in the cases of **State ex rel. Chase v. Minnesota Tax Commission**, 135 Minn. 205, 160 N. W. 498, and **In re Delinquent Real Estate Taxes, John E. Stryker,**

Objector, 149 Minn. 335, 183 N. W. 671, held that the expressions "unplatted" and "platted," as used in Section 273.13, did not mean what they ordinarily are understood to mean. The Court held that for assessment purposes the test of whether real property was "unplatted" or "platted" was whether it was rural in character and devoted or adaptable to rural use or urban in character and devoted or adaptable to urban use. In the **Stryker** case, for example, the property in question, a tract of about nine acres, lay within the municipal boundaries of the city of St. Paul in the southwest corner about a mile or so north of Fort Snelling. The territory adjoining was sparsely settled with only three or four dwellings lying within a half or three-quarters of a mile. The owner of the property kept a cow, a horse and some chickens. Part of his nine acres was set apart as a pasture for the cow, and the balance, except that portion which was occupied by the buildings, was devoted to gardening corn, potatoes and other vegetables. The Court held that this property should be assessed at 33⅓ per cent of its full and true value rather than at 40 per cent, because the major portion of the land was devoted to agricultural purposes and the property had no city advantages or conveniences.

Section 273.13 was amended in 1945 (Laws 1945, Chapter 527) to make the wording of the statute conform to the terminology used by the Supreme Court. Section 273.13, as amended, provides that all real property which is rural in character and devoted or adaptable to rural but not necessarily agricultural use, which is not used for the purposes of a homestead, shall be assessed at 33⅓ per cent of its full and true value, and that all other real estate which is not used for the purposes of a homestead, shall be assessed at 40 per cent of its full and true value.

Whether real property is "rural in character and devoted or adaptable to rural but not necessarily agricultural use," is a question of fact which can be determined only after giving consideration to many different factors. Obviously, if the property is a farm surrounded by other farms, it is both rural in character and devoted to rural use. On the other hand, if the property is residential, located in the middle of a built-up section of a city or village, it is neither rural in character nor devoted to rural use. These cases will give the assessing officials no difficulty. It is the cases between these two extremes which will give them trouble, and in the determination of which they will have to use sound discretion and judgment. 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'."

I trust that with these statements as a guide, the assessing authorities will be able to determine properly the question of fact as to the classification of the property to which you refer.

CHARLES P. STONE,
Assistant Attorney General.

West St. Paul City Attorney.
September 19, 1949. 474-J-2

EXCISE TAX

220

Gasoline tax—Additional one-cent tax imposed by Laws 1949, Chapter 678—"In storage"—What constitutes—M. S. 1945, Secs. 296.02, as amended, and 296.17, as amended.

Facts

Minnesota Statutes 1945, Section 296.02, Subdivision 1, was amended by the 1949 legislature (Laws 1949, Chapter 678) to increase the excise tax on gasoline from four to five cents per gallon. Chapter 678 further amended Section 296.02 by adding a new subdivision reading:

> "The additional one-cent excise tax shall apply to all gasoline in storage on July 1, 1949, the effective date of this act."

Prior to July 1, 1949, several firms which use considerable quantities of gasoline in their motor vehicles used in connection with their businesses, purchased gasoline upon which they paid the four-cent tax, and placed the gasoline in tanks on their premises. They then drew gasoline from these tanks as needed for use in their motor vehicle equipment.

Question

Is the gasoline "in storage" within the meaning of the above quoted 1949 amendment, so as to require these firms to pay the additional one-cent excise tax?

Opinion

We answer your question in the affirmative.

In our opinion the legislature intended to reach just such cases as these. In construing the statutes of this state, words and phrases are to be construed according to their common and approved usage.

Minnesota Statutes 1945, Section 645.08.

According to common and approved usage, the word "storage" means the keeping or placing of articles in a place of safe-keeping.

Funk & Wagnalls New Standard Dictionary of the English Language.

See 60 C. J., Storage, p. 115.

When the firms referred to purchased gasoline prior to July 1, 1949, and placed it in tanks on their premises, to be drawn as needed for use in their motor vehicles, they were placing and keeping the gasoline in a place of safe-keeping, and hence were "storing" it. Consequently, in our opinion any of the gasoline which was still in the tanks on the premises of these firms on July 1, 1949, was "in storage" and hence subject to the additional one-cent excise tax.

There can be no question but that the gasoline referred to is or will be used in producing and generating power for propelling motor vehicles used on the public highways of this state. Section 296.02, as amended, imposes an excise tax of five cents per gallon on all such gasoline. Section 296.17, Subdivision 1, as amended by Laws 1949, Chapter 143, reads:

> "It shall be the duty of every distributor, dealer, and person who sells or uses gasoline manufactured, produced, received or stored by him, and of every person using gasoline in motor vehicles, if the same has not been reported or if the tax on account thereof has not been paid to the commissioner, to report to the commissioner the quantity of such gasoline so sold or used by him, and such person shall become liable for the payment of the tax. All provisions of Sections 296.01 to 296.49 relating to the calculation, collection and payment of the tax shall be applicable to any such person, dealer or distributor."

In our opinion, Section 296.17, Subdivision 1, as amended clearly is applicable here. Each of the firms referred to is a "person who sells or uses gasoline * * * stored by him." He is also a "person using gasoline in motor vehicles." The one-cent additional tax "on account" of the gasoline "has not been paid to the Commissioner." Therefore, each of the firms referred to is liable for the payment of the additional tax.

CHARLES P. STONE,
Assistant Attorney General.

Commissioner of Taxation.
December 9, 1949. 324-G

221

Gasoline tax—Refunds—"Jeeps" used for strictly agricultural purposes— M. S. A., Secs. 296.18, Subd. 1, and 296.01, Subd. 10.

Facts

"During the past two years the Petroleum Division of this department has received a number of claims for the refund of gasoline excise tax on material consumed in the ordinary farm pursuits, such as plowing, dragging, etc., in a motor vehicle designated as a 'jeep.'

"We have taken the position that inasmuch as this piece of equipment is licensed by the Motor Vehicle Department as a motor vehicle and, therefore, permitted to be used on the public highways indiscriminately, we do not have sufficient authority under existing laws to permit a refund for that portion of the fuel consumed off the public highways."

Question

Is the Commissioner of Taxation authorized under the statutes to pay refund claims on gasoline consumed in "jeeps" used for strictly agricultural purposes?

Opinion

M. S. A., Sec. 296.18, Subd. 1, provides in part as follows:

"Subdivision 1. Any person who shall buy and use gasoline for any purpose other than use in motor vehicles, and who shall have paid the gasoline excise tax directly or indirectly through the amount of the tax being included in the price of the gasoline, or otherwise, shall be reimbursed and repaid the amount of the tax paid by him upon filing with the commissioner a verified claim in such form and containing such information as the commissioner shall require and accompanied by the original invoice thereof. The claim shall set forth the total amount of the gasoline so purchased and used by him other than in motor vehicles, and shall state when and for what purpose it was used. If the commissioner be satisfied that the claimant is entitled to payment, he shall approve the claim and transmit it to the state auditor * * * "

Section 296.01, Subd. 10, provides:

"Subd. 10. 'For use in motor vehicles' means for use in producing or generating power for propelling motor vehicles on the public highways of this state or in machinery operated on the public highways of this state for the purpose of constructing, reconstructing, or maintaining such public highways."

It is our opinion that when a person buys gasoline for use in a "jeep" during the time the "jeep" is used in such ordinary farm pursuits as farming, dragging, etc., and not upon the public highways of the State, he is

buying gasoline "for any purpose other than use in motor vehicles," within the purview of Section 296.18, Subdivision 1. It is our further opinion that such gasoline when so used is not "for use in motor vehicles" as that phrase is defined in Section 296.01, Subd. 10, because it is not being used to produce or generate power for propelling the "jeep" on the public highways of the state.

We therefore rule that the Commissioner of Taxation not only is authorized, but under the law is required, to approve claims for refund of gasoline taxes paid upon gasoline consumed in "jeeps" used for strictly agricultural purposes and not upon the public highways of the State, if such claims are timely filed and are properly substantiated.

CHARLES P. STONE,
Assistant Attorney General.

Commissioner of Taxation.
May 9, 1949. 324-K

EXEMPTION

222

Cemetery—Private—M. S. A., Sec. 307.09.

Facts

A man and his wife by deed acquired 12 acres of rural land in Martin County. There was no restriction in the deed. They platted the 12-acre tract for cemetery purposes, and recorded the plat with the Martin County Register of Deeds. They also improved the tract so that it can be used for the purposes for which it was platted. They are selling lots in the tract, and the deed to each lot contains a provision that the lot must be used for burial purposes only.

Question

Is the tract exempt from ad valorem taxes under M. S. A., Section 307.09?

Opinion

M. S. A., Section 307.01, provides that any private person may establish a cemetery on his land by having the land surveyed and a plat made, showing the area and location of the cemetery. It provides further that the plat must be filed for record in the office of the Register of Deeds.

Section 307.02 provides that when such plat has been recorded, the lands designated on the plat as streets, alleys, ways, commons or other public uses, shall be held by the owner of the cemetery in trust for the uses and purposes thereon indicated, and that every conveyance of lots in the cemetery shall be expressly for burial purposes.

Section 307.09 provides that the lands, not exceeding 100 acres in extent, so laid out and dedicated as a private cemetery, "shall be exempt from public taxes and assessments," so long as the same remain appropriated to the use of a cemetery.

It is the opinion of this office that if the owners of the 12-acre tract have complied with all of the provisions of Section 307.01 and 307.02, the tract is entitled to exemption from ad valorem assessment, under Section 307.09. This assumes, of course, that the tract actually is being, or in the near future will be, used as a burial ground. If, aside from the platting and dedication of the land for cemetery purposes, no use is being made of it, or it is being used only for agricultural purposes, we are of the opinion that the tract would not be entitled to exemption.

See **State v. Ritschel** (1945), 220 Minn. 578, 20 N. W. (2d) 673. The fact that the exemption provided by the legislature in Section 307.09 is given to private cemeteries while the constitutional exemption is limited to "public burying grounds" is not important. Our Supreme Court has held that the legislature may provide for other exemptions in addition to those specifically set forth in the Constitution, if they do not offend the uniformity clause or the Federal Constitution.

Reed v. Bjornson (1934), 191 Minn. 254, 253 N. W. 102.

CHARLES P. STONE,
Assistant Attorney General.

Martin County Attorney.
February 23, 1949. 414-D-4

223

Church property—Parsonage rented out temporarily pending arrival of new pastor—Minn. Const., Art. IX, Sec. 1.

Facts

The Bethel Lutheran Church of Bemidji owns and maintains a parsonage for its resident pastor. Some time last fall the pastor of the church gave up his pastorship and moved away from Bemidji. Rather than let the parsonage remain vacant during the winter months at the risk of damage from the elements, the church decided to rent out the parsonage temporarily pending the arrival of a new pastor, and leased the parsonage to a private person on a month to month basis terminable by one month's written notice. The parsonage was leased out in this way only for eight months. The lease was terminated at the end of that period, when the church secured its new pastor.

Question

Is the property entitled to exemption as church property as of May 1, 1950?

Opinion

Whether the parsonage is entitled to exemption from ad valorem taxation as "church property" under Article IX, Section 1 of the Minnesota Constitution is a question of fact which will have to be resolved by the local assessing officials. Upon the facts stated, it is the opinion of this office that those officials would have authority under the law to leave the property upon the tax exempt rolls for the year 1950 if they deem it proper so to do.

We are aware of the holding of the Minnesota Supreme Court in the case of **State v. Union Congregational Church** (1927), 173 Minn. 40, 216 N. W. 326, that a parsonage which is no longer used as such and is rented out to others is not entitled to exemption. But that holding, in our opinion, is qualified by the following language of the Court in the same case:

> " * * * a lot and dwelling house rented to others and not used in any way for religious or church purposes, **and not shown to be intended or necessary for such use in the future,** are not exempt."

In the instant situation it is apparent that the church intended to use the property as a parsonage again as soon as a new pastor could be secured. The parsonage was rented out temporarily only to preserve it pending its occupancy by the new pastor.

This office, in two previous opinions, has indicated that where property otherwise entitled to exemption temporarily is not being used for the purpose for which it was acquired and in the interim is being rented out because the care and preservation of the buildings require their occupancy, the property does not lose its tax exempt status.

Opinion 360, 1944 Published Opinions of the Attorney General.

Opinion 209, 1948 Published Opinions of the Attorney General.

CHARLES P. STONE,
Assistant Attorney General.

Beltrami County Attorney.
June 1, 1950. 414-d-12

224

Church property—Whether entitled to exemption during period of adaptation to use for which acquired—Effect of receipt of substantial income during that period.

Facts

Two years ago an individual made a gift to a church organization of a farm in your county. In making the gift the individual intended that the property should be built up and maintained as a boys' home. For the past

two years the church organization has done nothing in the way of adapting the farm to its intended use. It has continued to operate the farm, selling the grain and livestock, and has placed the money received from such sales in a separate account. The church organization is now beginning to construct buildings on the farm with the intention of using the property as a home and school for boys who have no home and for delinquent boys. It is using the money received from the sale of grain and livestock for this purpose.

Question

Was the farm entitled to exemption from ad valorem assessment for the past two years, or should it have been placed upon the tax rolls?

Opinion

In order for any institution to qualify for tax exemption under Minnesota Constitution, Article IX, Section 1—and Minnesota Statutes 1949, Section 272.02 enacted pursuant thereto, there must be a concurrence of ownership of the property by an institution of the type prescribed by the Constitution and a use of the property for the purpose for which such institution was organized.

Christian Business Men's Committee v. State (1949), 228 Minn. 549, 554, 38 N. W. (2d) 803.

In the instant situation, the necessary element of ownership exists. An examination of the purpose clause of the articles of incorporation of the church organization will disclose whether the intended use of the property is one authorized by those articles. If that use is so authorized, it remains to consider (1) whether the farm has yielded a substantial commercial income during the past two years, and (2) whether the church organization has proceeded without unreasonable delay to adapt the property to the authorized use. In its most recent expression of the law on these particular points, our Supreme Court, in the case of **Christian Business Men's Committee v. State**, supra has stated:

> " * * * A use of a property which merits tax exemption is a present use and not an intended future use, subject, however, to the proviso that where a corporation or other institution entitled to hold its property exempt from taxation acquires property with the intention of devoting it to a tax-exempt use, the right of exemption carries with it, as an incident, **the opportunity to adapt and fit the property for use within a reasonable time in execution of plans or arrangements made for the purpose, but during the period of adaptation the right of tax exemption does not exist if and when the property so purchased yields a substantial commercial income.** Cf. State v. Second Church of Christ, Scientist, and Village of Hibbing v. Commr. of Taxation, supra. Whether due diligence has been exercised in adapting the property to a tax-exempt purpose is a question of fact to be decided according to the circumstances of each case."

If the income from the sale of grain and livestock during the interim between the period of acquisition of property by the church organization and the completion of the contemplated buildings thereon, is substantial, the property is not entitled to exemption while it is yielding such income. Even if the income is merely nominal, the property is not entitled to exemption if the church organization is not exercising due diligence in devoting it to the use for which it was acquired.

Whether the income which the church organization is receiving from the operation of the farm is substantial, and whether the church organization has been exercising due diligence in devoting the property to the use for which it was acquired, involve questions of fact which must be resolved by the local assessing officials.

CHARLES P. STONE,
Assistant Attorney General.

Big Stone County Attorney.
April 25, 1950. 414-d-6

225

Historical site—Owned by religious organization—M. S. 1949, Secs. 272.02, 307.09; Minn. Const., Article IX, Sec. 1.

Facts

The Reverend Oblate Fathers, a corporation organized by virtue of the laws of Minnesota, acquired title to certain realty lying on Magnuson Island being situated in that portion of Lake of the Woods County, Minnesota, known as the Northwest Angle area. The realty has historical significance because it identifies the site where once stood Fort St. Charles. As a part of the old fort, a chapel had been set up within the fort. The Sioux Indians massacred 21 Frenchmen on an island known as Massacre Island, and when the spot was visited, the remains of the Frenchmen were buried under the chapel on Magnuson Island. All of this happened during the eighteenth century and about 1736. At some future date this spot will be dedicated as a shrine for generations to visit and to commemorate the tragedy referred to above.

Question

Is the tract exempt from ad valorem taxes under Minn. Const., Art. IX, Sec. 1, and Minnesota Statutes 1949, Secs. 272.05 (5), 272.02 (7), or 307.09?

Opinion

Minn. Const., Art. IX, Sec. 1, and Minnesota Statutes 1949, Sec. 272.02, paragraph (5), provide that "All churches, church property, and houses of worship" are exempt from taxation. In order to be exempt from ad valorem

taxation the property not only must be owned by the church, but the Supreme Court of the State of Minnesota has held that the property must be devoted to church use.

State v. Second Church of Christ Scientist (1932), 185 Minn. 242, 240 N. W. 532.

State v. Union Congregational Church (1927), 173 Minn. 40, 216 N. W. 326.

Whether or not the property is used for church purposes is a question of fact to be determined by administrative authorities. However, from the statement of facts contained in your correspondence, it seems apparent that the property is not devoted to church use.

Minn. Const., Art. IX, Sec. 1, and Minnesota Statutes 1949, Sec. 272.02, paragraph (7), provide that "public property used exclusively for any public purpose" shall be exempt from taxation. Although this historical site may be used for a public purpose within the meaning of the Constitution, the land in question is not owned by the public and, therefore, is not entitled to exemption under this provision of the constitution and statutes. See opinion of the Attorney General dated December 30, 1930, File 414A-11.

Your correspondence makes specific reference to Minnesota Statutes 1949, Sec. 307.01, relating to private cemeteries. By Sec. 307.09, certain private cemeteries are, by statute, exempt from ad valorem taxation. The statute sets out the requirements for laying out and dedicating land as a private cemetery. From the facts stated in your letter, there is no indication that any of such requirements has been met. The exemption granted by this statute is not applicable to mere graves.

For the reasons stated above, it is the opinion of this office that the land referred to in your letter under the facts as stated is not entitled to exemption from ad valorem taxation.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Lake of the Woods County Attorney.
May 26, 1950. 414-D-6

226

Public hospital—Offices in hospital building rented to doctors using facilities of hospital—Effect on exempt status of building.

Facts

A group of public spirited citizens of the village of Clements contemplate forming a non-profit corporation for the purpose of erecting and operating a community hospital. The operation of the hospital will be under the direction of officers chosen by the stockholders of the corporation.

Question

Will the furnishing of offices in the hospital building to the doctors who will use the hospital facilities, and the collection of rental therefor, have any effect upon the tax exempt status of the hospital property?

Opinion

In its latest expression on the subject of exemption from ad valorem taxation, the Minnesota Supreme Court, in the case of **Christian Business Men's Committee of Minneapolis, Inc. v. State of Minnesota**, 228 Minn. 549, 38 N. W. 2d 803, lays down the rule that when a building is owned by a charitable or other tax-exempt institution and one **substantial** part thereof is directly, actually, and exclusively occupied by the institution for the purposes for which it was organized, and another **substantial** portion thereof is primarily used for revenue by rental, the building with the grounds thereof is pro rata exempt from taxation and pro rata taxable according to its separate uses, and it should be assessed and taxed on that portion of its proper assessable value allocated to the taxable use, after deducting from its overall assessable value the portion thereof properly allocated to the proportionate tax-exempt use.

The Court in its per curiam decision denying the petition for reargument states that what is a **substantial** part of a hospital building within the above rule is a question of fact which the local assessing officials will have to decide in the light of a reasonable, natural, and practical interpretation of that term.

Whether the offices to which you refer will constitute a **substantial** part of the hospital building, thereby subjecting them to pro rata assessment, will have to be determined by the local assessing officials if and when the hospital building is constructed and the offices are rented.

CHARLES P. STONE,
Assistant Attorney General.

Clements Village Attorney.
October 4, 1949. 414-D-10

227

Public property—City building—Used exclusively for a public purpose—Property rented pending construction.

Facts

Between December 17, 1946, and November 24, 1947, the city of Windom obtained title to five lots adjoining the present fire station and city offices. The lots were acquired as a site for a new city building which will contain the offices of the city clerk and will house the city's fire fighting equipment.

The city was unable to build at the time the lots were acquired. It is proposed that the building will be constructed as soon as building conditions are favorable. No definite date has been set. In the meantime, the city has been renting out the two small houses which were on the lots at the time of their acquisition by the city, and receiving the rentals therefrom.

Question

Is the property entitled to exemption from ad valorem assessment?

Opinion

We quote from the Minnesota Supreme Court's opinion in the very recent case of **Christian Business Men's Committee of Minneapolis, Inc. v. State of Minnesota,** 228 Minn. 549, 38 N. W. 2d 803:

> " * * * A use of a property which merits tax exemption is a present use and not an intended future use, subject, however, to the proviso that where a corporation or other institution entitled to hold its property exempt from taxation acquires property with the intention of devoting it to a tax-exempt use, the right of exemption carries with it, as an incident, the opportunity to adapt and fit the property for use within a reasonable time in execution of plans or arrangements made for the purpose, but during the period of adaptation the right of tax exemption does not exist if and when the property so purchased yields a substantial commercial income."

Although you do not so state in your letter, we assume that the two small houses occupy only two of the five lots, and that the five lots are listed separately on the assessment rolls. Upon this assumption, under the above quoted rule the three lots which are vacant would be entitled to exemption for the year 1947 and subsequent years if the city, since acquisition thereof, has been exercising due diligence in devoting them to the use for which they were acquired. As to the two lots upon which the two houses are located, if the rental income which the city is receiving from the occupants of the two houses on these lots during the interim between the time of their acquisition and the completion of the contemplated building thereon, is substantial, the lots are not entitled to exemption while they are yielding such income. Even if the rental income is merely nominal, the two lots are not entitled to exemption if the city is not exercising due diligence in devoting them to the use for which they were acquired.

Whether the city has been exercising due diligence in devoting the lots to the use for which they were acquired and whether the rental income which the city is receiving from the occupants of the two small houses is substantial, involve questions of fact which must be resolved by the local assessing officials.

CHARLES P. STONE,
Assistant Attorney General.

Windom City Attorney.
October 5, 1949.

414-A-11

228

Public property—Used exclusively for a public purpose—Quonset housing units owned by city, located on privately owned real property, rented to service men.

Facts

In the spring of 1946, in order to relieve a serious housing shortage, the City of Austin made arrangements with the National Housing Agency, a federal agency, to lease from the latter agency, on a dollar a year basis, 26 quonset housing units. Under the terms of the lease the City was required to remove the units from their location in Wisconsin to Austin, and to erect, operate and maintain them in Austin. The units could be rented only to veterans and their families, and had to be rented without profit to the City. The City operated the units in conformity with the provisions of the lease until the fall of 1949, at which time, at the request of the federal agency, the City took over ownership of the units. Since January 1, 1950, the City has been renting the units out to the same people who previously occupied them, but has been collecting and retaining the rent instead of remitting it to the federal agency as was formerly done. However, the City makes practically no profit from the transaction—it just about breaks even. The quonset housing units are located on privately owned property which has been leased by the City. This lease expires April 1, 1951, at which time the units must be removed by the City.

Question

Are these quonset housing units subject to ad valorem assessment?

Opinion

The privately owned tract of real property upon which the quonset housing units are located is, of course, subject to ad valorem assessment. Because it is privately owned, it cannot be said to be public property, even though it may be used exclusively for a public purpose.

Opinion No. 412, 1938 Published Opinions.

Ordinarily, all buildings and structures on a tract of real property are included in the real estate assessment of that tract. Minnesota Statutes 1945, Section 273.08, requires the assessor to determine the true and full value of each tract of real property, and provides that he shall enter the value thereof "including the value of all improvements and structures thereon" opposite each description. Section 272.03, Subdivision 2, as amended by Laws 1945, Chapter 325, provides that for the purposes of taxation real property shall be construed to include the land itself "and all buildings, structures and improvements or other fixtures on it."

See Opinion No. 387, 1944 Published Opinions.

But where, as here, the quonset housing units are not owned by the owner of the real property, are portable, are not built on fixed foundations, and

not only can but must be removed by the tenant (the City) at the termination of the lease, we are of the opinion that they may be considered to be personal property, and need not be included in the real estate assessment.

It remains to consider whether the units are entitled to exemption from personal property ad valorem assessment as public property used exclusively for a public purpose.

This office previously ruled that if the city council was of the opinion that an emergency existed by reason of the lack of housing facilities for returned service men and their families, the charter provisions of the city of Austin were sufficiently broad to authorize the City to lease quonset housing units from the National Housing Agency on a dollar a year basis, move them from their location to the city, and erect, operate and maintain them, provided they were rented only to service men and their families and that no profit was to be made.

Opinion dated October 11, 1945, File No. 59-a-40.
This was on the theory that the public good would be promoted by evidencing a proper regard for those returning from military service, and that the project would be undertaken with the intention of preventing consequences which might reasonably be anticipated to result in public injury from the lack of shelter accommodations.

See Opinion dated September 28, 1945, File No. 59-a-40.

If the same emergency existed when the City took over ownership of the quonset housing units early this year, and still exists, and the units, under the new arrangement, continue to be rented only to service men and their families and no profit is made, it is our opinion that the units constitute public property used exclusively for a public purpose within the purview of Article IX, Section 1, of the Minnesota Constitution and Minnesota Statutes 1945, Section 272.02.

Cf. Opinion 206, 1948 Published Opinion.

In such case, they are entitled to exemption from personal property ad valorem assessment.

CHARLES P. STONE,
Assistant Attorney General.

Austin City Attorney.
April 11, 1950. 414-a-11

229

Public property—Used exclusively for a public purpose—Veterans housing project taken over by city from federal government.

Facts

In the early part of 1947 a veterans housing project was instituted in the City of Bemidji. The project was financed by the federal government, and has been operated since its inception by the city. In January of 1950

the federal government relinquished and transferred to the city all of its contractional rights, including the rights to revenues from and its title and interest in and to the project. The relinquishment was based upon the representation by the city that in filling vacancies in the housing project it would continue to give preference to veterans and service men.

At the present time there are 39 dwelling units which rent for an average of $24 a month per unit. The units are occupied exclusively by veterans or families of veterans. The cost of upkeep is slightly less than the rental income.

Question

Is the property now owned by the City of Bemidji subject to ad valorem property assessment?

Opinion

We assume that the City of Bemidji has not proceeded under M. S. 1949, Sections 462.411 to 462.711 (The Municipal Housing and Redevelopment Act) or Sections 462.72 to 462.82 (The Emergency Housing Act).

The City of Bemidji was organized and operates under a home rule charter. Chapter 1, Section 1, of that charter authorizes the city to "take, hold, purchase, lease and convey all such real, personal and mixed property, within or without the limit of said district, as the purpose of the corporation may require, or the transaction or exigencies of its business may render convenient." Chapter 8, Section 1, of that charter provides that the city is empowered "to acquire, by purchase, condemnation, proceeding or otherwise, any property, corporeal or incorporeal, wheresoever situated, either within or without the limits of the city, which may be needed by the city, or any board or department thereof, for any public purpose whatever."

This office has ruled that if the city councils of the home rule charter cities of Albert Lea and Austin were of the opinion that emergencies existed by reason of the lack of housing facilities for returned service men and their families, the charter provisions of those cities were sufficiently broad to authorize the cities to lease housing units from the National Housing Agency on a dollar a year basis, move them from their locations to the cities, and erect, operate and maintain them, provided that they were rented only to service men and their families,

Opinion dated September 28, 1945, File No. 59-a-40 (copy enclosed)

Opinion dated October 11, 1945, File No. 59a-40 (copy enclosed)
and that no profit was to be made by the cities.

See Opinion No. 206, 1948 Published Opinions of Attorney General
This was on the theory that the public good would be promoted by evidencing a proper regard for those returning from military service, and that the projects would be undertaken with the intention of preventing consequences which might reasonably be anticipated to result in public injury from the lack of shelter accommodations.

While the provisions of the charter of Bemidji and those of the charters of Albert Lea and Austin are not identical, it is the opinion of this office that they are sufficiently broad to permit us to reach the same conclusion in the case of the City of Bemidji as we reached in the cases of the cities of Albert Lea and Austin.

This office has also ruled that the home rule charter city of Red Wing has authority to accept from the federal government a gift of housing units such as those herein referred to, and to operate the project as a public enterprise, if it is operated without the expenditure of any tax money, on the theory that in so doing the municipality is performing a public service and purpose for the benefit of its citizens.

Opinion dated September 23, 1949, File No. 430, addressed to City Attorney of Red Wing (copy enclosed).

Upon the basis of these opinions, it is our opinion that if a housing emergency existed in the City of Bemidji in January, 1950, when the City took over ownership of the housing units, and still exists, and if the units, under the new arrangement, continue to be rented only to veterans and service men, and if the rentals are fixed at a figure intended to merely cover operating expenses and the intention is not to realize a profit (even though a slight profit may be made from time to time), such property is entitled to exemption from ad valorem assessment as "public property used exclusively for a public purpose."

See also Opinion dated April 11, 1950, File No. 414-a-11 (copy enclosed).

CHARLES P. STONE,
Assistant Attorney General.

Bemidji City Attorney.
August 24, 1950. 414-a-11

230

Railroad property—Gross earnings tax—Exemption or commutation of ad valorem tax in lieu thereof—Determined by use of property—M. S. A., Sec. 295.02.

Facts

The Minneapolis, Northfield & Southern Railroad owns a tract of several acres within the corporate limits of the village of Golden Valley, adjoining its right of way. It is now proposed to have this tract rezoned from open development (residential) to commercial uses. If the tract is rezoned, it apparently will then be leased to various industrial concerns, who will erect factories and other businesses upon it, and may possibly make use of the railroad's facilities.

Question

Under these circumstances, will this tract of land be subject to ad valorem taxation, or will the gross earnings tax which the railroad company pays be in lieu thereof?

Opinion

M. S. A., Section 295.02, provides in part as follows:

> "Every railroad company owning or operating any line of railroad situated within, or partly within, this state shall, annually, pay into the state treasury, in lieu of all taxes upon all property within this state **owned or operated for railway purposes by such company,** including equipment, appurtenances, appendages and franchises thereof, a sum of money equal to five per cent of the gross earnings derived from the operation of such line of railway within this state.
>
> * * * * * * * * * * * "

The exemption from ordinary taxation of, or, more properly speaking, the substituted method of taxing railroad property is based upon the assumption that it will be held and used for the purposes for which the railroad company was created and through such use will yield to the company an income, and to the state a percentage thereof in lieu of direct taxation. Property held by a railroad company not used for railroad purposes is taxable in the ordinary way where the railroad company's charter does not expressly provide for an exemption of all property. This rule has been applied to the lands which have ceased to be used for railroad purposes and are either leased to private parties or allowed to remain vacant,

County of Ramsey v. Chicago, Milwaukee & St. Paul Ry. Co. (1885), 33 Minn. 537, 24 N. W. 313

Whitcomb v. Ramsey County (1904), 91 Minn. 238, 97 N. W. 879

State v. Chicago, St. P. M. & O. Ry. Co. (1918), 140 Minn. 440, 168 N. W. 180

and to lands held for railroad purposes in the indefinite future.

City of St. Paul v. St. Paul, Minneapolis & Manitoba Ry. Co. (1888), 39 Minn. 112, 38 N. W. 925.

Based upon these authorities, the specific answer to your question is that the tract of land in question will be subject to ad valorem taxation when it is leased to private parties.

It is our further opinion that if the tract of land is not presently being used for railroad purposes, and is not intended to be so used within a reasonable time in the future, (and the proposal to have it rezoned for commercial use by private parties would seem to negative any such intention) it is presently subject to ad valorem taxation, even though it has not yet been leased to private parties.

If and when the tract is leased to private parties and those parties erect buildings thereon, those buildings will be assessable as personal property to the lessees. They should not be included in the real estate assessments made of the tract.

See M. S. A., Sec. 272.03, Subd. 3 (3).

See also 1948 Minnesota Assessors Manual, pp. 99-102, 164-165.

CHARLES P. STONE,
Assistant Attorney General.

Golden Valley Village Attorney.
May 10, 1949. 216-i

231

Royalties—Received by village on leased property—M. S. A., Sec. 299.01—Minn. Const. Art. IX, Sec. 1.

Facts

Under date of July 23, 1945, the Village of Aurora, by quitclaim deed, acquired title to the following described property in St. Louis County:

E½ SW¼, NW¼ SW¼, N½ SE¼ and SW¼ SE¼, all in Section 4, Township 58, Range 15.

This property, commonly known as the Miller-Mohawk Mine, had been operated for many years as an open pit-underground operation. The known marketable ore had been exhausted, and the lease had been surrendered and the property reverted to the fee owners. These owners conveyed the property to the village.

After acquisition of the property, the village proceeded to plant some 50,000 trees thereon within the next two years and claimed to be using it as a municipal forest.

Under date of September 21, 1948, the village leased the entire property to the Syracuse Mining Company for a term of fifty years, granting to the lessee the exclusive right to explore for, mine, take out and remove from the premises any and all iron ores and iron-bearing materials found on, in, or under the land, together with the full right and authority to make any use of the land necessary for these purposes including the right to construct buildings thereon, to strip and cave the surface, dump waste on the property and cut and use timber on the property for mining purposes. By the terms of the lease, the village reserved to itself all merchantable timber upon the property and the right to enter upon the property to cut and remove the timber. The lease further provides that when and if the lessee

requires the use of any part of the surface of the property in connection with its mining operations, the village will be given six months to remove all merchantable timber from that part of the property.

Question

Is a royalty tax required to be paid upon the royalties paid under the terms of the lease by the Syracuse Mining Company to the Village of Aurora?

Opinion

M. S. A., Sec. 299.01, provides as follows:

> "There shall be levied and collected upon all royalty received during the year ending December 31, 1947, and upon all royalty received during each calendar year thereafter, for permission to explore, mine, take out and remove ore from land in this state, a tax of 11 per cent.
>
> "The increased rate provided hereby shall be applicable to all royalties received subsequent to December 31, 1946."

The provisions of this section are clear. The royalties received by the village from the private mining company for permission to explore, mine, take out and remove ore are subject to payment of the royalty tax imposed by Sec. 299.01 unless they fall within that provision of Article IX, Sec. 1, of the Minnesota Constitution which exempts "public property used exclusively for any public purpose."

We assume that in acquiring the tract of real estate as and for a municipal forest, the Village of Aurora acted pursuant to the provisions of M. S. A., Sec. 459.06. So long as the property was owned by the village and used as and for a municipal forest, it is our opinion that the property was entitled to exemption from taxation as public property used exclusively for a public purpose, under the provisions of Article IX, Sec. 1, of the Minnesota Constitution. It is our further opinion that as soon as the property was leased to the private mining company, it lost its exempt status and became subject to taxation.

County of Anoka v. City of St. Paul (1935), 194 Minn. 554, 261 N. W. 588. The rights given to the lessee by the terms of the lease are so broad, and so inconsistent with any claim that the property can still be used as and for a municipal forest, that we do not believe the property can now be considered to be public property used exclusively for a public purpose, entitled to exemption from taxation.

However, it does not follow that the royalties received by the village for permission to explore, mine, take out and remove ore from the property, are not exempt *from* taxation. These royalties themselves constitute property. Since they belong to the village, they are public property and assuming that they go into the general revenue fund of the village to be used, with other village moneys, for payment of proper village expenditures, they will be used exclusively for a public purpose.

It is therefore our opinion that any royalties received by the Village of Aurora for permission to explore, mine, take out and remove ore from the property involved are exempt from payment of the royalty tax imposed by Sec. 299.01.

CHARLES P. STONE,
Assistant Attorney General.

Commissioner of Taxation.
April 1, 1949. 414-A-11

INCOME

232

Surtax—For Payment of Veterans Adjusted Compensation Bonds—Whether Subject to Reduction by Credits—$5.00 Annual Tax—Who Required to Pay—M. S. A., Secs. 290.06, Subds. 4 and 5; 290.361, Subd. 6; 290.061, Subd. 2.

Questions

1. Minnesota Statutes Annotated, Section 290.06, Subdivision 5, provides that the rates of taxation fixed by Subdivision 2 of Section 290.06 as the several rates to be applied in computing the income taxes imposed by Chapter 290 upon individuals, estates, and trusts, are increased 5 per cent of such respective rates. It provides further that the increase of these rates of taxation shall be known as the surtax upon individuals, that the proceeds of the surtax are pledged to the payment of the bonds authorized by Laws 1949, Chapter 642, and that the surtax shall not be reduced below 5 per cent of the respective rates as they are now fixed by Subdivision 2.

Is the amount of the surtax imposed by Subdivision 5 of Section 290.06 subject to reduction by the credits provided for in Subdivision 3 of Section 290.06?

2. Section 290.06, Subdivision 4, provides that the rate of taxation fixed by Subdivision 1 of Section 290.06 as the rate to be applied in computing the privilege and income taxes imposed by Chapter 290 upon corporations is increased 5 per cent of such rate. It provides further that the increase in the rate of taxation shall be known as the surtax upon corporations other than banks, that the proceeds of the surtax are pledged to the payment of the bonds authorized by Laws 1949, Chapter 642, and that the surtax shall not be reduced below 3/10ths of 1 per cent.

Is the amount of the surtax imposed by Subdivision 4 of Section 290.06 subject to reduction by the credit provided for in Subdivision 3 of Section 290.06?

3. Section 290.361, Subdivision 6, provides that the rate of taxation fixed by Subdivision 2 of Section 290.361 as the rate to be applied in computing the privilege and income taxes imposed by Chapter 290 upon national

and state banks is increased 5 per cent of such rate. It provides further that the increase in the rate of taxation shall be known as the surtax upon national and state banks, that the proceeds of the surtax are pledged to the payment of the bonds authorized by Laws 1949, Chapter 642, and that the surtax shall not be reduced below 4/10ths of 1 per cent.

Is the amount of the surtax imposed by Subdivision 6 of Section 290.361 subject to reduction by the credit provided for in Subdivision 3 of Section 290.06?

4. Section 290.061, Subdivision 2, provides that in addition to all other taxes imposed by Chapter 290, an annual tax of $5.00 for each taxable year is imposed upon the taxable net income for such year of all persons, except corporations, who are required to make returns by Section 290.37.

Is such a person required to pay the $5.00 annual tax when his allowable deductions from gross income are in excess of his gross income assignable to this state?

Opinion

Question No. 1

Minnesota Statutes Annotated, Section 290.06, Subdivision 2, provides that the income taxes imposed by Chapter 290 upon individuals, estates, and trusts, other than those taxable as corporations, shall be computed either by applying a stated schedule of rates to their taxable net income, or, in the case of individuals whose adjusted gross income for the taxable year is less than $5,000, according to a stated schedule of taxes. Subdivision 3 of Section 290.06 provides that the tax "due under the foregoing computation shall be credited with certain specified credits."

The surtax due under Subdivision 5 of Section 290.06 is not a tax due under the computations set forth in Subdivision 2. It is an additional tax arrived at by using a percentage of the rates set forth in Subdivision 2. Since the credits permitted by Subdivision 3 are expressly limited to the taxes due under the computations provided for in Subdivision 2, it follows that the surtax imposed by Subdivision 5 is not subject to reduction by the credits provided for in Subdivision 3.

Under any other ruling, it would be possible to nullify the provision of Subdivision 5 that the surtax shall not be reduced below 5 per cent of the respective rates as they are now fixed by Subdivision 2, by merely increasing the credits in Subdivision 3.

Question No. 2

Section 290.06, Subdivision 1, provides that the privilege and income taxes imposed by Chapter 290 upon corporations shall be computed by applying to their taxable net income in excess of the applicable credits against net income allowed under Section 290.21 the rate of 6 per cent. The surtax due under Subdivision 4 of Section 290.06 is not a tax due under the com-

putation provided for in Subdivision 1. It is an additional tax arrived at by using a percentage of the rate set forth in Subdivision 1. Since the credit permitted by Subdivision 3 is expressly limited to taxes due under the computation provided for in Subdivision 1, it follows that the surtax imposed by Subdivision 4 is not subject to reduction by the credit provided for in Subdivision 3.

Question No. 3

Section 290.361, Subdivisions 1 and 2, provide that the tax imposed on national and state banks by Chapter 290 shall be governed by the provisions of Section 290.02, and shall be computed in the manner provided by Chapter 290 except that the rate shall be eight per cent instead of six per cent. Section 290.02 imposes a privilege tax upon corporations. The privilege and income taxes imposed by Chapter 290 upon corporations are computed according to the provisions of Section 290.06, Subdivision 1. The surtax due under Subdivision 6 of Section 290.361 is not a tax due under the computation provided for in Subdivision 1 of Section 290.06. Since the credit permitted by Subdivision 3 of Section 290.06 is expressly limited to taxes due under the computation provided for in Subdivision 1, it follows that the surtax imposed by Subdivision 6 of Section 290.361 is not subject to reduction by the credit provided for in Subdivision 3 of Section 290.06.

Question No. 4

We answer this question in the affirmative.

Section 290.061, Subdivision 2, imposes a new and additional tax upon the taxable net income for each taxable year of all persons other than corporations. Section 290.01, Subdivision 22, defines "taxable net income" as the net income assignable to this state, and provides that it shall be determined as provided in Sections 290.17 to 290.20. Section 290.18 provides that the taxable net income shall be computed by deducting from the gross income assignable to this state deductions of the kind permitted by Section 290.09.

The new annual tax is a flat sum of $5.00 and is not dependent upon any deductions, credits or rates of taxation such as apply in the computation of the taxes upon taxable net income under other provisions. It follows that the $5.00 annual tax is imposed without regard to tax liability for taxable net income under other provisions of law. It is our conclusion that if a person, other than a corporation, has net income assignable to the State of Minnesota, he is liable for the $5.00 whether or not he has taxable net income subject to tax under other provisions of law.

GEORGE B. SJOSELIUS,
Deputy Attorney General.

Commissioner of Taxation.
August 22, 1949. 531

233

Taxpayer — Individuals residing on Fort Snelling reservation — M. S. A., Chapter 290; 53 Stat. 575; 54 Stat. 1059.

Question

Are individuals residing in the area embraced in the Fort Snelling Reservation subject to the provisions of Minnesota Statutes Annotated, Chapter 290 (the Minnesota Income Tax Act)?

Opinion

By Laws 1889, Chapter 57, the State of Minnesota ceded jurisdiction to the United States of the territory embraced within the Fort Snelling Reservation, reserving from the cession of jurisdiction so granted only the right to serve civil and criminal process lawfully issued under authority of the state or departments thereof, and the right to make arrests. The state thus surrendered exclusive jurisdiction except as to the two specified reservations. It is clear that since it granted such exclusive jurisdiction to the United States, the State of Minnesota could not lawfully impose a tax upon income received by either residents or nonresidents of Minnesota from services performed on the reservation, unless Congress granted consent thereto. But Congress has granted such consent.

By the Act of April 12, 1939, C. 59, Title I, Section 4, 53 Stat. 575, 5 U. S. C. A., Par. 84a, (the Public Salary Tax Act), employees of the United States Government were rendered subject to taxation by the state within which they reside, regardless of whether or not their compensation was earned on a federal reservation. This resulted in the anomalous situation of a state being able to tax its own residents who were federal employees for income earned on a federal reservation, and being able to tax non-resident federal employees, whether living on or off the reservation, for income earned within the state proper, but being without authority to tax non-residents, federal and non-federal employees alike, and whether they lived on or off the reservation, for income earned on the reservation. To correct this situation Congress, on October 9, 1940, passed Public Act No. 819, 54 Stat. 1059, 4 U. S. C. A., Par. 14, Section 2 of which reads:

> "(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area. (b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940."

The construction of these federal statutes has been passed upon directly by the Pennsylvania Supreme Court in the case of **Kiker v. City of Philadelphia** (1943), 346 Pa. 624, 31 Atl. (2d) 289, cert. denied 320 U. S. 741, 64 S. Ct. 41, 88 L. Ed. 439. In that case the Commonwealth of Pennsylvania in 1827 had ceded exclusive jurisdiction to the United States of League Island, a navy yard lying within the corporate limits of the city of Philadelphia, reserving only the right to serve civil and criminal process. Pursuant to permission conferred by the legislature, in 1939 the city of Philadelphia enacted an ordinance providing for a tax on all incomes earned within the municipality. Kiker, a resident of New Jersey who was employed by the United States Government at the League Island Navy Yard, sought to restrain the imposition by the city of a tax upon his salary. In affirming the decision of the trial court dismissing the bill in equity, the Supreme Court said:

> "Having determined that Public Act No. 819 permits this Commonwealth and its subdivisions to enact legislation taxing the incomes of persons engaged on Federal reservations lying within the State's territory limits or boundaries, and that this statute as so construed does not violate the Constitution of the United States, we next pass to a consideration of the construction and applicability of the income tax ordinance of the City of Philadelphia. That ordinance, enacted on December 13, 1939, pursuant to permission of the legislature conferred upon that City by the Act of Assembly of August 5, 1932, P. L. 45, Sterling Act, 53 P. S., Secs. 4613-4615, provided for a general nondiscriminatory tax inter alia, on all incomes earned within that municipality. Although plaintiff's salary was at that time immune from the levy, when the immunity was removed by Public Act No. 819, which receded to Philadelphia jurisdiction to impose taxes on League Island, the ordinance became applicable there without further action by either the State legislature or city council. * * * Plaintiff argues that the phrase of the ordinance 'in Philadelphia' excluded League Island because it is not within Philadelphia. This contention is without merit, for obviously that phrase was intended to mean within the geographical limits of that City. As is clearly shown by the Act of February 2, 1854, P. L. 21 (incorporating the City) and the statutes granting consent to its purchase and ceding jurisdiction over League Island, as well as the Federal government's Certificate of Acceptance thereof, the reservation is within the City's territorial boundaries, and the area comprising the island is not, by the phrase 'in Philadelphia' excluded from the rest of the City where the tax is clearly applicable. See Rainier Nat. Park Co. v. Martin, D. C. 18 F. Supp. 481, affirmed 302 U. S. 661, 58 S. Ct. 478, 82 L. Ed. 511; Standard Oil Co. v. California, supra, 291 U. S. page 243, 54 S. Ct. 381, 78 L. Ed. 775. * * *
>
> "We conclude, after carefully considering all of the arguments advanced by plaintiff, that the Philadelphia income tax ordinance is applicable to him, and that, as so applied, it is not unconstitutional."

See also **City of Philadelphia v. Cline** (1945), 158 Pa. Super. 179, 44 Atl. (2d) 610, cert. denied 328 U. S. 848, 66 S. Ct. 1120.

The pertinent sections of Chapter 290 (the Minnesota income tax act) are 290.03, 290.08 (7) and 290.17. Section 290.03 provides for the imposition of an annual tax upon the taxable net income for the year of:

> "(2) Resident and non-resident individuals, except that no non-resident individual shall be taxed on his income from compensation for labor or personal services within this state during any taxable year unless he shall have been engaged in work within this state for more than 150 working days during such taxable year";

Section 290.08 (7) provides that salaries, wages, fees, commissions or other compensation received from the United States, its possessions, its agencies or instrumentalities by federal employees residing in "Federal areas" shall be excluded from gross income for all taxable years ending prior to January 1, 1941. And Article 8-6 of the 1947 Rules and Regulations promulgated by the Commissioner of Taxation (which have the force and effect of law) provides that the exemption referred to in Section 290.08 (7) does not apply after December 31, 1940. Section 290.17 provides that the entire income of all resident taxpayers from compensation for personal services shall be assigned to Minnesota, and the income of non-resident taxpayers from such source shall be assigned to Minnesota if, and to the extent that, the services are performed within Minnesota.

Under the authority of the two federal acts heretofore referred to, and the **Kiker** case, it is our opinion that all individuals residing in the area embraced in the Fort Snelling Reservation are subject to the provisions of Minnesota Statutes Annotated, Chapter 290.

CHARLES P. STONE,
Assistant Attorney General.

Commissioner of Taxation.
October 4, 1949. 531-K

LEVIES

234

County Agricultural Societies — M. S. A. 38.27 has general application throughout the state. This opinion follows that of August 31, 1948, and reverses that of November 2, 1949.

Opinion

On August 31, 1948, an opinion of the Attorney General was written addressed to the County Attorney of Freeborn County (File 519a). The subject of that opinion was M. S. A. 38.27, by the terms of which county boards are authorized to levy a tax not to exceed one-half mill upon all property subject to taxation in the county and to appropriate and pay over the pro-

ceeds of the tax when collected to any agricultural society of the county which is a member of the state agricultural society to assist the society in paying its financial obligations "now or hereafter created."

In that opinion, following the doctrine of **State v. Washburn,** 224 Minn. 269, 28 N. W. (2d) 652, and citing earlier cases to the same effect, the opinion was expressed that the county board of Freeborn County had authority to make the appropriation and to levy the tax mentioned.

It was therein intimated that, under the doctrine in the Washburn case, the section applied to all counties of the state.

On November 2, 1949, an opinion was rendered to the County Attorney of Fillmore County (same file) in which the opinion was expressed that the section of the statutes cited was limited in its application by the title of the 1927 act which was its source.

Since the second opinion was rendered, both opinions have been reconsidered by several members of the staff. I have concluded that the opinion dated November 2, 1949, is incorrect in its conclusion.

I have now concluded and it is my opinion that, since the adoption of Minnesota Revised Statutes by the act of March 8, 1945 (M. S., Preface, p. 5), M. S. A. 38.27 is of general application in all counties of the state. This conclusion is consistent with the doctrine in the Washburn case.

CHARLES E. HOUSTON,
Assistant Attorney General.

Fillmore County Attorney.
December 14, 1949. 519-A

235

Musical entertainment—Cities of the third class—May levy tax for musical entertainment under provisions of charter, or under M. S. A., § 449.08, subject to the tax limitations levy as provided for in the charter.

Questions

"(a) Does Sec. 449.08, M. S. A., take precedence over our Charter so that we can levy one mill for music purposes rather than one-half mill as provided by Charter, subject, of course to maximum of $2,000 as provided by said Sec. 449.08?

"(b) In the event Sec. 449.08, M. S. A., takes precedence over our Charter, can we levy this amount in excess of the 24 mill maximum provided by our City Charter?"

Opinion

Section 54 (No. 12) of the city charter reads as follows:

> "A musical entertainment fund, for the support of which fund the city council is authorized to annually levy against the taxable property of the city a tax in amount not exceeding a sum producible from one-half mill on the dollar of the latest assessed valuation of such taxable property prior to the time of every such levy; provided, that the amount of such tax and the expenditures therefrom shall be otherwise limited and controlled in accordance with the provisions of Chapter 426, General Laws 1917."

Laws 1917, c. 426, referred to therein, have been repealed. M. S. A. § 449.03. Section 449.08 authorizes cities of the third class to levy a tax of not exceeding one mill on all taxable property within the city for the purpose of providing musical entertainment for the general public, subject to an annual expenditure of $2,000 for such purpose.

Section 55 of the city charter, before amendment, contained a tax levy limitation of 12 mills, excepting from such limitation funds No. (1), interest fund; No. (2), sinking fund; No. (4), library fund; No. (5), park fund; No. (9), permanent improvement fund; and No. (14), hydrant rental, street lighting and electric power fund. It will be noted that fund No. (12), now under consideration, was not included in the funds excepted from the tax limitation levy of 12 mills. Obviously, in computing the aggregate amount authorized to be levied under this section, the entertainment fund, No. (12), should be included. It appears that § 55 of the charter has been amended, and the amended section now reads as follows:

> "That annual amount to be levied for general taxation in any year for all said funds, shall not exceed twenty-four (24) mills on the dollar of the latest previous assessed valuation of all taxable property in the City, and any levy in excess of such limitations, shall be void as to the excess."

This amendment containing a tax levy limitation of 24 mills does not, as provided for in the original section, except any funds in computing the aggregate amount of taxes authorized to be levied. The term "for all said funds" as used in the amended section includes the entertainment fund No. (12).

In our opinion the city may levy a tax for musical entertainment under § 54 (12) of the city charter or under M. S. A. § 449.08, subject, however, in either case, to the 24 mill limitation as provided for in the amendment of § 55 of the city charter.

We have examined attorney general's opinion dated March 19, 1941, file 519-H referred to in your letter, and find no inconsistency therein with the conclusion above stated. The charter provisions considered in connection with the above referred to opinion contain no express limitations such as those set forth in § 55 of your city charter.

As bearing upon specific charter provisions in conflict with general laws, see

Grant v. Berrisford, 94 Minn. 45, 101 N. W. 940, 1133;

Turner v. Snyder, 101 Minn. 481, 112 N. W. 868;

American Electric Co. v. City of Waseca, 102 Minn. 329, 113 N. W. 899;

Northern Pacific Railway Co. v. City of Duluth, 153 Minn. 122, 189 N. W. 937.

VICTOR J. MICHAELSON,
Special Assistant Attorney General.

Brainerd City Attorney
March 16, 1949. 519-H

236

Road and bridge—Town meeting—Record of proceedings—How proceedings can be attacked—M. S. A. 365.10, 275.10, subd. 4, 212.03.

Facts

At the recent town meeting in the town of Carlston a motion was made by a voter to levy a tax of $7,000 for road and bridge purposes. The motion was seconded. Thereupon, the chairman called for a vote of those in favor and there was no response. He then called for a vote of those opposed and there was no response. Thereupon, the chairman declared that it appeared to him that the motion was carried.

Thereafter, the town clerk in the minutes of the meeting made a record:

"On motion, it was ordered, that the following sums of money be raised by tax upon the taxable property in said Town for the following purposes for the current year:

For Road and Bridge.....$7,000.00
For Town fund..... 1,000.00"

The record discloses nothing about the vote.

Questions

1. Was there a legal proceeding for the levy and collection of $7,000 in taxes for road and bridge purposes?
2. If the proceedings were not regular, what steps should be taken by the town officers to hold another meeting and make a proper levy?

Opinion

The law usually requires towns to make written records of their transactions and proceedings had at their meetings, and such a record is conclusive of the facts stated so long as it stands as a record. 52 Am. Jur., Towns and Townships, Sec. 14.

Under direct attack a record does not import verity. No presumption arises to support it, and it can survive only in the event that it speaks the truth and is free from error. However, a record so far denotes absolute verity that it is not subject to collateral attack unless it is a nullity. The general rule applies only to such records as are required by law to be made and kept. 45 Am. Jur., Records and Recording Laws, Sec. 9, p. 423.

M. S. A. 365.10 relates to the powers of town meetings. Among the powers enumerated is the power to vote money for the repair and construction of roads and bridges. Of course this really means to levy a tax for this purpose.

The procedure relating to tax levies requires that the levy be certified by the town to the county auditor. The law calls this a return. M. S. A. 275.10, subd. 4. Necessarily, this return or certificate showing the levy is in writing. Without doubt, that is the reason that the clerk made the record in the minutes above set forth.

> "The general rule that records cannot be contradicted by parol evidence has quite generally been extended to technical and legal requirements, conformity with which is recited in records; and so, where the records of a city council, kept as required by law, recited that an ordinance was enacted in a certain manner, as by vote of two-thirds of the council, under suspension of the rule requiring three readings on three different days, parol evidence was held inadmissible to contradict the recital, as illustrated by Roberts v. Street Improv. Dist. (1922), 156 Ark. 248, 245 S. W. 489, and Lewis v. Forrest City Special Improv. Dist. (1923), 156 Ark. 356, 246 S. W. 867." 98 A. L. R. 1232.

Of necessity, the presiding officer at a legislative meeting has authority to declare any proposed measure carried or that the motion or resolution failed to carry. Thereupon, any member present, in conformity with rules, may appeal from the ruling of the chairman, whereupon the chairman is required, the motion being seconded, to put to a vote of those present whether the chair is sustained or overruled. In this case under consideration it does not appear that any appeal was taken from the ruling of the chairman and accordingly the clerk has recorded that this action was taken as declared by the chairman. It is my opinion that on the face of the record it appears that the levy of taxes in the sum of $7,000 was made for road and bridge purposes.

The method of calling special town meetings is specified in M. S. A. 212.03. If a special town meeting should be called in pursuance of authority of this section, it would appear to me to be proper that a voter, after the meeting is organized, make a motion to approve the minutes of the annual

town meeting held in March, 1950, whereupon the question would be before the meeting whether the meeting should approve the minutes of the clerk as he has written them. If they are disapproved, and if the notice calling the special meeting makes due provision therefor, a motion could then be made to levy the amount of tax which the meeting shall choose to levy.

The motion might be in different form. It might be made to disapprove the minutes of the March, 1950, annual meeting in so far as those minutes relate to the levy of taxes for road and bridge purposes.

CHARLES E. HOUSTON,
Assistant Attorney General.

Attorney, Town of Carlston.
March 30, 1950. 519-K

237

School districts — Reorganized — Where component former districts have in some cases levied taxes and in other cases no taxes were levied desires to levy one uniform tax—method outlined.

Facts

Several school districts in Renville County have been reorganized into one district. The reorganized district includes the district in which the village of Renville is situated. I assume that most of the districts reorganized were common school districts and that the Renville district was an independent district. The reorganized district is an independent school district.

At the annual meeting in several of the common school districts, taxes were voted as required by law. The taxes voted in the several common school districts were in varying amounts so that if the taxes so levied are spread, the taxes in one such district will not be at a rate uniform with the taxes spread in other districts. Some common school districts failed to levy any taxes at all.

You comment that this gives rise to a situation which will be unjust since the tax rate in the various component areas of the district will have no uniformity.

Question

As I understand your problem, the thing that you are trying to accomplish is that such steps shall now be taken as will produce a situation similar to that which would have existed if all of the reorganized districts had been included in one district before any taxes were levied by such districts.

Opinion

Without dealing with the specific questions submitted in your letter, I think that we get at the meat of the problem as hereinafter outlined.

The present reorganized district is the successor of each former district, the area of which is now entirely included in the reorganized district. So, the board in the reorganized district is the successor of the governing body in each former district which is now entirely included in the reorganized district. That being the case, I suggest that the present board in the reorganized district adopt a resolution revoking each tax levy heretofore made by any school board heretofore existing in a district, the area of which is now included in the reorganized district. The clerk of the reorganized district will then transmit a copy of that resolution to the county auditor.

Then, the board in the reorganized district will levy its taxes just as though the district had always existed as it now exists. Such tax levy will be certified to the county auditor by the clerk of the reorganized district and will be spread by the county auditor over the entire present district. The result will be the same as though the tax levies had not been made in the individual districts and the result will be the same as though this district had always existed with its present boundaries.

Now, if this does not solve your problem, let me know and I will try to consider the specific questions submitted. But I think that this is a solution to the problem which confronts the board.

This opinion does not apply to a tax levy made to pay bonded indebtedness.

CHARLES E. HOUSTON,
Assistant Attorney General.

Renville County Attorney.
November 29, 1950. 519-M

MONEY AND CREDITS

238

Assessed valuation — Valuation placed on money and credits — Assessed valuation of money and credits in City of Benson as equalized in 1942 is not to be included in determining "assessed valuation" of taxable property within the meaning of the City of Benson Charter.

Facts

"The City of Benson is governed by a charter adopted in February, 1908. This charter permits a levy for taxes for any purpose, except special purposes enumerated in the charter, in an amount each year not exceeding 2% of the 'assessed valuation.' (Charter — Chapter 5, Sec. 2.)

"There is no limitation on the taxes that may be raised for the special purposes mentioned except as therein provided.

"The assessed valuation of the real and personal property, as equalized by the Department of Taxation in 1948, for the City of Benson, was $1,043,276.00. This figure employs a valuation on rural homestead property at 33⅓% of the full and true value, and on all other homesteads at 40% of the true and full value. The value of money and credits, as finally equalized in 1942 for the City of Benson, was $588,051.00. If this value could be added to the value of the real and personal property mentioned to determine the amount of the 'assessed valuation' upon which the tax levy limitation is calculated, the amount that the City could raise under the charter would be much greater than otherwise."

Question

Should the assessed valuation of money and credits in the City of Benson, as finally equalized for the year 1942, be included in determining the 1950 "assessed valuation" of the taxable property of said city within the meaning of Chapter V, Sec. 2, of said Charter of the City of Benson?

Opinion

The question is answered in the negative.

Chapter V, § 2, of the Charter of the City of Benson, so far as here material, provides:

"The City Council shall have the power to levy upon all the **taxable property** of said City taxes to provide for the current expenses of the City government, and for the acquiring, improving and maintaining of public grounds and the construction of buildings and improvements of a public character, and for other purposes conducive to good order, general welfare, health, cleanliness and protection against crime; provided, that all taxes levied for any purpose except special taxes hereinafter enumerated, shall in no year exceed two per cent of the **assessed valuation.**"

Obviously, the phrase **"assessed valuation"** in the above quoted provision of the charter refers back to the phrase **"taxable property."** Thus, the limitation of the proviso is that all taxes levied for any purpose other than special taxes shall in no year exceed two per cent of the assessed valuation of the taxable property of the city. A limitation of two per cent of the "assessed valuation" is equal to a limitation of 20 mills on the dollar.

L. 1911, c. 285, provided for the separate taxation of money and credits on the basis of three mills against the full value thereof and provided further that the money and credits tax paid thereunder "shall be apportioned, one-sixth to the revenue fund of the State of Minnesota, one-sixth to the county revenue fund, one-third to the city, village or town and one-third to the school district in which the property is assessed." The pertinent provision of § 1, c. 285, L. 1911, follows:

"'Money' and 'credits' as the same are defined in section 798, 'Revised Laws of 1905' **are hereby exempted from taxation other than that imposed by this act and shall hereafter be subject to an annual tax of three mills on each dollar of the fair cash value thereof.**"

That was a clear legislative direction that money and credits should thereafter be subject to no other tax than an annual tax of three mills on each dollar of the fair cash value thereof.

In 1943 the legislature suspended the tax on money and credits for the years 1943 and 1944. L. 1943, c. 656, § 30. In 1945 the legislature specifically and completely exempted money and credits from taxation. L. 1945, c. 453, § 1 (now coded as M. S. 1949, § 285.021).

Attorney General's opinion No. 361 of the 1930 Report, file 614-R, dealt with the construction of what was then G. S. 1923, § 1727, now coded as M. S. 1949, § 426.04. That statute then provided, as it now provides, that the governing body of any city of the fourth class in this state is authorized "to annually levy taxes against the taxable property in any such city for all general city and municipal purposes, not exceeding 25 mills on the dollar of the assessed valuation of the city." One of the questions considered in that opinion of the Attorney General was:

"In computing the tax levy provided for under section 1727, G. S. 1923, * * * should the valuations placed on moneys and credits be included or excluded in determining the taxable valuation?"

That opinion concluded that "moneys and credits should be excluded in calculating the amount of tax which may be levied" under the statute there involved.

The writer of the opinion of the Attorney General dated February 6, 1930, said:

"It is clear that under the case of Hicken v. Board of Education of the City of Duluth, 153 Minn. 120, 189 N. W. 709, moneys and credits should be included in determining the assessed valuation of any municipality under statutes authorizing the issuance of bonds. It does not follow from this decision, however, that the same rule would apply to statutes such as those above cited levying a tax.

"* * * The five mills which the county may levy under section 2060 could not be collected on the moneys and credits. The deficit arising from that fact would have to be collected from the other real and personal property which would mean that it would be taxed at a rate somewhat greater than five mills for county purposes.

"Similarly under General Statutes 1923, section 1727, if a city of the fourth class should levy as taxes an amount of money equal to 25 mills on the dollar of the assessed valuation including moneys and credits the auditor would have to spread the entire tax against the real and personal property excluding moneys and credits which would result in that property paying a tax in excess of 25 mills for city purposes.

"It seems to us that this result was not contemplated by the legislature and that when the levy was put at 25 mills under section 1727 for city purposes * * * it was intended that that percentage should be figured on the property which would be called upon to pay the levy, and the portion of the assessed valuation representing moneys and credits, which would not contribute in any way to pay the levy, should not be included in figuring the percentage."

The reasoning of the opinion of the Attorney General dated February 6, 1930, is equally applicable to your question.

As hereinbefore noted, by L. 1945, c. 453, § 1 (M. S. 1949, § 285.021, subd. 1), the legislature specifically and completely exempted money and credits from taxation.

L. 1945, c. 453, specifically provided that the exemption granted thereby should not preclude the taking of money and credits into account in determining the assessed value thereof as finally equalized in 1942 "for the purpose of computing the limit of indebtedness prescribed by any general law or by the special law or home rule charter" under which the municipality operated, nor preclude the taking of such money and credits into account "for the purpose of determining salaries of public officers, or for any other purpose."

But § 2 of c. 453, L. 1945, quite significantly, provided:

"Any county, city of any class, village, borough, or town, may, notwithstanding any millage limitation imposed by law or home rule charter, levy a tax in excess thereof, but not in excess of the tax on money and credits, assessed in said political subdivision for the year 1942, and apportioned to it in 1943 as provided in Mason's Minnesota Statutes of 1927, Section 2349."

The provision of the statute last above quoted is now coded as M. S. 1949, § 285.143. The obvious purpose of M. S. 1949, § 285.143 is to enable municipalities to recoup the loss in taxable income which they suffered through the repeal of the money and credits tax law. See **Governmental Research Bureau, Inc. v. Borgen**, 224 Minn. 313, at 321, 28 N. W. 2d 760.

It was never intended by the legislature by the enactment of what is now § 285.143 that the municipality should thereby gain a better position, so far as tax receipts are concerned, after the repeal of the money and credits law than it had before. The purpose of the statute was merely to enable the municipality to recover the loss in taxable income which it suffered by reason of the repeal of the money and credits tax law. Nothing more. Nothing less.

Prior to the suspension and repeal of the money and credits tax law, the City of Benson was entitled to one-third of all taxes paid to the county treasurer of its county under the provisions of the money and credits tax law. During the existence of the money and credits tax law, the City of Benson was not authorized under its charter to levy an amount equal to 20 mills on the dollar against the assessed value of money and credits

within the municipality as finally equalized, because, under the money and credits tax law, money and credits were exempt from taxation except for the annual tax of three mills on each dollar of the fair cash value thereof. To say that the City of Benson may now apply to the assessed valuation of money and credits in that municipality for the year 1942 its charter limitation of 20 mills on the dollar would not only enable the City of Benson to do something which it could not do during the existence of the money and credits tax law, but would do violence to the express language of the legislature used in what is now § 285.143.

M. S. 1949, § 285.143 controls and is dispositive of your question. The City of Benson may, notwithstanding any millage limitation imposed by law or home rule charter, levy a tax in an **amount equal to the amount apportioned to the city in 1943 upon the basis of the 1942 assessment of money and credits in the City of Benson.**

LOWELL J. GRADY,
Assistant Attorney General.

Public Examiner.
September 12, 1950. 614-R

MOTOR VEHICLES

239

Exemption — Motor vehicle owned and used exclusively for village purposes is exempt from taxation—Const. Art. IX, Sec. 1. **M. S. 1949, 168.012, furnishes a reasonable means of identification of publicly owned vehicles.**

Facts

"The Village of St. Louis Park recently acquired an automobile which it desires to place at the disposal of the Village Engineer. The Council considers it desirable that there be no sign on the car indicating that it is a Village car because the Engineer is often called upon to make investigations where it would be desirable that he appear in a private automobile.

"The Village Clerk is aware of the requirements of Sec. 168.012 which requires such a sign on tax exempt vehicles. He therefore made application to the Registrar of Motor Vehicles for registration on this automobile as a non-tax exempt vehicle and tendered the regular license fee. Registration was refused on the ground that Sec. 168.012 requires all vehicles owned by municipalities to be labeled and tax exempt."

Question

Does Sec. 168.012, supra, require that all municipal automobiles be registered as tax exempt vehicles and labeled unless they come within the exception of police and fire vehicles specified in the act, and does it follow that a village cannot register a vehicle as nontax exempt?

Opinion

M. S. 1949, 168.012 relates to motor vehicles and the taxation thereof and issuing licenses therefor. Certain motor vehicles are specified in this section to be exempt from taxation. Among vehicles exempt from taxes are those owned by the state or any political subdivision thereof. A village is not required to pay a tax on a motor vehicle which it owns. The language of this section that such vehicles shall be exempt is specific. Nevertheless, such vehicles are subject to registration. It is required that such vehicles display tax exempt number plates furnished by the registrar of motor vehicles at cost. Then, in the section, we read this language:

> "* * * * In the case of vehicles used in general police work the passenger vehicle classification license number plates shall be displayed and furnished by the registrar at cost; but the exemption herein provided shall not apply to any vehicles, except such vehicles used in general police work, unless the name of the state department or political subdivision owning such vehicle shall be plainly printed on both sides thereof in letters not less than 2½ inches high, one inch wide and of a ⅜ inch stroke. * * *"

More detail is stated as to the printing. In this section, we further read:

> "* * * The owner of any such vehicle **desiring** to come under the foregoing exemption provisions shall first notify the chief of the state trunk highway patrol who shall provide suitable seals and cause the same to be affixed to any such vehicle. * * *"

Public property used exclusively for any public purpose shall be exempt from taxation. Minn. Const. Art. IX, Sec. 1. So, in my opinion, if this automobile owned by the village of St. Louis Park, in other words, owned by the public, is used exclusively for a public purpose, it is not subject to taxation and no act of the legislature will make it subject to taxation. But the act of the legislature does provide for identification of the unit and makes regulations as to how the law shall be administered to obtain the identification. In **Foster v. City of Duluth**, 120 Minn. 484, 140 N. W. 129, Judge Bunn, in the opinion, very concisely and plainly deals with the subject of the inability to tax public property devoted to a public use. He plainly states that the reason that it is not subject to taxation is not because of any provision in the statutes declaring it exempt but because of its character as public property devoted to a public use.

While the legislature is not at liberty to tax this property, it is at liberty to provide means by which the automobile may be identified and to set up procedure to obtain the plates which will identify it. I believe

there is no doubt that it has the right to require that public vehicles be labeled, as this act requires them to be labeled. There has been abuse of the use of public vehicles for private purposes and, doubtless, this statute is considered to safeguard against such abuse.

It appears to me that the licensing authority, knowing that this vehicle is owned by a village and used for public purpose, has no right to collect a tax upon the vehicle, even though the village offers to pay such tax. And I see no right on the part of the village officers to pay a tax upon a vehicle which the Constitution says is not subject to taxation.

CHARLES E. HOUSTON,
Assistant Attorney General.

St. Louis Park Village Attorney.
November 30, 1950. 632-a-14

240

Personal Property — Abatement — Taxes on motor vehicles licensed in 1949 — Abated in full — Minn. St. 1945, § 168.06, Subds. 1 and 7; L. 1949, c. 694, § 3, Subd. 5; §§ 5 and 6.

Facts

L. 1949, C. 694, Sec. 3, Subd. 5, reads in part as follows:

"If such motor vehicle be registered and taxed under this act for a fractional part of the calendar year only, then such ad valorem tax shall be reduced in the percentage which such fractional part of the year bears to a full year."

Question

"Whether the taxes resulting from the assessment of new automobiles in a dealer's hands on May 1, 1949, in instances where the automobiles were sold and, subsequently during the calendar year were licensed as motor vehicles, may be abated in full in accordance with the language of Minnesota Statutes 1945, Section 168.06, Subdivision 7, or may be abated only on a pro rata basis as provided for under Laws of Minnesota, Chapter 694, Section 3, * * * Subdivision 5."

Opinion

Laws 1949, Chapter 694, Sections 5 and 6, read as follows:

"Sec. 5. Minnesota Statutes 1945, Section 168.01, Sections 168.02, 168.03, 168.06, 168.073, 168.075, 168.08, 168.14, 168.163, and Section 168.165, the third paragraph; and Laws 1947, Chapter 462, and Laws 1947, Chapter 551, Sections 1, 2, and 3, are hereby repealed save only as to the registrations and taxation of motor vehicles for the year 1949.

"Sec. 6. On and after October 1, 1949, this act shall be in full force and effect for motor vehicle registration and taxation for the year 1950 and subsequent years."

The ad valorem taxation of motor vehicles as personal property is on a calendar year basis. The licensing of motor vehicles is likewise on a calendar year basis. Minn. St. 1945, Sec. 168.06, Subd. 7, provides, among other things, that the ad valorem taxes resulting from the assessment of taxes on any automobiles in dealer's hands on May 1 of any calendar year, which, of course, includes the year 1949, with which we are here concerned, in instances where the automobiles are sold and, subsequently during the same calendar year licensed as motor vehicles, may be abated in full by the Commissioner of Taxation. L. 1949, c. 694, Sec. 3, Subd. 5, provides that the abatement of such ad valorem taxes under such circumstances shall be on a pro rata basis, as therein provided.

Sec. 5, quoted above, specifically provides that the old applicable provisions of law were not repealed as to registration and taxation of motor vehicles for the year 1949. Sec. 6, quoted above, clearly provides that c. 694 shall be effective only as to motor vehicle registration and taxation for the year 1950 and subsequent years. It is our conclusion that ad valorem taxes assessed upon any automobiles in a dealer's hands on May 1, 1949, and thereafter sold and, subsequently during the calendar year, licensed as motor vehicles, may be abated in full as provided in Minn. St. 1945, Sec. 168.06, Subd. 1, and that ad valorem taxes resulting from the assessment of taxes on any automobiles in dealer's hands on May 1, 1950, and subsequent years may be abated only on a pro rata basis as provided by L. 1949, c. 694, Sec. 3, Subd. 5.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Commissioner of Taxation.
September 16, 1949. 407-K

241

Personal property — New and unused motor vehicles for which license plates have been purchased by dealer prior to May 1 — L. 1949, c. 694 construed.

Facts

On April 15, 1950, an automotive agency will have on hand for the purpose of sale a number of new and unused motor vehicles. On that date the agency will purchase license plates for each of these vehicles.

Question

Will the vehicles then be exempt from ad valorem tax as of May 1, 1950?

Opinion

The pertinent provisions of the statutes are:

Laws 1949, Chapter 694, Section 3, Subdivision 1 (M. S. A., Sec. 168.013, Subd. 1):

> "Motor vehicles, except as set forth in Section 2 of this act, **using the public streets or highways in the state,** shall be taxed in lieu of all other taxes thereon, * * *, and shall be privileged to use the public streets and highways, on the basis and at the rate for each calendar year as follows:
>
> * * * ."

Minnesota Statutes 1945, Section 168.28:

> "* * * New and unused motor vehicles in the possession of a dealer solely for the purpose of sale, * * *, shall not be deemed to be vehicles using the public streets or highways * * *."

Laws 1949, Chapter 694, Section 3, Subd. 2 (M. S. A., Sec. 168.013, Subd. 2):

> "When a motor vehicle first becomes subject to taxation during the calendar year for which the tax is paid, the tax shall be for the remainder of the year pro-rated on a monthly basis; one-twelfth of the annual tax for each calendar month or fraction thereof."

This office previously has ruled that new and unused motor vehicles in the possession of a dealer solely for the purpose of sale are not motor vehicles "using the public streets or highways in the state" and hence are not subject to the motor vehicle registration tax.

Opinion No. 322, 1940 Published Opinions.

Obviously, such motor vehicles, brought to the dealer's place of business by trailer-truck without themselves having been driven on the streets or highways, are not motor vehicles "using the public streets or highways in the state." Nor do we think that such motor vehicles have lost their classification as "New and unused motor vehicles in the possession of a dealer solely for the purpose of sale," within the purview of Section 168.28 above referred to, merely because they may have been driven over the streets or highways under their own power in order to reach the dealer's place of business or because they may have been driven a few miles over the streets or highways in connection with their being serviced preparatory to sale. They are still "New and unused motor vehicles in the possession of a dealer solely for the purpose of sale" and as such "shall not be deemed to be vehicles using the public streets or highways."

If these new and unused motor vehicles are still in the possession of the dealer solely for the purpose of sale on May 1, 1950, it is our opinion that they are subject to ad valorem taxation. They constitute personal property (Minnesota Statutes 1945, Sec. 272.03, as amended by Laws 1947, Chapter 325), all personal property in this state is taxable except such as is by law

exempt from taxation (Minnesota Statutes 1945, Sec. 272.01) and new and unused motor vehicles in the possession of a dealer solely for the purpose of sale do not fall within any of the enumerated classes of exempt property (Minnesota Statutes 1945, Sec. 272.02). It is our opinion that the purchase by the agency before May 1, 1950, of license plates for these new and unused cars held solely for the purpose of sale does not and cannot have any effect upon their taxability for ad valorem tax purposes. The motor vehicle registration tax is only in lieu of all other taxes on motor vehicles "using the public streets or highways in the state." Since the motor vehicles in question are not yet using the public streets or highways, they have not yet become subject to the motor vehicle registration tax "in lieu of all other taxes thereon."

In an earlier opinion (Opinion dated February 11, 1950, File No. 632-E-5) we pointed out that there is, of course, nothing to prevent a dealer from purchasing license plates for his new and unused cars before they become subject to motor vehicle tax, if he desires to do so. Assuming that the dealer prior to May 1, 1950, has elected to purchase license plates for the new and unused motor vehicles which he is still holding solely for the purpose of sale on May 1, 1950, that these motor vehicles are assessed on May 1, 1950, as personal property, and that the agency thereafter sells them and the new owners commence to drive them over the public streets and highways, the question next arises as to whether the dealer is entitled to a reduction of the assessed valuation of the vehicles assessed for ad valorem tax purposes as of May 1, 1950, and, if so, how much.

Laws 1949, Chapter 694, Section 3, Subdivision 5 (M. S. A., 168.013, Subd. 5), provides that if an ad valorem tax upon any motor vehicle has been assessed against a dealer in new and unused motor vehicles, and the tax imposed by Chapter 694 for the required period is thereafter paid by the owner, then upon proper showing the Commissioner of Taxation, upon the application of the dealer, shall grant the dealer a reduction of assessed valuation in the percentage which the fractional part of the calendar year for which the tax imposed by Chapter 694 was paid bears to a full year.

If the agency sells one of its new and unused cars of the kind referred to in this opinion after May 1, 1950, the date on which the new owner commences to drive the vehicle over the public streets and highways in the state is the date when that motor vehicle first becomes subject to taxation under Chapter 694, even though the agency purchased a license plate for the car on April 15, 1950. If that date is June 1, 1950, the motor vehicle then becomes subject to a pro rated tax for the remainder of the year of 7/12ths of the annual tax. It is common knowledge that new cars are listed for sale at fixed prices and that if the dealer pays the motor vehicle registration tax it is added to such price. We may therefore consider that the tax for the required period will in fact be paid by the new owner.

See **State ex rel. v. Minnesota Tax Commission** (1929), 178 Minn. 300, 227 N. W. 43.

It follows that the agency, upon proper showing upon application, will be entitled to a 7/12ths reduction of the assessed valuation of the car which it sells on June 1, 1950. The period from April 15, 1950 (when the agency purchased the license plate) to June 1, 1950, cannot be counted.

CHARLES P. STONE,
Assistant Attorney General.

Ramsey County Attorney.
April 11, 1950. 421-C-25

PERSONAL PROPERTY

242

Aircraft — Registration and taxation — Minnesota owner basing aircraft in adjoining state and occasionally using airspace overlying state and airports of state is required to register and pay tax on aircraft— M. S. 1949, §§ 360.51 to 360.67.

Facts

"'A' residing in the State of Minnesota owns an aircraft which is based in an adjoining state; the aircraft is used principally outside the State of Minnesota but does occasionally use the airspace overlying this state and the airports of Minnesota."

Question

"Under the above circumstances, must the aircraft be registered and tax be paid under the provisions" of the law relating to aircraft?

Opinion

The Aircraft Registration and Taxation Act is Minnesota Statutes 1949, §§ 360.51 to 360.67. Section 360.53, Subdivision 1, subjects all aircraft using the air space overlying the State of Minnesota and the airports thereof to a tax in lieu of all other taxes on the basis and at the rate prescribed in the act except certain aircraft, not material to your inquiry, exempt from the tax by Sections 360.54 and 360.55. Section 360.54 provides in part as follows:

"Every aircraft shall be presumed to be one using the air space overlying the state of Minnesota and the airports thereof, and thence subject to taxation under sections 360.51 to 360.67, if such aircraft has prior to the effective date of Laws 1945, Chapter 411, used such air space and airports, or shall actually use them or if it shall come into the possession of an owner in this state, * * *."

Section 360.55 exempts an aircraft owned by a nonresident of the state and transiently or temporarily using the air space overlying this state and the

airports thereof, unless such nonresident uses the air space overlying this state and the airports thereof for more than sixty days in any calendar year. Section 360.58 provides in part as follows:

> "No aircraft except as exempted by sections 360.54 and 360.55 shall use or be operated in the air space over this state or upon any of the airports thereof in any calendar year until it shall have been registered as required in sections 360.51 to 360.67 and the aircraft tax and fees herein provided shall have been paid * * *."

Section 360.59 requires each owner of any aircraft in this state, except as exempted under the sections previously indicated, to file a listing for taxation and an application for registration of the aircraft.

The aircraft referred to in the statement of facts is in the possession of a Minnesota owner thereof. It also actually uses the air space overlying the State of Minnesota and the airports thereof. It is not owned by a nonresident. It therefore must be registered and the tax paid thereon in view of the statutory provisions referred to herein. Your question is therefore answered in the affirmative.

The views expressed herein follow the opinion of this office to the Commissioner of Aeronautics dated June 3, 1946, relating to Laws 1945, Chapters 303 and 411 (our file 234-b).

JOSEPH J. BRIGHT,
Assistant Attorney General.

Department of Aeronautics. 234
April 27, 1950. 421-C-4

243

Assessments — Erroneous — Procedure for correcting after judgment — M. S. 1949, Sec. 270.07.

Facts

In 1949 an assessment of personal property was made against A. The assessment included certain personal property which A claims is not his. A was not aware of this fact until he was about to pay his tax in February, 1950. At that time he called the attention of the county treasurer to the matter, and paid the first half of the tax. He did not pay the second half of the tax and judgment has been entered against him therefor. A has now appeared before the county board asking for relief.

Question

What is the proper procedure to be taken to give A relief, in view of the fact that judgment has been entered against him?

Opinion

The only statutory provision of which we are aware under which action may be taken at this late date to give the taxpayer in question relief is Minnesota Statutes 1949, Section 270.07. This section of the statutes authorizes the Commissioner of Taxation, upon application therefor being submitted to him with a statement of facts in the case and the favorable recommendation of the county board and county auditor, to order such reduction of assessed valuations or taxes and of any costs, penalties or interest thereon, as he may deem just and equitable. This authority has been held to include personal as well as real property taxes, either before or after the entry of judgment.

Opinion dated May 11, 1940, File No. 421-a-8.

See also Opinions Numbered 232 and 771, 1934 Published Opinions of the Attorney General, and Opinion dated May 6, 1929, File No. 421-a-8.

CHARLES P. STONE,
Assistant Attorney General.

Brown County Attorney.
August 16, 1950. 421-a-8

244

Assessments omitted — Procedure for adding to tax list—M. S. A., Sec. 273.02.

Facts

An omitted assessment for 1948 of certain personal property was made, and the resulting tax added to the tax roll, after April 1, 1949. On August 11, 1949, the County Treasurer of Brown County certified the tax to the Clerk of the District Court as a delinquent personal property tax.

Question

What is the correct procedure for obtaining payment of this tax?

Opinion

We assume that the county auditor was proceeding under and by virtue of the provisions of Minnesota Statutes Annotated, Section 273.02, when he assessed the personal property referred to as omitted property for the year 1948 and added the assessment to the tax roll after April 1, 1949. Section 273.02, Subdivision 1, provides that if any personal property be omitted in the assessment of any year, and the property thereby escape taxation, when such omission is discovered the County Auditor shall enter such property on the assessment and tax books for the year omitted, and shall assess the property and extend against the same on the tax list for the current year

all arrearage of taxes properly accruing against it, including interest thereon at the rate of seven per cent per annum from the time the tax would have become delinquent, if the omission was caused by the failure of the owner to list the property.

Since the county auditor already had delivered the tax list for 1948 to the county treasurer long prior to April 1, 1949, thereby relinquishing all control thereover, we do not see how he had any authority to add the omitted property assessment to the 1948 list. In our opinion, he will have to wait and extend the 1948 tax against the property on the 1949 tax list. Nor do we know of any authority for the county treasurer to certify delinquent personal property taxes to the clerk of the district court at times other than those specified in Section 277.02. The premature actions of both the county auditor and county treasurer should be disregarded.

The 1948 tax resulting from the omitted property assessment should be extended against the property on the 1949 tax list in the manner outlined in Subdivision 1 of Section 273.02. If it is not paid prior to the fifth secular day of April, 1950, it should be included in the list of delinquent taxes certified to by the County Treasurer and filed by him with the Clerk of the District Court on that date. In the meantime, if the omission of the personal property from the May 1, 1948, assessment was caused by the failure of the owner to list the property, the tax will carry interest at the rate of seven per cent per annum from March 1, 1949.

After the tax is included in the list of delinquent taxes certified to by the county treasurer and filed by him with the clerk of the district court on the fifth secular day of April, 1950, the same proceedings should be had with reference to collection of the tax as are had with reference to taxes on other personal property on the list of delinquent personal property taxes.

CHARLES P. STONE,
Assistant Attorney General.

Brown County Attorney.
November 21, 1949. 554-i

245

Buildings — Upon railroad right of way — Procedure when incorrectly included in real estate assessment — M. S. A., Secs. 272.03, Subd. 2; 270.07; and 273.02.

Facts

A railroad company leased a portion of its right of way to an individual for commercial purposes. The individual constructed upon the leased premises the buildings necessary for the operation of a lumber yard, and was operating his yard in 1948.

In making his 1948 assessment, the local assessor included the value of the buildings in his assessment of the tract of real estate. When the railroad company discovered this situation at the time it came into the county treasurer's office to pay the real estate tax on the leased tract in 1949, it tendered to the county treasurer only so much of the tax as was attributed to the bare tract. The county treasurer accepted the tender.

Questions

"How would you now consider the buildings? They should have originally been assessed as personal property, see Section 272.03, Subd. 3, Item 3, Minnesota Statutes 1945. Should they now be regarded as omitted personal property and so be added to next year's assessment under Section 273.02, Minnesota Statutes 1945? Further, how can we remove them from the tax list in the Treasurer's hands at the present time? Since they are assessed as real estate apparently this tax will not be paid and since they are not properly assessed there is no way of forcing their payment as a tax on real estate."

Opinion

M. S. A., Section 272.03, Subd. 2, provides in part as follows:

"For the purposes of taxation 'personal property' includes:

* * *.

(3) All improvements upon land the fee of which is vested in the United States, and all improvements upon land the title to which is vested in any corporation whose property is not subject to the same mode and rule of taxation as other property."

It necessarily follows that the buildings in question, being located on railroad right of way, are taxable as personal property and should have been listed, assessed and taxed against the individual owner of the buildings.

Opinion No. 388, 1944 Published Opinions of the Attorney General.

The 1948 real estate assessment, which patently is incorrect to the extent that it includes the value of the buildings, can be corrected by application for a reduction in assessed valuation to the extent of the value of the buildings, made by the railroad company under M. S. A., Section 270.07. Unless and until this is done, the records will continue to show an unpaid tax against the tract, and the railroad company will be in danger of losing the tract by tax judgment and subsequent forfeiture. The payment which the county treasurer accepted did not constitute a payment of the tax assessed against the tract. He had no authority to accept the payment as a payment of the tax, since there is no legal provision for making partial payments on real estate taxes (at least without a court order), except the provision (M. S. A., Section 279.01) allowing installment payments, either quarterly or semi-annually.

See Opinion dated April 19, 1945, File No. 450-F-1.

If the application for reduction in assessed valuation for 1948 is granted prior to the spreading of the 1949 tax it will be unnecessary to file a similar application for a reduction in the 1949 assessed valuation.

In so far as the assessment of the buildings is concerned, an omitted personal property assessment for 1948 should be made against the individual owner of the buildings by the county auditor pursuant to the provisions of M. S. A., Section 273.02, as you suggest. And since the assessor has not yet turned in his books for 1949, there is still time to make a personal property assessment of the buildings against the individual owner thereof for this year.

CHARLES P. STONE,
Assistant Attorney General.

Waseca County Attorney.
June 16, 1949. 408

246

Exemption — Non-resident Army officer assigned as ROTC Instructor at U. of M.

Facts

An officer of the Army of the United States is an instructor in the ROTC at the University of Minnesota. He was assigned there in 1947 from army headquarters at Chicago, Illinois.

Question

Assuming that he is a resident of Illinois, is his personal property exempt from Minnesota ad valorem taxation?

Opinion

Section 574 of Title 50 of U. S. C. A. (the Soldiers' and Sailors' Civil Relief Act of 1940, as amended) provides in part as follows:

> "* * * For the purposes of taxation in respect of the personal property * * * of any such person [in military service] by any State * * * of which such person is not a resident or in which he is not domiciled, * * * personal property shall not be deemed to be located or present in or to have a situs for taxation in such State * * *."

This office heretofore has ruled that the provision of Section 574 above quoted is constitutional and binding upon the taxing officers of Minnesota.

Opinion dated February 28, 1946, File No. 421-b-1.

In that opinion it was pointed out that the language of Section 574 makes it clear that it does not extend immunity from taxation to a person in military service who, apart from his military service, has acquired a residence or domicile within the taxing state.

Section 584 of the Act provides as follows:

> "This Act shall remain in force until May 15, 1945; **Provided, That** should the United States be then engaged in a war, this Act shall remain in force until such war is terminated by a treaty of peace proclaimed by the President and for six months thereafter. * * *"

The United States was still engaged in war on May 15, 1945, and that war has not yet been terminated by a treaty of peace proclaimed by the President.

Assuming that the individual to whom you refer has not acquired a residence or domicile in Minnesota apart from his military service, and that he is still a resident of Illinois, it is our opinion that his personal property is immune from taxation in Minnesota.

CHARLES P. STONE,
Assistant Attorney General.

Washington County Attorney.
October 27, 1950. 421-B-1

247

Payment — Delinquent — Without penalty — Laws 1949, Chapter 269, (M. S. A., Sec. 277.01).

Facts

Laws 1949, Chapter 269 (M. S. A., Sec. 277.01), provides in part as follows:

> "Section 1. Delinquent personal property and money and credits taxes **prior to those levied for the year 1947** may be paid in full without penalty, interest, or costs, if such payment is made prior to December 1st, 1950, as hereinafter provided * * *."

It then goes on to provide that if the party offering to pay such taxes presents a tax receipt showing that the current personal property taxes then due and payable have been paid in full, the county auditor shall make a delinquent tax statement setting forth "all delinquent personal property and money and credits taxes against the person assessed for such taxes excluding penalties, interest and costs for the years prior to 1947."

Question

Does this mean that only the principal amount of the taxes for the years prior to 1947 need be included in the auditor's statement, or does it mean that there must also be included therein the principal amount of the 1947 and 1948 taxes, and of the 1949 tax if it is then delinquent, plus whatever penalties, interest and costs have accrued thereon?

Opinion

Minnesota Statutes Annotated, Section 277.01, provides that all unpaid personal property taxes shall be deemed delinquent on March 1st next after they become due, except that when the amount of the tax exceeds $10, if the first half is paid prior to March 1st and the remaining half is not paid before July 1st, the unpaid portion of the tax shall become delinquent on July 1st. Any 1947 and 1948 personal property taxes which are now unpaid are therefore delinquent. And any 1949 personal property tax which is not paid by March 1, 1950 (or by July 1, 1950, if the tax exceed $10 and the first half is paid prior to March 1, 1950), will be delinquent after that date.

Chapter 296 provides that the county auditor "shall make a delinquent tax statement setting forth **all delinquent** personal property and money and credits taxes" against the person assessed for such taxes. It is therefore our opinion that if the county auditor is called upon at any time between now and March 1, 1950, to make up a delinquent tax statement under Chapter 269, he must include therein the unpaid 1947 and 1948 personal property taxes, together with the penalties, interest and costs which have accrued thereon. It is our further opinion that after March 1, 1950, the auditor must also include any 1949 personal property tax the first half of which has not been paid by that date, and that after July 1, 1950, he must include in the statement the unpaid balance of any 1949 personal property tax, including in either case the accrued penalties, interest and costs.

CHARLES P. STONE,
Assistant Attorney General.

Wadena County Attorney.
July 8, 1949. 421-a-5

248

Payment — Installment payments — Authority of County Treasurer to accept after March 1 — M. S. 1945, Section 277.01.

Question

"Suppose that after March 1st and before July 1st a taxpayer with a (personal property) tax bill of more than $10.00 comes into the County Treasurer's office and pays all the penalty upon the entire tax for the entire year. Can the County Treasurer then accept one-half of the tax and give a receipt for one-half of the tax, plus penalties for the

entire tax for the entire year, and then later upon payment of the other one-half tax before the expiration of the year, issue his receipt for the balance of the tax due, only exclusive of penalties which have already been paid?"

Opinion

Minnesota Statutes 1945, Section 277.01, provides in part as follows:

"All unpaid personal property taxes shall be deemed **delinquent** on **March first** next after they become due, and thereafter a penalty of eight per cent shall attach and be charged upon all such taxes; except when the amount of such tax exceeds the sum of $10.00 the same shall not become delinquent if half thereof is paid **prior to March first** and the remaining half is paid prior to July first next following the year assessed; * * * ."

In construing this provision, this office in a previous opinion, opinion dated March 9, 1939, File 421A-5, has stated:

"In our opinion if the taxpayer did not before March 1 pay half of his personal property tax, then and in that event the entire amount of the personal property tax of such taxpayer became delinquent on March 1st. A penalty of eight per cent of the whole amount of such delinquent personal property tax attached thereto on said March 1st, and such penalty should be charged thereon. There is nothing in the laws relating to personal property taxes which gives the taxpayer any right to pay his personal property tax in two installments after it has become delinquent on March 1st."

It necessarily follows that the County Treasurer, after March 1, has no authority to accept and give a receipt for half of a personal property tax plus penalties for the entire tax, and then later accept and give a receipt for the balance.

We therefore answer your question in the negative.

CHARLES P. STONE,
Assistant Attorney General.

Itasca County Attorney.
March 31, 1950. 421-a-5

249

Situs — Coca Cola signs — M. S. A., Sec. 273.29.

Facts

The Coca Cola Bottling Company of St. Cloud is a distributor of coca cola for several counties including Benton County. Its main office is located in the City of St. Cloud in Stearns County. The Bottling Company receives advertising material from the Coca Cola Company and from the latter

company's advertising agency, and this material is incorporated into signs which the Bottling Company distributes and installs along the roads and at the places of business of its local dealers. Both the Bottling Company and the local dealers disclaim ownership of the signs, the Bottling Company insisting that the signs belong to the dealers and the dealers insisting that they belong to the Bottling Company.

Question

Where should these signs be assessed and to whom?

Opinion

To whom the signs should be assessed involves a question of fact which this office is in no position to answer. That can be determined only after all of the facts bearing upon the ownership of the signs have been developed and examined carefully by the local assessing officers.

In discussing the question of the situs of the signs for assessment purposes, we eliminate the possibility of their being owned by the Coca Cola Company, because neither the Bottling Company nor the dealers make any such claim.

If the local assessing officials determine that the Bottling Company is the owner of the signs, then in our opinion the situs of the signs for assessment purposes is in the City of St. Cloud in Stearns County. The Bottling Company, in our opinion, is a "merchant" within the definition of that term as it appears in M. S. A., Section 272.03, Subdivision 11. Section 273.29 provides that the personal property pertaining to the business of a merchant shall be listed in the taxing district where that business is carried on. The Bottling Company has its main office in the City of St. Cloud in Stearns County. We assume that it has no other office, and that all of its sales and advertising activities are centered there. The signs certainly pertain to its business. Their only purpose is to stimulate the sale of its product.

If the local assessing officials determine that the signs are owned by the local dealers, then it is our opinion that the situs of each such sign for assessment purposes is in the taxing district where the place of business of the dealer-owner is located. It is our opinion that the local dealers of the Bottling Company are also merchants. Presumably, each such dealer has an office or place of business from which his business is carried on, and all of his business activities are centered there. The signs pertain to that business.

CHARLES P. STONE,
Assistant Attorney General.

Benton County Attorney.
October 6, 1949. 421-a-17

250

Situs — Equipment of contractor — M. S. A., Sec. 273.26.

Facts

"We have a contractor with but one principal place of business and that is in the Village of Crosby but he has a large amount of equipment scattered about in many localities in the State, all of which is personal property, * * *."

Question

"* * * we would like to know if we are within our rights in assessing all this property to this contractor in the Village of Crosby."

Opinion

M. S. A., Sec. 273.26 lays down the general rule of situs of personal property for ad valorem assessment purposes. It 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."

Of the exceptions referred to, only Section 273.28 which provides that the personal property of corporations shall be listed in the taxing district where the principal office or place of business of the corporation is located in Minnesota, and Section 273.29 which 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 business is carried on, could have any possible application in the instant case.

We assume that the contractor is an individual and not a corporation. This eliminates Section 273.28. We do not believe that his equipment constitutes property of a merchant or manufacturer (see Opinion No. 205, 1924 Published Opinions of the Attorney General). This eliminates Section 273.29.

It necessarily follows that the proper situs of the equipment of the contractor in this case is in the taxing district where he resides. If that taxing district is the Village of Crosby, the answer to your question is in the affirmative.

CHARLES P. STONE,
Assistant Attorney General.

Crosby Village Attorney.
May 6, 1949. 421-a-17

REAL ESTATE

251

Delinquent taxes — Default — Confession of judgment in tax proceedings — Practice as to notice to county officials — M. S. A. 279.37, Subd. 6.

Facts

Under M. S. A. 279.36 and 279.37, the clerk of the district court was authorized to enter what was known as a confession of judgment in which the confessor had no personal liability. In Sec. 279.37, Subd. 6, it is provided that:

> "Failure to make any payment required by the confessed judgment within 60 days from the date on which payment was due shall constitute a default."

After default has occurred, the right to make deferred payments has ceased. After default, the lands are subject to forfeiture under the tax laws.

Question

When "confession of judgment" on delinquent taxes is cancelled because of default, is it necessary to give some sort of notification to the clerk of court, and if so, what is the correct procedure?

Opinion

It is the fact of default and not any notice thereof to the clerk which sets the operation of the law in motion. The county treasurer is the officer who receives the payment. It would be proper practice, in view of the intent of the law, if between the county treasurer, the county auditor and the clerk of district court a practice should be established whereby after the passage of 60 days subsequent to the due date of an installment on a confessed judgment notice should be communicated either by the treasurer or by the auditor to the clerk of the district court of the existence of such default. Some office notation might be made thereof so that the machinery might again be set in motion as though no confession of judgment had theretofore been made. Then such procedure would follow as the law requires, taking into account such payments as had been made in due time by the owner or taxpayer. But the operation of the law does not depend upon the office practice.

CHARLES E. HOUSTON,
Assistant Attorney General.

Itasca County Attorney.
March 29, 1949. 412-a-10

252

Delinquent — Redemption — Notice of expiration to be posted by county auditor in relation to land sold under tax judgments and bid in by the state — Form of notice — "And/or" — M. S. 281.23.

Facts

The real estate tax judgments entered in Pine County in 1942 and 1943 were void. In 1944, tax judgment was entered for delinquent real estate taxes for the years 1940, 1941 and 1942. It is your opinion that this is a good judgment. In 1944, the lands described in such tax judgment were sold at the May sale. Certain lands were bid in for the state.

It is now desired to give the notice of expiration of redemption concerning these lands bid in for the state. The notice mentioned is that for which provision is made in M. S. 281.23. A notice has been prepared which in part reads:

> "* * * the parcels * * * were bid in for the State on the 8th day of May, 1944, at the tax judgment sale of lands **for delinquent taxes for the year 1942."**

The taxes included in the 1944 tax judgment were for the years 1940 and 1941, and the emphasized language is inappropriate.

Questions

1. Would it be proper to forfeit those parcels along with the others in the same posted notice?
2. Would it be necessary to post separate notices for each of the years included in the judgment?
3. Could the posted notice of expiration be amended to read: "For delinquent taxes for the year 1942 and/or prior years," and then go ahead with a single service as a 1942 judgment?

Opinion

The use of the much abused symbols "and/or" should be avoided. Here is what Mr. Justice Fowler of the Wisconsin Supreme Court said in **Employers' Mut. Liability Ins. Co. v. Tollefsen**, 263 N. W. 376, on p. 377:

> "It is manifest that we are confronted with the task of first construing 'and/or,' that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of some one too lazy or too dull to express his precise meaning, or too dull to know what he did mean, now commonly used by lawyers in drafting legal documents, through carelessness or ignorance or as a cunning device to conceal rather than express meaning with view to furthering the interest of their clients. We have even observed the 'thing' in statutes, in the opinions of courts, and in statements in briefs of counsel, some learned and some not."

We had better avoid inviting such comments by the courts in respect to our chosen language, especially in the application of statutes involving taxes, where the rules are sufficiently technical without injecting something new.

The posted notice which you mention is, I assume, that which is authorized in the first form set out in M. S. 281.23 and which applies only to parcels of land bid in at the tax judgment sale by the state and having the same stated period of redemption. It appears to me that said notice would be sufficient if it were to read in line 8 of the notice as printed in the statute as follows:

"At the tax judgment sale of land for delinquent taxes for the years 1940, 1941 and 1942; * * *."

This is a statutory proceeding. In the absence of the statutes on the subject, the notice would have no force. Subd. 2 of this section says that all parcels of land bid in at the same tax judgment sale and having the same period of redemption shall be covered by a **single posted notice.** Therefore, we see that a single notice is contemplated and there should not be separate notices posted except in the case of omission.

CHARLES E. HOUSTON,
Assistant Attorney General.

Pine County Attorney.
April 6, 1949. 423-C

253

Delinquent Taxes — Redemption — Notice of expiration of time for redemption — Effect of use of ditto marks — Sufficiency of description of lands — Minn. St. 1945, § 281.23; Minn. St. 1949, § 272.031.

Facts

"Ditto marks were used in the notice of expiration of time within which to redeem, which was given by the county auditor to the sheriff for service upon occupant of the property, and also in the sheriff's return of said notice to the county auditor which return certified that the property was vacant and unoccupied. I wish to draw your attention to Section 272.03, subd. 13, which states '* * * ditto marks shall not be used * * *'."

Question

"* * * whether tax forfeiture proceedings are void because of the use of ditto marks to describe the town and range in which the tax delinquent property is situated."

Opinion

A copy of a notice of expiration of time for redemption is attached to your request. This notice contains a list of descriptions of various parcels of real estate under the heading SUBDIVISION and at the right thereof the headings Section or Lot, Town or Block, and Range. The section and range numbers are placed under the appropriate headings only in the case of the first description. Ditto marks are placed under the section and range headings in the case of all other descriptions without repetition of the section and range numbers.

You draw our attention to Minnesota Statutes 1949, Section 272.031, which reads as follows:

> "In all proceedings under chapters 270 to 284, ranges, townships, sections, or parts of a section, blocks, lots, or parcels of lots, and dollars and cents may be designated by initial letters, abbreviations, and figures; but 'ditto marks' or the abbreviation 'do' may be used only as to the name of the owner, addition, or subdivision."

It is well established that ditto marks are generally understood to mean "the same as above." **Duerr v. Snodgrass**, 58 W. Va. 472, 52 S. E. 531; **Hughes v. Powers**, 99 Tenn. 480, 42 S. W. 1. The use of ditto marks in a tax proceeding has been sustained in **Best v. Wohlford**, 153 Calif. 17, 94 Pac. 98. It would appear, therefore, that the use of ditto marks did not render the forfeiture here in question void unless it is void for failure to comply with the provisions of Section 272.031, quoted above. The failure to comply with Section 272.031 did not render the forfeiture void unless that failure to comply is a jurisdictional defect. The forfeiture is not subject to attack now by reason of the use of ditto marks, if, as we assume, the certificate of forfeiture was filed in 1945 in the Register of Deeds office pursuant to Minn. St. 1945, Sec. 281.23, Subd. 8.

If it was within the power of the legislature, and we believe it was, to provide that ditto marks may or may not be used, the use of ditto marks contrary to the provisions of Section 272.031, quoted above, is not, in our opinion, a jurisdictional defect in the forfeiture proceedings. **Ensign v. Barse**, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401; **Nind v. Myers**, 15 N. D. 440, 109 N. W. 335; **Randall v. Perkins County** (S. D.), 36 N. W. (2d) 845.

It is our conclusion that the use of ditto marks in the notice of expiration of time for redemption here in question did not make the forfeiture proceedings void.

We think that we would be remiss in the performance of our duty in this matter if we failed to call to your attention defects as to certain parcels of land which we believe may well be jurisdictional.

It has been held by the Supreme Court of this state:

> "* * * that the test of sufficiency in relation to descriptions of real estate in tax proceedings is whether a man of ordinary intelligence would identify the land described with reasonable certainty." **Doherty**

v. Real Estate Title Ins. & T. Co., 85 Minn. 518, 89 N. W. 853. The court has also held:

> "* * * if the description in the assessment book, claimed to be the description of the land described in the notice, is so indefinite and uncertain as not to describe the land, the notice, served upon those in possession, does not eliminate the right of redemption." **Foster v. McClure**, 121 Minn. 409, 410, 141 N. W. 797.

It appears exceedingly doubtful to us, applying the tests laid down in the two cases last above cited, that a court would hold that any of the descriptions in the notice of expiration of time for redemption other than those which simply contain the description by government lots alone are sufficiently definite and certain to place the owner of the land on notice of the fact that his land is being forfeited for failure to pay delinquent taxes. This would appear particularly likely if the land is unoccupied or is occupied by some person other than the owner in view of the present statute with regard to the service of notice of expiration of time for redemption.

It is our conclusion that the interested county officials should give serious consideration to the question of whether a new forfeiture proceeding should be commenced as to those parcels of land discussed in the preceding paragraph and as to the other parcels of land, if all doubt as to the effect of the use of ditto marks is to be removed.

We have assumed in this opinion that the parcels of land involved are correctly described in the assessment books and in the published list of delinquent taxes upon the parcels of land involved. If this assumption is incorrect, a broader discussion than that in this opinion would be required.

GEO. B. SJOSELIUS,
Deputy Attorney General.

Cass County Attorney.
May 8, 1950. 423-c

254

Equalization — Effect of failure of town board of review to give notice of intent to increase assessments — M. S. A., Sec. 274.01; Laws 1949, Chapters 76 and 485.

Facts

One of the town boards of review in Renville County, at its meeting in June, 1948, increased the assessments of the properties of several individuals within the township without first having notified such individuals of its intent so to do. The county board of equalization adopted the assessment figures of the town board of review.

Questions

1. Did the act of the township board of review in raising the assessment of property of persons without first duly notifying such persons of the intent of the board to do so, make any taxes based upon such assessment void?

2. If such action on the part of the township board of review, makes such taxes void, does such invalidity apply only to the increase of assessment as made by the township board, or is the entire tax on the property a nullity and void?

3. Does the county board of commissioners have any authority upon proper petition and showing, to rectify and adjust, to the satisfaction of the person whose property is involved, the taxes on any such property which may have been increased by reason of the raising of the assessment of the property by the township board of review?

4. Assuming that the action of the board of review of the township in raising the assessment without first having notified the persons interested of its intention to do so, makes the entire assessment and tax void, must the taxpayer, in order to obtain relief, proceed under Section 278.01 of M. S. A.?

Opinion

Question No. 1

It is the opinion of this office that the failure of the town board of review to give notice of its intent to increase the several assessments, did not invalidate the assessments, in whole or in part.

It is true that M. S. A., Sec. 274.01, specifically provides that no assessment of the property of any person shall be raised by the local board of review until he has been duly notified of the intent of the board so to do. But our Supreme Court has stated that in this state the provisions relating to equalization are construed as directory rather than mandatory, and has held that failure to give notice does not invalidate the assessment.

State v. Cudahy Packing Co. (1908), 103 Minn. 419, 115 N. W. 645, 1039:

"3. Defendant also argues that the action of the Minneapolis board of equalization, and of the state board of equalization, also, in increasing the assessment, was invalid, because in both cases notice required by law to be given in such cases was not given. The argument is not tenable. The proceedings to collect taxes in this state are judicial. Official machinery is provided for the creation of a just demand on the part of the state to be paid by certain individuals or out of certain property. Opportunity is given for an objecting property owner to appear in court and to interpose any objection he may have, including that of unfair or unequal valuation. * * * The statutory provisions which are intended to guide the conduct of officers in the transaction of public business, so as to insure the orderly and prompt performance of public

duties, and which pertain merely to the system and dispatch of proceedings, are construed as directory. The provisions which affect the subsequent collection of the tax, and which are intended for the protection of the citizen by preventing the sacrifice of his property, and by the disregard of which his rights might be affected, are construed as mandatory. Kipp v. Dawson, 31 Minn. 373, 17 N. W. 961, 18 N. W. 96; Faribault Waterworks Co. v. County of Rice, 44 Minn. 12, 46 N. W. 143.

"Under the judicial system, the equalization proceedings are designed merely to produce a just demand. Subsequent opportunity to defend against that demand on the ground of unfair or unequal valuation is allowed. Under the summary system, the means by which the taxpayer secures his day in court is often by appeal or resort to other remedy pending or following the action of the boards of equalization. In this state, accordingly, provisions relating to equalization are generally construed as directory, not mandatory. Failure to give notice, under the judicial system, becomes clearly material only when it is sought to bring the person or property into court. The mere failure of the assessor to notify the property owner and require him to list or return his taxable property (State v. Wm. Deering & Co., 56 Minn. 24, 57 N. W. 313), or the failure to give notice of hearing of boards of equalization (State v. Hynes, 82 Minn. 34, 84 N. W. 636), does not invalidate the assessment, in whole or in part. Indeed, the omission of equalization not resulting in unfair or unequal assessment is not a basis of objection in proceedings to collect. Scott Co. v. Hinds, 50 Minn. 204, 52 N. W. 523."

See also **State v. Minnesota & O. Power Co.** (1913), 121 Minn. 421, 424, 141 N. W. 839.

And see Note in 24 A. L. R., pp. 331, 352-353.

It follows that in the instant case the failure of the town board of review to give notice did not affect the validity of the assessments in question.

Question No. 2

This question requires no answer, in view of our answer to Question No. 1.

Question No. 3

This question is also answered in the negative.

The only authority which is given to the board of county commissioners as such, to make changes in assessments is that which recently (Laws 1949, Chapter 76, amended by Laws 1949, Chapter 485) was delegated to it to grant homestead classifications in those cases where the local assessor improperly has classified real property as non-homestead. The 1948 county board of equalization (composed of the county commissioners and the auditor) has long since adjourned, and M. S. A., Sec. 274.14, specifically provides that after final adjournment the board shall not change the assessed valuation of the property of any person.

If the individuals whose assessments have been increased by the town board of review feel that their properties have been unfairly or unequally assessed, or assessed at valuations greater than their real or actual values, they may proceed to raise those objections in the proper court actions, proceeding under Chapter 278 if the properties consist of real estate, or under Chapter 277 if personal property is involved. Or they may make applications for reductions in assessed valuation, proceeding under M. S. A., Sec. 270.07. In the latter case, the board of county commissioners will have an opportunity to pass upon the applications, since the favorable recommendations of the county board and county auditor are required before the applications can be acted upon by the commissioner of taxation.

Question No. 4

Since this question is based upon an erroneous assumption, it requires no answer.

CHARLES P. STONE,
Assistant Attorney General.

Renville County Attorney.
May 13, 1949. 406-d

255

Payment — Installment payments — First half paid after June 1 but before November 1 — No penalty on second half if paid before November 1 — M. S. 1949, Sec. 279.01.

Question

"Where no part of the taxes are paid prior to June 1st, and then prior to November 1st the taxpayer offers to pay one-half does 'accrued penalties' in the statute mean penalties on just the one-half, or on the whole amount of the tax?"

Opinion

You refer to Opinion dated June 1, 1931, File No. 505-i, and state that you assume that that opinion answers the question.

Your assumption is correct. We enclose a copy of the opinion referred to. We also enclose a copy of a more recent opinion, dated October 6, 1939, File No. 474-H, to the same effect. These opinions hold that if an owner pays no part of his real estate tax before June 1, he may pay the first one-half thereof at any time before November 1, together with the penalties which have accrued on that one-half of the tax, and the remaining one-half of the tax may be paid without penalty at any time prior to November 1.

CHARLES P. STONE,
Assistant Attorney General.

Wadena County Attorney.
July 5, 1950. 505-i-

256

Tax judgment sale — Redemption — Homestead and non-homestead lands — Mortgagee of portion of parcel — M. S. 1945, Secs. 281.08, 281.11.

Facts

Judgment for taxes for 1947 was entered against a parcel of real estate consisting of 120 acres, 80 acres of which is homestead and the remaining 40 acres of which is non-homestead. At the annual tax judgment sale the property was bid in for the State. The county auditor has made no assignment. The mortgagee having a mortgage only on the homestead 80 acres now desires to pay the delinquent tax on that 80 acres and satisfy the judgment only in so far as it applies thereto.

Question

Can the county auditor split the judgment upon payment of that portion thereof applicable to the homestead, leaving the remainder unsatisfied, and if so, would the costs incident to judgment and redemption be pro rated on the same basis as the tax?

Opinion

Since the 120-acre parcel of real estate has been sold at tax judgment sale, the real question to be decided is whether a redemption of the 80 acres may be made without redeeming the whole parcel.

This office heretofore has ruled that where a delinquent tax judgment has been taken against three forties together as a single parcel, all subsequent proceedings must be based upon the judgment against the entire property, and that, at least in the absence of some difference in the nature of the owner's interests in the three forties, the county auditor has no authority to make a division of the tracts so as to make it possible for the owner to pay the delinquent taxes on only a portion thereof.

Opinion No. 297, 1942 Published Opinions of Attorney General (file 412-a-10).

We have specifically ruled that Minnesota Statutes 1945, Section 281.08, is not sufficient to permit such an owner of the whole of the parcel to redeem a specific portion thereof without redeeming the whole parcel.

Opinion No. 263, 1932 Published Opinions of Attorney General (file 423-H).

Whether the nature of the owner's interests in the 80-acre tract and in the balance of the 120-acre parcel involved in the instant situation is sufficiently different to permit the owner to redeem the 80-acre tract under Section 281.08, we do not now decide. Certainly, there is nothing in the provisions of Section 281.08 which would permit the mortgagee of the 80-acre tract to do so.

We know of no other statutory provision which is applicable to the instant situation. While Section 281.11 specifically mentions **mortgagees,** in our opinion its provisions are applicable only to the current tax, since Section 281.11 relates only to persons who wish to **pay** the tax and not to persons who wish to **redeem.**

See Opinion No. 308, 1928 Published Opinions of Attorney General (file 423-H).

We therefore answer your question in the negative.

CHARLES P. STONE,
Assistant Attorney General.

Todd County Attorney.
November 29, 1949. 423-H

257

Tax rolls — County auditor — Real estate tax duties — Omission of property in assessment book by reason of improper transfer on tax rolls — Authority to correct — M. S. 1949, §§ 273.03 and 274.09.

Facts

"In the year 1910 or 1911, certain lands in the Village of St. Paul Park were transferred to the tax rolls of Cottage Grove Township and have been treated as Cottage Grove lands for taxing purposes ever since. It appears that the records of the Village, Township, and County board are silent as to any authority or legal proceedings in regard to that transfer.

"The Village Council of St. Paul Park has now made a written demand upon our County Auditor to transfer these lands back to the Village of St. Paul Park for tax purposes on the records in his office."

The Village of St. Paul Park at all times involved has constituted, and still constitutes, a separate assessment district and there is no record whatever of the lands involved ever having been detached from the Village of St. Paul Park.

Question

Whether the County Auditor has authority to make such a transfer at this time without an Order of Court.

Opinion

M. S. 1949, § 273.03, imposes upon the county auditor the duty annually to "provide the necessary assessment books * * * for and to correspond with each assessment district." The statute then requires that the county auditor:

"* * * shall make out, in the real property assessment book, complete lists of all lands or lots subject to taxation, showing the names of the owners, if to him known; and, if unknown, so stated opposite each tract or lot, the number of acres, and the lots or parts of lots or blocks, included in each description of property."

On the basis of the facts stated, the real property assessment book delivered by the county auditor to the assessor of the Village of St. Paul Park on or before the 3rd Monday in April, 1950, should have included a description of the lands involved in your inquiry, if such property is subject to taxation. As a consequence of the auditor's omission, the property here involved will necessarily be omitted from the assessor's return of the assessment books. In that situation, I am of the view that the only statutory authority for correcting the error is to be found in M. S. 1949, § 274.09. That statute in its parts here material provides:

"If the county auditor has reason to believe or is informed * * * that the assessor has not returned the full amount of all property required to be listed in his * * * district, or has omitted, or made an erroneous return of, **any property subject to taxation,** he shall proceed, at any time before the final settlement with the county treasurer, to correct the return of the assessor * * * "

in the manner in that statute specified.

Accordingly, your specific inquiry is answered in the affirmative.

LOWELL J. GRADY,
Assistant Attorney General.

Washington County Attorney.
September 20, 1950. 21-F

TAX-FORFEITED LANDS

258

Conveyance to municipality without money consideration — Conditions — More than one public use — Separate conveyance for each tract — Reservations permissible — M. S. A., Secs. 282.01, Subd. 1, 282.12.

Facts

The village of Little Fork, proceeding under the provisions of M. S. A., Section 282.01, Subdivision 1, has presented to the Commissioner of Taxation an application for conveyance to it by him of the following tracts of tax-forfeited land in Township 68, Range 25, Koochiching County:

SW¼ of Section 17.
SE¼ of Section 18.
NE¼ of SE ¼ and S½ of SE¼ of Section 19.
NW¼, W½ of SW¼, and SE¼ of SW¼ of Section 20.

The application, which has the recommendation of the county board, asks that these tracts be conveyed to the village for the following four purposes: "for recreation purposes, also for educational purposes in order to be able to encourage and foster a mode of land utilization, and for the establishment of a public municipal park, and for the further purpose of establishing a memorial to honorably discharged Veterans, improving, beautifying and developing the same as a 'Memorial Forest.'"

The application also asks that the conveyance be made "subject to the reservations, rights, and privileges thereunder made by the State of Minnesota described as State Pit No. 3130, with the right of transporting the said gravel under a reservation of record for road purposes, with the right of removal of the same and any and all other reservations which the taxing authorities and/or the Commissioner of Taxation shall deem proper, and conditional that the lands herein involved and set forth in the petition shall be used for the purposes herein stated."

The resolution of the county board attached to the application recommends that the application be granted with all the reservations and conditions set forth therein "but with the additional reservation that all sand and gravel on the said lands be reserved and to be used for the benefit of the taxing district, together with the right to enter upon the said land and to remove the sand and gravel therefrom."

Questions

1. Do the provisions of M. S. A., Section 282.01, Subdivision 1, authorize the Commissioner of Taxation to convey a tract of tax-forfeited land to a municipality for more than one authorized public use?

2. Does the Commissioner of Taxation have authority to include in the tax deed either the specific reservation called for by the application, or the general reservation called for by the county board's recommendation that all sand and gravel be reserved for the benefit of the taxing district?

Opinion

Question No. 1

It is our opinion that the Commissioner of Taxation is authorized to convey a tract of tax-forfeited land, under the provisions of M. S. A., Section 282.01, Subdivision 1, for more than one authorized public use.

The provision in Section 282.01, Subdivision 1, which authorizes the Commissioner of Taxation to convey a tract of tax-forfeited land to a governmental subdivision without the payment of a money consideration reads:

> "* * * The commissioner of taxation shall have power to convey by deed in the name of the state any tract of tax-forfeited land held in trust in favor of the taxing districts, to any governmental subdivision for any authorized public use, provided that an application therefor

shall be submitted to the commissioner with a statement of facts as to the use to be made of such tract and the need therefor and the recommendation of the county board. The deed of conveyance shall be upon a form approved by the attorney general and shall be conditioned upon continued use for the purpose stated in the application."

M. S. A., Section 645.08, provides that in construing the statutes of this state, the singular includes the plural, unless the observance of this canon of interpretation would involve a construction inconsistent with the manifest intent of the legislature or repugnant to the context of the statute. In our opinion, construing the singular words "use" and "purpose" as they appear in the above quoted portion of Section 282.01, Subdivision 1, to include the plural words "uses" and "purposes" would be neither inconsistent with the manifest intent of the legislature nor repugnant to the context of Section 282.01.

Although your request for opinion does not raise any question as to whether the purposes specified in the application before you are authorized public uses, we point out that we know of no statutory authority for a village to acquire property "for educational purposes in order to be able to encourage and foster a mode of land utilization." Nor are we aware of any authority for the acquisition and establishment by a village of a "Memorial Forest." Section 416.01 authorizes a village to acquire a site for and maintain "a building or monument or parks" in recognition of the services performed by soldiers, sailors, marines and other veterans of the United States," but only after the approval of a majority of the voters of the village, voting at a special, general or annual election.

We note also that the application before you includes seven different tracts of land. In our opinion, each of these tracts should be included in a separate application. Otherwise, the efficacy of the reconveyance and declaration of reversion provisions of the second paragraph of Subdivision 1 of Section 282.01 could be seriously impaired if the village decided to utilize only one or two of the tracts for one or more of the specified uses and left the other tracts lying idle.

Question No. 2

According to a letter dated August 11, 1949, addressed to you and signed by the Koochiching County Attorney, which letter recently has been added to the file of correspondence attached to your request for opinion, State Pit No. 3130 was obtained by the State of Minnesota by condemnation proceeding in October, 1948. We have ascertained from the Department of Highways that in this proceeding the State obtained fee title to the land included within the description of this pit, and that the pit lies entirely within the N½ of the NW¼ of Section 20. Certainly the portion of the

NW¼ of Section 20 comprising State Pit No. 3130 should not be included by the Commissioner of Taxation in a conveyance of the NW¼ of Section 20 as tax-forfeited land. We suggest that when new applications are submitted, the application covering the NW¼ of Section 20 should give the description as:

> "All that part of the NW¼ of Section 20, Township 68, Range 25, except (here insert the legal description of State Pit No. 3130 as it appears in the final order in the condemnation proceeding — the final order was filed October 29, 1948, in the office of the Register of Deeds of Koochiching County in Book 'U' of Miscellaneous, page 545, as Instrument No. 90640)."

The Commissioner of Taxation can then use the same description in his conveyance of tax-forfeited land.

We are also advised by the Department of Highways that in the same condemnation proceeding the State obtained an easement for a haul road over the N½ of the NW¼ of Section 20. This easement interest must also be recognized in any conveyance of the NW¼ of Section 20 as tax forfeited land. We suggest that both the application and conveyance covering the NW¼ of Section 20 include a recital that the conveyance is being made subject to that certain easement for a haul road which the State of Minnesota has acquired by virtue of that certain condemnation proceeding titled **State of Minnesota v. George C. Romens, et al.**, Case No. 8821, and set forth in the final order therein filed in the office of the Register of Deeds in and for Koochiching County, Minnesota, on October 29, 1948, and recorded in Book 'U' of Miscellaneous, page 545, as Instrument No. 90640.

It is our opinion that the Commissioner of Taxation does not have authority to include in any of the conveyances covering the seven tracts the general reservation called for by the recommendations of the county board that all sand and gravel be reserved for the benefit of the taxing district.

The approved form of Conveyance of Forfeited Lands contains the following provision:

> "excepting and reserving to the said state, in trust for the taxing districts concerned, all minerals and mineral rights, as provided by law."

This wording complies with the provision of Section 282.12 that any sale of forfeited lands under Section 282.01 shall be subject to exceptions and reservations in this state, in trust for the taxing districts, of all minerals and mineral rights, and in our opinion should not be expanded to include the wording called for by the county board's resolution.

CHARLES P. STONE,
Assistant Attorney General.

Commissioner of Taxation.
September 9, 1949.

425-C-11

259

Sale — Authority of county board to attach conditions requiring land to be included in auxiliary forest — M. S. A., Secs. 282.01, 282.011, and 282.03.

Question No. 1

"Under Minnesota Statutes 1945, Section 282.03, may the county board, upon the sale of tax-forfeited land, attach conditions requiring the land to be included in an auxiliary forest and maintained as such?"

Opinion

Minnesota Statutes Annotated, Section 282.01, Subdivision 1, provides that all parcels of land becoming the property of the state in trust under the provisions of any law now existing or hereafter enacted declaring the forfeiture of lands to the state for taxes, shall be classified by the county board as conservation or non-conservation. Subdivision 2 provides for the disposition by the county board of the lands classified as conservation lands. The second paragraph of that subdivision (which was added by Laws of 1945, Chapter 574) reads as follows:

> "The county board may, by resolution duly adopted, declare lands classified as conservation lands as primarily suitable for timber production and as lands which should be placed in private ownership for such purposes. If such action be approved by the commissioner of conservation, the lands so designated, or any part thereof, may be sold by the county board in the same manner as provided for the sale of lands classified as non-conservation lands. Such county action and the approval of the commissioner shall be limited to lands lying within areas zoned for restricted uses under the provisions of Laws 1939, Chapter 340, or any amendments thereof."

Subdivisions 3, 4, 5, and 6 of Section 282.01, and Section 282.02, provide for the sale of lands which have been classified by the county board as non-conservation.

Section 282.011 (which was added by Laws 1947, Chapter 496) provides that any lands which have become the absolute property of the state for forfeiture or non-payment of taxes and which have been classified by the county board as conservation lands under the provisions of Section 282.01, or as non-agricultural lands under the provisions of Section 282.14, or any such lands which shall hereafter be so classified, may be designated by the county board as "appropriate and primarily suitable for * * * auxiliary forest lands," and if the resolution adopting such designation is approved by the Commissioner of Conservation, the lands so classified, after appraisal, may be sold in the same manner as provided for the sale of lands classified as non-conservation lands under Section 282.01, or as agricultural lands under Section 282.14, as the case may be. The last sentence of Section 282.011 reads as follows:

"The title and right accorded the purchaser at any such sale shall be conditioned upon the lands being placed in an auxiliary forest or used for designated conservation purposes as designated by the resolution of the County Board."

Section 282.03 reads as follows:

"There may be attached to the sale of any parcel of forfeited land, if in the judgment of the county board it seems advisable, conditions limiting the use of the parcel so sold or limiting the public expenditures that shall be made for the benefit of the parcel or otherwise safeguarding against the sale and occupancy of these parcels unduly burdening the public treasury."

A consideration of all of these sections of Chapter 282 in context compels the conclusion that only in those cases where the county board, acting pursuant to the provisions of Section 282.011, by resolution has designated as appropriate and primarily suitable for auxiliary forest lands, tax-forfeited lands which have been classified by the board either as conservation lands under the provisions of Section 282.01, Subdivision 1, or as non-agricultural lands under the provisions of Section 282.14, does the county board have authority to attach a condition that such lands must be placed in an auxiliary forest. If it were to be ruled that under authority of Section 282.03, the county board has the authority to attach such a condition where it is selling tax-forfeited lands which it has classified as conservation lands under Section 282.01, Subdivision 1, and by resolution has declared to be "primarily suitable for timber production and as lands which should be placed in private ownership for such purposes," under the second paragraph of Subdivision 2 of Section 282.01, then by the same criterion it also would have to be ruled that the board has authority to attach such a condition where it is selling tax-forfeited lands which it has classified as non-conservation lands under Section 282.01, Subdivision 1. And had the Legislature intended Section 282.03 to confer such authority upon the board, it hardly would have expressly limited the lands which the board could declare "primarily suitable for timber production" under the second paragraph of Subdivision 2 of Section 282.01, and "appropriate and primarily suitable for * * * auxiliary forest lands" under Section 282.011, to lands classified as "conservation" lands or as "non-agricultural" lands.

Question No. 2

"If the answer to Question No. 1 is in the affirmative, may the county board prescribe the particulars of the conditions to be attached to the conveyance, including, for example, the following matters:

"(a) The time within which an auxiliary forest proposal covering the land must be filed by the purchaser, approved by the proper authorities, executed, and filed for record as provided by law?

"(b) Provisions for revesting the title to the land in the state in case the auxiliary forest contract should not be consummated within the time specified?

"(c) Provisions for revesting the title to the land in the state in case the auxiliary forest contract, after consummation, should be cancelled as provided by law?

"(d) Provisions for refundment of the purchase price of the land to the purchaser in case the title should be revested in the state, with due allowance for timber removed and other items chargeable to the purchaser?"

Opinion

Since the county board is authorized to attach a condition requiring the lands to be placed in an auxiliary forest only in those cases where, acting pursuant to Section 282.011, by resolution it has designated such lands (which must be either conservation lands so classified under the provisions of Section 282.01, Subdivision 1, or non-agricultural lands so classified under the provisions of Section 282.14) as appropriate and primarily suitable for auxiliary forest lands, and since it has that authority only by virtue of the specific provision of the last sentence of Section 282.011 that the right and title accorded the purchaser shall be conditioned "upon the lands being placed in an auxiliary forest," it is our opinion that the particulars of the condition must be limited to the simple requirement that the lands be placed in an auxiliary forest.

We point out that while the county board does not have authority to include in the condition the particulars which you list in your second question, most of these requirements are provided for by the statute itself. Section 282.013 provides that the purchaser must furnish the county board, within six months from the date of the purchase, satisfactory proof that he has complied with the provisions of Section 88.48, pertaining to auxiliary forests, and that his application thereunder, including such lands, has been finally approved. It provides further that if such proof is not so furnished, the sale shall be deemed cancelled and the purchase price refunded. Section 282.014 provides that the sale shall not be complete and a conveyance of the land issued to the purchaser by the Commissioner of Taxation until the purchaser has complied with the terms and conditions of the sale — in other words, until he has entered into a contract with the Commissioner of Conservation for the placing of the lands in an auxiliary forest pursuant to the provisions of Sections 88.47-88.49. From that point on, the purchaser is subject to the provisions of Section 88.49 as to performance of his contract with the Commissioner of Conservation, cancellation of such contract for non-performance, etc.

Question No. 3

"If the answer to question No. 1 is in the affirmative, please advise whether the conclusions expressed are applicable to tax-forfeited land held absolutely by the state in the Red Lake Game Preserve and the conservation areas as well as to ordinary tax-forfeited land held in trust for the taxing subdivisions."

Opinion

This question has been answered by our answers to Questions Nos. 1 and 2.

CHARLES P. STONE,
Assistant Attorney General.

Commissioner of Conservation.
August 3, 1949. 425-C

260

Sales — Notice — Publication — Authority to publish in other newspapers in county in addition to official newspaper of county — M. S. 1949, Secs. 282.02, 375.21, Subd. 1.

Facts

For several years it has been the practice of the Mille Lacs county board of commissioners in offering tax-forfeited lands for sale, to publish a notice of such sale in the official newspaper of the county (at the present time it is the newspaper at Princeton, Minnesota) as provided by Minnesota Statutes 1949, Section 282.02, and in addition to also publish notice of the sale in the other three newspapers of the county. A majority of the tax-forfeited lands is located in the northern part of the county (some 40 to 50 miles from Princeton), and the notice has been published in the other three papers for the purpose of attracting more purchasers and thus making a better sale.

Question

Does the county board have authority to publish the notice of forfeited tax sale in other newspapers in addition to the official newspaper of the county?

Opinion

Minnesota Statutes 1949, Section 282.02, provides that the county auditor shall publish the notice of forfeiture and intended public sale by publication once a week for two weeks "in the official newspaper of the county." The official newspaper of the county is the newspaper designated by the county board pursuant to the provisions of Minnesota Statutes 1949, Section 375.12.

Opinion No. 408, 1938 Published Opinions of the Attorney General.

Section 375.12 provides that the lowest bidder on the publication of the official proceedings of the county board shall be the official newspaper of the county. In providing that the notice of sale of tax-forfeited lands shall be published in that newspaper, the legislature must have been motivated by the same consideration of economy which led it to limit the publication of the official proceedings of the county board to one newspaper (except in

counties whose population exceeds 50,000), and therefore must have intended that the publication of the notice of sale be made in the official newspaper and no other.

In your letter you call attention to Section 375.21, Subdivision 1, which provides that in counties having less than 75,000 population, no contract for work or labor, or for the purchase of furniture, fixtures, or other property, or for the construction or repair of roads, bridges or buildings, the estimated cost or value of which shall exceed $1,000, shall be made by the county board without first advertising for bids or proposals "in some newspaper of the county," and ask whether this provision might authorize the county board to publish the notice of sale in other newspapers of the county in addition to the official newspaper.

It is our opinion that Section 375.21 is not applicable to the instant situation. This office previously has ruled that professional services performed by a physician cannot be classified as "work or labor" within the provisions of Section 375.21.

Opinion dated November 29, 1935, File No. 104-b-7.
For the same reason, we believe that publication of a notice of sale in a newspaper cannot be so classified.

We therefore rule that in providing in Section 282.02 for the publication of the notice of sale of tax-forfeited lands "in the official newspaper of the county," the legislature has provided for the exclusive method of publication of the notice, and there is no authority for publication of the notice in other newspapers in the county. We appreciate the considerations which have motivated your county board in the matter, but as long as the present statutory authority for publishing the notice of sale remains unchanged, we cannot rule otherwise.

CHARLES P. STONE,
Assistant Attorney General.

Mille Lacs County Attorney.
December 28, 1950. 419-B

261

Sale — Purchaser — Vacated street and alley — Whether included in tract acquired by purchaser at sale.

Facts

The east side of Lot 1, Block 10, Syndicate Division, Grand Rapids, abuts on 11th Avenue. The south side of the lot abuts on T Alley. 11th Avenue and T Alley were dedicated to the public and for public use, in the original recorded plat of Syndicate Division.

By resolution dated April 6, 1938, the village council of Grand Rapids vacated 11th Avenue and T Alley.

In the 1940 assessment book and tax book, Lot 1, Block 10, was listed as "Lot 1, Block 10, Syndicate Division, Grand Rapids," without any mention of the vacated street and alley. The 1940 tax became delinquent, and judgment was taken. Forfeiture for nonpayment of the 1940 and subsequent years' taxes, based upon the tax judgment for the 1940 tax, was effected in 1947. The lot subsequently was sold at a tax-forfeited land sale. In all of the proceedings, the lot was described as "Lot 1, Block 10, Syndicate Division, Grand Rapids," without any mention of the vacated street and alley.

Questions

1. Does the purchaser at the forfeited tax sale acquire only Lot 1 as originally platted, or does he also acquire the half of the vacated street and alley upon which Lot 1 abuts?
2. In a situation like that of the foregoing case, does title to the vacated street and alley accrue to the owners of the abutting lots?
3. If so, are the boundary lines of the said abutting lots considered automatically extended to the center line of the adjoining vacated street or alley, or do the respective portions of the vacated street or alley become separate tracts?
4. If the boundary lines of the abutting lots are deemed to be extended automatically to the center lines of the vacated street or alley, is it necessary to modify the assessment book and tax book descriptions of said lots to indicate the additional area or are the original lot descriptions sufficient?

Opinion

It is the opinion of this office that when 11th Avenue and T Alley were vacated in 1938, the then owner of Lot 1, Block 10, thereafter held the fee of those portions of the street and alley upon which Lot 1 abutted to the center lines of the street and alley.

Lamm v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co. (1890), 45 Minn. 71, 47 N. W. 455;

White v. Jefferson (1910), 110 Minn. 276, 124 N. W. 373.

But under the rule of the **White v. Jefferson** case, supra, these vacated portions of 11th Avenue and T Alley did not become part of Lot 1; they constituted separate tracts.

See **Empenger v. Fairley** (1912), 119 Minn. 186, 137 N. W. 1110;

Patton on Titles, Sec. 92, p. 314.

The 1940 assessment was made against "Lot 1, Block 10, Syndicate Division, Grand Rapids." It did not include the vacated portions of 11th Avenue and T Alley upon which Lot 1 abutted. We therefore conclude that the purchaser at the forfeited-tax sale acquired only Lot 1 as originally platted.

Since the vacated portions of 11th Avenue and T Alley which constitute separate tracts, apparently have not been assessed since 1938, the county auditor should proceed to enter them on the assessment and tax books for the years omitted, pursuant to the provisions of M. S. A., Sec. 273.02, subject to the limitation contained in Subd. 2 thereof.

CHARLES P. STONE,
Assistant Attorney General.

Commissioner of Taxation.
May 2, 1949. 425-C

262

State tax deeds — Whether issuable to assignees of purchasers of tax-forfeited land under M. S. 1949, Sec. 282.35, and M. S. 1949, Secs. 282.031 to 282.037.

Facts

A purchaser of tax-forfeited land under Laws 1943, Chapter 164 (now Minnesota Statutes 1949, Section 282.35) assigned her rights to a third party before the contract was paid up in full. A purchaser of tax-forfeited land under Laws 1947, Chapter 422 (now Minnesota Statutes 1949, Sections 282.031 to 282.037), assigned his contract to a third party before it was paid up. The two contracts have now been paid up in full.

Question

Are the two assignees entitled to have the state tax deeds issued to them if the county auditor's certificates sent in to the Commissioner of Taxation recite those facts?

Opinion

1. It is our opinion that the assignee of the person repurchasing under Section 282.35 is entitled to receive a state tax deed upon proper certification to the Commissioner of Taxation.

Section 282.35, Subdivision 7, provides as follows:

> "* * * When the purchase price of a parcel of land shall be paid in full, the following facts shall be certified by the county auditor to the commissioner of taxation: the description of land, the date of sale, the name of the purchaser **or his assignee**, and the date when the final installment of the purchase price was paid. Upon payment in full of the purchase price, the purchaser **or his assignee** shall receive a quit claim deed from the state, to be executed by the commissioner of taxation * * * ."

See also:

Opinion dated September 1, 1936, File No. 425-c-13;

Opinion dated December 16, 1937, File No. 425-c-13;

Opinion dated Feb. 25, 1938, File No. 425-c-13, No. 445, 1938 Report, Published Opinions of Attorney General;

Opinion dated October 4, 1939, File No. 425-c-13;

Opinion dated December 3, 1943, File No. 425-c-13;

Opinion dated July 12, 1944, File No. 425-c-13, No. 369, 1944 Report.

2. We are also of the opinion that the interest of a veteran purchaser of tax-forfeited land under Sections 282.031 to 282.037 is assignable and that the assignee is entitled to receive a state tax deed upon proper certification to the Commissioner of Taxation.

Section 282.035 specifically recognizes the right of a veteran who has purchased tax-forfeited land under the provisions of Section 282.031 to sell his purchase contract to a third party before the contract is fully paid up. It reads:

> "In the event a purchaser desires to sell his purchase contract to a third party prior to the expiration of the five-year period during which a claim may be filed, he shall previous to such sale notify the county board of the intended sale and file his claim for allowance as provided in section 282.033. No credit shall be allowed on the contract for additional land cleared and placed under cultivation after such sale."

And Section 282.034 provides as follows:

> "Upon payment in full by cash or credit of the balance due on the purchase contract, the county auditor shall so certify to the commissioner of taxation, or to the commissioner of conservation, as the case may be, who shall thereupon execute a deed in behalf of the state **in the manner provided for in the sale of other tax-forfeited lands."**

In an opinion dated October 13, 1944, File No. 425-c-13, No. 365, 1944 Report, addressed to the Commissioner of Taxation, the Attorney General previously has ruled that the contract right of a purchaser of tax-forfeited land under Minnesota Statutes 1941, Section 282.01, is assignable. That opinion reads in part as follows:

> "The opinion of this office to the County Attorney of Roseau County dated July 12, 1944, held assignable repurchase contracts of tax-forfeited lands following earlier opinions of this office and of our predecessors in office dating back to the year 1936. Any real distinction between repurchase contracts and contracts for the purchase in installments of tax-forfeited lands as respects assignability is not apparent and the freedom with which holders of the latter have transferred their executory contracts, as in the case of an ordinary contract for the sale of real estate between private persons, thus giving rise to the issuance of the several auditors' certificates for deeds of conveyance based upon assignment, is understandable.

"There are more cogent reasons for holding assignable contracts for the purchase of tax-forfeited lands discernible from an examination of the applicable statute. Minn. Statutes 1941, Sec. 282.01, Subdivisions 4, 5 and 6, were amended in a manner not here pertinent by Laws 1943, Chapter 627. The statute by express language neither authorizes nor forbids assignment. Subdivision 5, relating to performance of and default in the contract, provides that 'Failure of the purchaser **or any person claiming under him** to pay installments and taxes shall constitute default.' It further states that cancellation following default shall be 'without any right of redemption by the purchaser, **or anyone claiming under him**, and the **original purchaser** in default, **or any person claiming under him**, who shall remain in possession or enter thereon, shall be deemed a wilful trespasser and punished as such.' Subdivision 6 provides for repossession and reappraisal of the land when the statement of the county auditor 'shows that a purchaser, **or his assignee, is in default.**' The statute further authorizes 'appropriate' conveyance in fee upon payment of the purchase price, and omits any requirement that the conveyance run to the original purchaser.

"By making applicable to persons claiming under the original purchaser and to the original purchaser's assignee all statutory recitals respecting default, we conclude that the legislature has unquestionably recognized the assignability of the contract of purchase of tax-forfeited land."

Since the assignee of a purchaser of other tax-forfeited land is entitled to receive a state tax deed upon proper certification to the Commissioner of Taxation, and since Sections 282.035 and 282.034 provide that the veteran purchaser may sell his purchase contract and that the state tax deed to tax-forfeited land purchased by a veteran shall issue in the same manner provided for in the sale of other tax-forfeited lands, we conclude that the state tax deed may properly issue to an assignee of the veteran purchaser.

CHARLES P. STONE,
Assistant Attorney General.

Beltrami County Attorney.
November 13, 1950. 410-B

263

Taxes accruing — State public lands — Forfeited for non-payment of taxes accruing after compliance with terms of certificate of sale but before patent issued — Meaning of word "accruing" as used in Laws 1945, Chapter 169.

Facts

"Laws of 1945, Chapter 169, Section 1, provides as follows:

" 'Whenever it shall appear (1) that the terms of a certificate of sale of state public lands have been fully complied with so as to have

entitled the owner to a patent under the terms of the certificate, (2) that such patent has not been issued and (3) that after such compliance, such lands were forfeited to the state for nonpayment of taxes accruing after such compliance, the commissioner shall, upon resolution of the board of county commissioners of the county in which said lands lie, issue a certificate reciting that there was compliance with the terms of the certificate of sale prior to such forfeiture, and releasing such lands from the trust attached thereto prior to their sale as state public lands.'

"In a case at hand all monies due the State on a certificate of sale were paid on June 12, 1939, but no patent was issued. On October 20, 1947, the land forfeited to the State for taxes for the year 1939. The 1939 tax was assessed May 1, 1939, and became payable the 1st Monday of January, 1940. The County Board by resolution has applied for a certificate releasing the land from the trust. It appears that the date the taxes accrued will determine whether or not this land should be released from the trust."

Question

"Did the 1939 tax accrue on May 1, 1939, when it was levied or did it accrue on the 1st Monday of January, 1940, when it became payable?"

Opinion

Our Supreme Court has pointed out in the case of **Spaeth v. Hallam** (1941), 211 Minn. 156, 300 N. W. 600, that:

"The French and Latin origins of the word 'accrue' and its derivatives justify generally the idea that anything accrues when it attaches itself to something else. In that sense 'accrual' is synonymous with 'accretion.' But the word and its derivatives are anything but works of legal art. In general and legal usage they have a variety of meanings. There is hence need in the process of interpretation for resort to context and, in the case of statute or contract, to declared purpose. * * *"

While Laws 1945, Chapter 169, contains no express declaration of purpose, we think that a reading of the act in context compels an interpretation that the Legislature used the word "accruing" in the sense of the tax becoming a liquidated, fixed and payable demand, rather than in the sense of the tax being secured by a lien in favor of the State. Using that interpretation, the 1939 tax accrued on the first Monday of January, 1940, when it became payable.

See M. S. A., Section 276.01.

Spaeth v. Hallam, supra.

CHARLES P. STONE,
Assistant Attorney General.

Division of Lands and Minerals.
October 7, 1949.

425-C-17

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