BIENNIAL REPORT

of the

ATTORNEY GENERAL

to the

GOVERNOR OF THE STATE OF MINNESOTA

FOR THE PERIOD ENDING
DECEMBER 31, 1926

CLIFFORD L. HILTON, Attorney General

SYNDICATE PRINTING CO., MINNEAPOLIS, MINN.

TABLE OF CONTENTS

ATTORNEY GENERAL'S STAFF

Clifford L. Hilton	Attorney General
James E. Markham	Deputy Attorney General
Rollin L. Smith①	Assistant Attorney General
Albert F. Pratt	Assistant Attorney General
G. A. Youngquist	Assistant Attorney General
Ernest C. Carman	Assistant Attorney General
Charles E. Phillips	Assistant Attorney General
Victor E. Anderson	Assistant Attorney General
William H. Gurnee	Assistant Attorney General
Chester S. Wilson②	Assistant Attorney General
Hayner N. Larson	Law Clerk
G. K. Spangenberg	Department Clerk
C. S. Brown	Inheritance Tax Agent
T. E. Cassill	Inheritance Tax Examiner

①Resigned July 15, 1925.
②Appointed October 1, 1925.

ATTORNEYS GENERAL OF MINNESOTA

TERRITORIAL

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

STATE

Charles S. Berry.....May 24, 1858, to Jan. 2, 1860
Gordon E. Cole.....Jan. 4, 1860, to Jan. 8, 1866
William Colville .....Jan. 8, 1866, to Jan. 10, 1868
F. R. E. Cornell.....Jan. 10, 1868, to Jan. 8, 1874
George P. Wilson.....Jan. 9, 1874, to Jan. 10, 1880
Charles M. Start.....Jan. 10, 1880, to Mar. 11, 1881
W. J. Hahn.....Mar. 11, 1881, to Jan. 5, 1887
Moses E. Clapp.....Jan. 5, 1887, to Jan. 2, 1893
H. W. Childs.....Jan. 2, 1893, to Jan. 2, 1899
W. B. Douglas.....Jan. 2, 1899, to April 1, 1904
W. J. Donahower.....April 1, 1904, to Jan. 2, 1905
Edward T. Young.....Jan. 2, 1905, to Jan. 4, 1909
George T. Simpson.....Jan. 4, 1909, to Jan. 1, 1912
Lyndon A. Smith.....Jan. 1, 1912, to Mar. 5, 1918
Clifford L. Hilton.....Mar. 8, 1918, to .....

OFFICE OF THE ATTORNEY GENERAL

LETTER OF TRANSMITTAL

Hon. Theodore Christianson, Governor.

Sir: I submit herewith my report for the biennial period ending December 31, 1926, to which is appended a statement of the various suits handled in this office during that time and their present status, a condensed tabulation of the reports of the county attorneys for the years 1925 and 1926, and also certain legal opinions rendered by me and my assistants which are considered of sufficient public importance to warrant their publication. The number of opinions to be published has purposely been reduced in the interests of economy. There has been no reduction in the number of opinions rendered during the period indicated; in fact there has been an increase. Over 6,000 have been written. I have, however, for the purposes of this report, limited the published ones to those of greatest importance and included only those which I deemed might prove of special assistance to county and state officials in the discharge of their duties.

DUTIES OF THE ATTORNEY GENERAL

The office of attorney general is created by the constitution and the duties thereof, to a large extent, are prescribed by legislative enactments. In addition to being the legal adviser of all state officers, boards, and commissions, section 115, General Statutes 1923, provides as follows:

> "The attorney general on application shall give his opinion in writing to county, city, village or town attorneys, on questions of public importance; and on application of the state superintendent of public instruction he shall give his opinion in writing upon any question arising under the laws relating to public schools, and on all school matters such opinion shall be decisive until the question involved shall be decided otherwise by a court of competent jurisdiction."

The opinions referred to in the foregoing section, although by no means the most important part of the work done by the attorney general, have proven to be of great aid to the officers referred to. The universal approval and appreciation of the service which this office has rendered along this line has been a source of great gratification to me.

THE ATTORNEY GENERAL'S OFFICE

There has been but one change in the personnel of the attorney general's office during the past two years. Mr. Rollin L. Smith, who rendered most efficient service to the state as assistant attorney general, resigned in July, 1924, to enter private practice in the state of Florida. I secured for the position thus vacated Mr. Chester S. Wilson, of Stillwater, Minn., who for a number of years had been county attorney of Washington county.

During my incumbency of the office of attorney general I have been most fortunate in the personnel of my staff. Without exception every member has been hardworking, loyal, and efficient. No higher compliment can be paid to my present deputy and assistants than to say that the standard in that regard has been maintained. Minnesota is to be congratulated upon the conditions which have made it possible for me to retain such men in the public service at the very modest compensation which is paid them. Not one of them is a time-server, but each is imbued with a spirit of doing everything possible for the best interests of the state.

The legal business of the state is steadily increasing from year to year, both in importance and volume. However, all things considered, the work has been performed with satisfactory promptness, and I believe that this

condition can be maintained during the coming biennium. It would, of course, be desirable to increase the number of assistants; but I do not feel that it is absolutely necessary. I am in hearty accord with the plan of the governor and the legislature to keep down the expense of government, and I therefore make no request for any addition to my staff. We will get along without it and render as efficient service as possible.

It has been my practice as attorney general to assign to each member of the staff certain work. This is done in the interests of greater efficiency. Each member thereby becomes more or less of a specialist in the subjects assigned to him. In addition one member is selected as an assistant on each one of the subjects so assigned.

The attorney general himself has the executive and administrative management of the entire legal department and acts as legal adviser of the constitutional state officers.

Mr. Markham, as deputy, performs the purely administrative duties of the attorney general during the latter's absence, and in addition gives special attention to criminal appeals, motor vehicle subjects, drainage matters, inquiries submitted by the industrial commission, extradition proceedings, and the commission of administration and finance.

Mr. Pratt is the assistant in charge of inheritance tax matters. He also has the subjects of criminal law, dairy and food, soldiers bonus, military affairs, corporations, and prohibition.

Mr. Youngquist has the subjects of insurance, mines, taxation, and the University.

Mr. Carman handles the work of the Railroad and Warehouse Commission, the Securities Commission, and the timber and forestry departments.

Mr. Phillips specializes on matters pertaining to the administration of counties, cities, villages, and towns, and advises the commissioner of education and the public examiner.

Mr. Anderson is assigned to the subjects of highways, agriculture, rural credits, and advises the live stock sanitary board.

Mr. Gurnee advises the board of control, the compensation insurance board, the fire marshal, and the commissioner of banks. All matters pertaining to oil inspection, public property, and hotel inspection are also handled by him.

Mr. Wilson's assignments include the game and fish department, elections, examining boards, and public health.

LAW ENFORCEMENT

Law enforcement in Minnesota devolves in the main upon the county attorneys and the sheriffs, and I am pleased to record my judgment that almost without exception these officers are reliable, trustworthy, and industrious. It has been a pleasure to be associated with them in the common purpose of helping to promote the public welfare.

The crime commission appointed by the governor has accomplished most effective and praiseworthy results. Its report embodies many recommendations which I trust will be enacted into law. Perhaps no subject in recent years has so engaged the public attention as the one relating to crime and the apprehension and punishment of offenders. This department is particularly interested in a proper amendment of the laws having to do with necessary changes in criminal procedure. I am in hearty accord with the principle that all necessary safeguards should be allowed to one accused of crime, but the state should not be handicapped by certain provisions now in the laws. I recommend that the same number of peremptory challenges be allowed the state and the defendant; that the prosecuting attorney be permitted to make a brief reply to the argument made by the attorney for the defense; that persons indicted jointly for the commission of a crime be tried jointly, unless the court upon proper application and for good cause shall otherwise direct.

A condensed tabulation is hereto annexed showing the number of criminal cases in the entire state as reported by county attorneys for the years 1925 and 1926, the nature of the crime, and the result of the prosecution. A similar tabulation is also given as to each county.

COLLECTIONS

During the period since my last biennial report there has been collected and placed in the state treasury the following amounts:

Insurance	$722.69	
Mining companies	274,387.51	
Miscellaneous	84,778.25	
Oil	9,659.25	
Telephone	975.45	
Timber	73,338.82	
Total		$443,861.97

Inheritance Taxes—1925-26

Minnesota estates	$1,612,652.61	
Foreign estates	184,806.56	
Total		$1,797,459.20
Grand total		$2,241,321.17

CONCLUSION

In closing permit me to express to you my hearty thanks for the uniform courtesy and appreciation which I have received from you. The co-operation I have had from you and all other state officers has been most gratifying and has helped in a marked degree toward the efficiency of my department. It is only through the united efforts of all state officials that the best interests of the state can be served and the most satisfactory results secured.

Respectfully submitted,
CLIFFORD L. HILTON,
Attorney General.

ACTIONS AND PROCEEDINGS

Supreme Court of United States	18
District Courts of United States	19
Supreme Court of this state	60 civil 83 criminal
District Court of this state	278 civil 17 criminal
Minor Courts	25
State Departments	16
United States Departments	7
Total	523

Attorney General's Docket Number.

UNITED STATES SUPREME COURT

308A. Charles H. Graves. Practising dentistry without a license. Affirmed. 270 U. S. 669. 272 U. S. 425.

324A. Fairmont Creamery Company. Violation anti-discrimination statute. Reversed April 11, 1927.

2585. Duluth Street Railway Company vs. Railroad & Warehouse Commission. Injunction; six-cent fare at Duluth. Affirmed April 11, 1927.

2632. First National Bank of St. Paul, Minn. Taxing shares of stock of national bank. Affirmed March 21, 1927.

2673. United States vs. Minnesota. Swamp land. Bill dismissed. 270 U. S. 181.

2675. United States vs. Minnesota. Swamp land. Bill dismissed. 270 U. S. 181. See No. 2673.

2758. William E. Boeing, et al. vs. Minnesota Tax Commission. Injunction; chapter 226, Laws 1923; royalty tax. Affirmed. 271 U. S. 577.

2759. Royal Mineral Association et al. vs. Minnesota Tax Commission. Royalty tax. Affirmed. 271 U. S. 577.

2762. Helen P. Bardwell, et al. vs. Sargent Land Company, Minnesota Tax Commission. Royalty tax. Affirmed. 271 U. S. 577.

2763. Robert B. Whiteside, et al. vs. Minnesota Tax Commission. Royalty tax. Affirmed. 271. U. S. 577.

2773. Lake Superior Consolidated Iron Mines, et al. vs. Minnesota Tax Commission. Royalty tax. Affirmed. 271 U. S. 577.

2800. George L. Burrows, Jr. et al. vs. Minnesota Tax Commission. Royalty tax. Affirmed. 271 U. S. 577.

2823. United States vs. Sanitary District of Chicago. In re reducing level of Lake Michigan. Hearing in U. S. supreme court held. Commissioner Hughes appointed to take testimony.

2828. Merrimac Mining Company vs. Minnesota Tax Commission. Royalty tax. Affirmed. 271 U. S. 577.

3021 (1809). Great Northern Railway Company. Gross earnings taxes. Dismissed for want of jurisdiction.

3087. Hughes Bros. Timber Company vs. State of Minnesota. Certiorari; personal property tax on pulpwood. Reversed. 272 U. S. 469.

3215. Gunder Draxton, et al. vs. C. P. Fitch, et al. To test constitutionality of Chapter 269, Laws 1923. Set for October 1927 term.

3295. Charles H. Graves vs. Frank W. Brunskill, Chief of Police of Minneapolis, et al. Certiorari. Petition for writ denied. 270 U. S. 669.

UNITED STATES DISTRICT COURT

2992. Guaranty Trust Company of New York, et al. vs. Minneapolis & St. Louis Railway Company. Fees for cost of testing railroad track scales. Claim allowed.

3014. Superior White Company vs. Registrar of Motor Vehicles. Recovery of motor vehicle taxes. Judgment in favor of plaintiff.

3026. In re Hosea Dove. Habeas corpus. Writ discharged.

3033. John J. Quigley vs. Atlantic Tar & Chemical Works. Receivership; state's claim; gross earnings tax. Claim filed.

3056. St. Paul City Railway Company vs. Railroad and Warehouse Commission, City of St. Paul. Injunction; six-cent fare. Order filed restraining city of St. Paul from proceeding with injunction.

3058. Minneapolis Street Railway vs. Railroad and Warehouse Commission, City of Minneapolis. Injunction; six-cent fare. Settlement between city and company approved by court.

3073. Old Colony Life Insurance Company vs. County of Swift, Minn., et al. Cancellation of ditch liens. Dismissed.

3092. St. Paul City Railway Company vs. Railroad and Warehouse Commission, City of St. Paul, et al. Injunction. Order filed restraining city of St. Paul from proceeding with its application for injunction in state court.

3141. Northern Pacific Railway Company et al. vs. Railroad and Warehouse Commission. Injunction; rates under I. C. C. order; Fargo case. Preliminary injunction against commission granted. (See 210 N. W. 399).

3145. H. E. Byram, et al., as receivers of Chicago, Milwaukee & St. Paul Railway, Minneapolis & St. Louis Railway Company et al. vs. Railroad and Warehouse Commission. Injunction; I. C. C.; Watertown case. (See 210 N. W. 399.)

3180. United States vs. Railroad and Warehouse Commission. Injunction. Dismissed.

3183. In re application of United States for condemnation of certain lands along the Mississippi river in Houston County. Condemnation. State appeal from award.

3188. In re Biery Oil Company, bankrupt. Freight line tax. Claim filed.

Attorney General's Docket Number.

3189. In re Oklahoma-Texas Refining Company, bankrupt. Freight line tax. Claim filed.

3198. Arden Dairy Products Company et al. vs. State et al. Foreclosure of trust deed. Notice of special appearance filed.

3201. In re Perry Hardware Company, bankrupt. Claim for fishing licenses. Claim paid.

3242. Jones Bros., bankrupt. Freight line earnings. Collected $1.90.

3250. In re J. C. Henkes, bankrupt. Nonresident fishing licenses. Collected $300.00.

3330. In re Conrad J. D. Erickson, bankrupt. Oil inspection fees. Claim filed.

STATE SUPREME COURT CIVIL CASES

2492. Allyn R. Skelton. To set aside sale of land. Reversed. 167 M. 159.

2632. State vs. First National Bank of St. Paul. Taxing shares of stock. Reversed. 204 N. W. 874. Appealed to U. S. Supreme Court.

2634. R. L. Horr. Sale of timber land. Affirmed. 203 N. W. 979.

2647. City of Duluth vs. Railroad and Warehouse Commission. In re increase of local and rural telephone rates at Duluth, Minn. Affirmed. 204 N. W. 873.

2669. R. L. Horr. Sale of timber land. Affirmed. 205 N. W. 444.

2752. Crete Mining Company. Delinquent occupation taxes. Reversed. 204 N. W. 932.

2777. Midland National Bank of Minneapolis vs. Henry Rines et al. Garnishment. Affirmed. 206 N. W. 723.

2793. In re proceedings to enforce delinquent real estate taxes in Kanabec County. William H. Bean, trustee, objector. Affirmed. 204 N. W. 640.

2794. Great Northern Railway Company. Omitted gross earnings; penalties. Affirmed. 203 N. W. 453.

2804. Bert Waldo vs. Game and Fish Commissioner. Unlawful seizure of hides. Reversed. 206 N. W. 45.

2869. Sweeney Detective Bureau vs. Mike Holm. Motor vehicle tax. Affirmed. 205 N. W. 270.

2882. Harriet State Bank et al. vs. George E. Samels et al. Suit on bond given superintendent of banks as trustee. Affirmed. 204 N. W. 938.

2884. Automatic Signal Advertising Company vs. Commissioner of Highways. Injunction; signals on highways. Affirmed. 166 Minn. 416.

2889. Frank J. Hodgman et al. Highway condemnation; appeal to supreme court for failure to allow state's costs and for granting landowner's costs. 167 M. 505.

2916. Victor Anderson vs. Soldiers Bonus Board. Certiorari; soldier's bonus. Writ quashed. 162 M. 251.

2938. Louis W. Schwartz vs. Rice County Cooperative Egg & Poultry Association et al. Injunction; cooperative marketing. Affirmed in part and reversed in part. 204 N. W. 316.

2957. Nels C. Westman vs. Adjutant General and Soldiers Bonus Board. Certiorari; soldier's bonus. Writ quashed. 162 M. 255.

2968. Minnesota Mutual Indemnity Company vs. Commissioner of Insurance. Mandamus; refusing license under chapter 200, Laws 1921. Affirmed. 208 N. W. 659.

2971. Floyd Raymond et al. vs. Mike Holm. Mandamus; motor vehicle license; commercial freighting trucks. Affirmed. 165 M. 215.

2981. In re estate of Albert E. Rice. Certiorari; inheritance tax. Reversed. 204 N. W. 543.

2982. City of St. Paul vs. Railroad and Warehouse Commission. In re St. Paul City Railway Company valuation. Reversed. 203 N. W. 972.

2983. Citizens of Pipestone et al. vs. Chicago, Milwaukee & St. Paul Railway Company et al. Track connection. 209 N. W. 913. 208 N. W. 809.

2985. John B. Davenport vs. Earl Brown, sheriff. Habeas corpus. Affirmed. 203 N. W. 226.

2993. In re Kelma Vinstad, feebleminded. Discharge of guardianship. Affirmed. 211 N. W. 12.

3019. Wm. L. Spalding. Insurance contract. Affirmed. 207 N. W. 317.

3036. Petters and Company vs. Superintendent of Banks. Injunction; restraining superintendent from examining books. Affirmed. 209 N. W. 9.

3044. Common School District No. 251, Polk County, vs. Independent School District No. 1, Polk County et al. School District boundaries. 204 N. W. 572.

3053. Interstate Iron Company et al. vs. Minnesota Tax Commission. Certiorari; enforcement of occupation taxes for 1923. Remanded. 166 M. 230.

3054. Shenango Furnace Company vs. Minnesota Tax Commission. Certiorari; 1924 occupation taxes. Remanded. 166 M. 249.

Attorney General's Docket Number.	
3055.	Bennett Mining Company et al. vs. Minnesota Tax Commission. Certiorari; 1924 occupation taxes. Remanded. 166 M. 243.
3072.	George Arthur Sundberg vs. Superintendent of State Asylum for Insane. Habeas corpus. Dismissed.
3078.	Thos. Yapp et al. vs. Commission of Administration and Finance and State Auditor. Mandamus; chapter 426, Laws 1925. Affirmed. 206 N. W. 396.
3085.	McReavy Bros. Transfer Company vs. Registrar of Motor Vehicles. Injunction; chapter 299, Laws 1925. Affirmed. 166 M. 22.
3090.	In re estate of John Smith. Certiorari; inheritance tax on transferred property. Dismissed.
3091.	City of Duluth vs. Railroad and Warehouse Commission and Duluth Street Railway Company. Injunction; to fix rate of fare. Affirmed. 209 N. W. 10.
3102.	Mrs. J. J. O'Rourke vs. Percy Vittum Company et al. Workmen's compensation. Affirmed. 166 M. 251.
3104.	Boyd Transfer & Storage Company, as Auto Transportation Company, vs. Railroad and Warehouse Commission. Chapter 185, Laws 1925. Reversed. 209 N. W. 872.
3113.	Attorney General vs. Village of Minnewashta and officers thereof. Quo warranto. 206 N. W. 455.
3119.	Kalman, Wood & Company vs. County of Grant, Minn. Recording of county ditch warrants. Reversed with directions. 209 N. W. 638.
3121.	In re estate of Mary L. Morgan. Certiorari; inheritance taxes; value of homestead. 211 N. W. 823.
3126.	Thomas Erskine, as county auditor of Itasca County, Minn. Mandamus; tax assessment. 206 N. W. 447, also see 211 N. W. 329.
3130.	A. I. and Ole Storseth. Seed grain note. See 210 N. W. 1006.
3131.	Charles Bucholz. Seed grain note. Affirmed. 210 N. W. 1006.
3132.	Tor T. Trontredt. Seed grain note. See 210 N. W. 1006.
3133.	A. Buck. Seed grain note. Return filed. See 210 N. W. 1006.
3134.	O. J. Johnson. Seed grain note. See 210 N. W. 1006.
3143.	County of Wilkin vs. First State Bank of Rothsay. Depository bond. Reversed. 212 N. W. 183.
3155.	Live Stock Sanitary Board vs. Board of County Commissioners of Lincoln County, Minn. Mandamus; chapter 269; Laws 1923. Reversed. 210 N. W. 635.
3157.	American Railway Express Company vs. Mike Holm, as registrar of motor vehicles. Mandamus; chapter 299, Laws 1925. Reversed. 211 N. W. 467. (See chapter 12, Laws 1927.)
3161.	Marshall Business Men's Association of Lyon County. Injunction; lottery law. Plan held a lottery. 212 N. W. 169.
3169.	Frank Bohman et al. vs. Game and Fish Commissioner. Injunction; chapter 195, Laws 1925. Affirmed. 211 N. W. 577.
3205.	In re Irwin Degen. Habeas corpus; release from insane asylum. Writ quashed. 210 N. W. 14.
3218.	Northwestern Employment Company (E. E. Palardy) vs. Industrial Commission. Injunction. Affirmed. 211 N. W. 824.
3230.	Bennett Mining Company vs. Minnesota Tax Commission. Occupation tax; certiorari. Adjusted.
3231.	The Shenango Furnace Company vs. Minnesota Tax Commission. Occupation tax. Argued.
3232.	A. J. Marsh and A. H. Shoemaker, as executors of the estate of Cordelia Truax, vs. Probate Court of St. Louis County. Certiorari; inheritance tax. Affirmed. 210 N. W. 389.
3233.	International Harvester Company vs. Tax Commission. Occupation tax. Dismissed.
3255.	George E. Kerst and Leslie E. Montrose vs. State Securities Commission. Injunction; chapter 195, Laws 1925. Affirmed.
3309.	Oscar Lidstrom vs. Amherst Mining Company et al. Certiorari; attorney's fees. Reversed. 211 N. W. 674.
3323.	Thomas Dandrea et al. vs. County Auditor of Itasca County. Mandamus; tax assessment. Reversed. 211 N. W. 329.

SUPREME COURT CRIMINAL CASES

285A.	Albert Lindberg, Vincent Sanez, Charles Shansy et al. Murder first degree. Affirmed. 164 M. 10.
287A.	R. M. Minor et al. Criminal libel. Affirmed. 163 M. 109.
301A.	Bert Green. Receiving stolen property. Affirmed. 167 M. 348.
308A.	Charles H. Graves. Practising dentistry without license. Affirmed. 161 M. 422; 209 N. W. 24; 210 N. W. 110; 270 U. S. 669.
309A.	Chris H. Ahlfs. Arson. Affirmed. 164 M. 110.
319A.	James Upson. Selling intoxicating liquor. Affirmed. 162 M. 9.

Attorney General's Docket Number.	
322A.	Walter A. Pocock. Violating chapter 298, Laws 1923. Affirmed. 161 M. 376.
323A.	Alois Pumper. Bastardy. Affirmed. 162 M. 39.
324A.	Fairmont Creamery Company. Violation anti-discrimination statute. Affirmed. 202 N. W. 714; 210 N. W. 163, 608. Order reversed by U. S. Supreme Court.
325A.	C. H. Dahlstrom. Grand larceny first degree. Affirmed. 162 M. 76.
326A.	Paul Eames, Jr. Unlawfully giving intoxicating liquor. Reversed. 163 M. 249.
329A.	Marion Perkins. Violation city ordinance relating to intoxicating liquor. Dismissed.
330A.	Ben Greenstein. Rape. Affirmed. 162 M. 346.
332A.	Thomas Kerr. Operating motor vehicle while intoxicated. Affirmed. 162 M. 309.
334A.	Warren S. Oligney. Chapter 418, Laws 1923; Wisconsin trucks operating on Minnesota highways without license. Affirmed. 162 M. 302.
335A.	Wesley St. Clair. Minimum wage law. Affirmed. 161 M. 444.
339A.	W. F. Fruen et al. Selling securities without license. Remanded. 162 M. 351.
340A.	Martha McGraw. Larceny. Affirmed. 163 M. 154.
342A.	K. K. Peterson and Albert Amundson. Forgery and grand larceny. Affirmed. 167 M. 216.
343A.	Earl Rank. Information not filed until three years after crime. Remanded with directions. 162 M. 393.
344A.	Harry Simon. Carrying concealed weapon. Reversed. 163 M. 317.
345A.	Hunter Quistgard. Illegal possession of intoxicating liquor. Dismissed.
346A.	Diedrich Harder. Violation motor vehicle law. Reversed. 163 M. 47.
347A.	Chris W. Fick. Intoxicating liquor; druggist selling moonshine. Affirmed. 164 M. 287.
349A.	James Thompson and William Stock. Furnishing liquor to a minor. Reversed. 163 M. 271; remanded. 211 N. W. 319.
350A.	Morris Rachner. Transporting intoxicating liquor. Dismissed.
351A.	Tom Suey. Assault first degree. Affirmed. 164 M. 497.
352A.	A. M. Warner. Intoxicating liquor. Affirmed. 165 M. 79.
353A.	John G. McDonnell and Richard L. Ellwood. Grand larceny first degree. Affirmed. 165 M. 423.
354A.	Bennie and Abe Gleeman. Murder. Affirmed. 212 N. W. 203.
356A.	John R. Kiewel. Grand larceny. 166 M. 303.
358A.	Albert Anderson. Grand larceny first degree. Affirmed. 166 M. 453.
359A.	Fred Bushard et al. Investment contract. Affirmed. 164 M. 455.
360A.	Mike Abdo. Carnal knowledge. Reversed. 165 M. 440.
361A.	George Miller. Selling intoxicating liquor. Affirmed. 166 M. 116.
363A.	Daniel Louis Goldman. Arson second degree. Affirmed. 166 M. 292.
364A.	Edward Wheat. Carnal knowledge. Affirmed. 166 M. 300.
365A.	Harry Wellman. Dismissed; failure of appellant to comply with rules.
366A.	Uriah Hooper Randall. Perjury in applying for marriage license. Affirmed. 166 M. 381.
367A.	Roy Andrist. Manslaughter second degree. Appeal abandoned.
369A.	A. N. Jacobs. Criminal libel. Affirmed. 166 M. 279.
370A.	James and Matilda Hoffman. Selling intoxicating liquor. Remanded. 165 M. 220.
372A.	A. H. Doty. Manslaughter first degree. Affirmed. 167 M. 164.
380A.	James Pappas. Arson. Affirmed. 210 N. W. 883.
381A.	Herman Korsch. Arson. Affirmed. 210 N. W. 10.
382A.	M. E. Monson. Grand larceny. Affirmed. 210 N. W. 108.
384A.	David Tuomi. Arson second degree. Affirmed. 167 M. 74.
385A.	William K. Oswald. Selling intoxicating liquor. Affirmed. 210 N. W. 65.
386A.	N. M. Nelson. Petty larceny. Reversed. 166 M. 371.
387A.	M. F. Kline. Manslaughter. Affirmed. 209 N. W. 881.
388A.	A. T. Miller. Rape. Affirmed. 213 N. W. 740.
390A.	Frank Fredeen. Arson third degree. Affirmed. 167 M. 234.
391A.	Abraham Rosenzweig. Arson. Affirmed. 210 N. W. 403.
392A.	Abe Ginsberg. Subornation of perjury. Affirmed. 167 M. 25.
394A.	Charles E. French. Manslaughter first degree. Affirmed. 210 N. W. 45.
397A.	Otto Mandehr et al. Perjury. Affirmed. 209 N. W. 750.
398A.	Mack Whitman. Carnal knowledge. Reversed. 210 N. W. 12.
400A.	Ephraim Beaudette. Carnal knowledge. Affirmed. 210 N. W. 286.
404A.	Harry C. Wood. Failure to support minor children. Affirmed. 209 N. W. 529.
405A.	Mrs. Fogen Silver. Unlawful manufacture of intoxicating liquor. Affirmed. 211 N. W. 463.
407A.	R. W. Helmer. Concealing mortgaged property. Remanded. 211 N. W. 3.

Attorney General's Docket Number.

408A. T. G. Johnson. Grand larceny. Affirmed. 211 N. W. 334.
409A. Godfred Johanson. Habeas corpus; liquor nuisance. Affirmed. 211 N. W. 5.
411A. William Saha and Walter Turppinen. Selling moonshine. Affirmed. 211 N. W. 469.
412A. Clarence Eaton. Bank robbery. Set for March 24, 1927.
413A. Eli Danculovic. Defendant wrongfully interested in payment voted by town board. 209 N. W. 941.
414A. E. T. Sandberg. Defendant wrongfully interested in payment voted by town board. 209 N. W. 943.
415A. E. O. Nordstrom. Selling securities without license. Remanded. 210 N. W. 1001.
416A. Henry James Wood. Child abandonment. Affirmed. 211 N. W. 305.
417A. Jacob Friedson. Receiving stolen property. Reversed. 211 N. W. 958.
418A. Anton Skogman. Selling intoxicating liquor to a minor. Affirmed. 213 N. W. 923.
419A. Carl Umlauf. Transporting intoxicating liquor. Reversed. 211 N. W. 475.
420A. Franklin T. Wolf. Grand larceny first degree. Affirmed. 210 N. W. 589.
421A. James Coon. Carnal knowledge. Affirmed. 212 N. W. 588.
423A. Gus Pothakos. Arson second degree. Affirmed. 212 N. W. 598.
424A. George B. Ervin. Selling intoxicating liquor to a minor. Affirmed. 211 N. W. 956.
425A. Edward Sabatini. Falsely auditing and allowing a claim as a public officer. Affirmed. 213 N. W. 552.
426A. William Voogd. Defendant borrowing money from bank of which he was an officer. Remanded. 212 N. W. 528.
427A. James Jenkins. Rape. Affirmed. 213 N. W. 923.
429A. William Bauer. Forgery first degree. Affirmed. 214 N. W. 262.
430A. Andrew Ludman. Driving motor vehicle while intoxicated. Affirmed. 213 N. W. 34.
431A. John Brandt. Manufacturing intoxicating liquor. Reversed. 214 N. W. 60.
434A. Tom Colcord et al. Entering a banking room. Affirmed. 212 N. W. 894.
442A. Sam Thornson and one Buick sedan automobile. Confiscation of motor vehicle. Affirmed. 212 N. W. 591.

DISTRICT COURT CIVIL CASES

2486. Wm. A. Baune. To set aside swamp land certificate. Stipulation of dismissal signed. 208 N. W. 660.
2491. Attorney General vs. Lakewood Cemetery. Injunction. Order filed modifying judgment and decree.
2525. St. Paul Union Stockyards Company. Injunction; weighing livestock. Writ of injunction filed.
2551. State vs. Julius Schmahl. For an accounting. Pending.
2779. Ray W. Palmer vs. Minnesota Tax Commission et al. Mandamus; tax deed. Order for judgment in favor of relator.
2812. John Saari, Jacob Saari and Maryland Casualty Company. Timber permit. Check for $9,801.58 and $1,270.23 received.
2822. State Fire Marshal vs. Elk River High School. Condemnation. School district ordered to replace fire escape.
2894. John Edstrom and Maryland Casualty Company. Timber permits. Draft for $2,063.80 received from casualty company.
2902. John M. Haven et al. (State Bank of Ogilvie). Action on depository bond. Judgment for $19,780.41 entered.
2924. Royal Indemnity Company and James Brushwood. 1924 motor vehicle tax and penalties. Check for $986.03 received in adjustment of state's claims in cases Nos. 2924 and 2925.
2925. Royal Indemnity Company. Motor vehicle tax and penalties. See No. 2924.
2927. Warren S. Oligney vs. Mike Holm. For recovery of motor vehicle tax paid under protest. Tax paid; see 292 N. W. 893.
2928. William H. Quinn vs. C. M. Babcock as commissioner of highways et al. Injunction; interfering with property rights. Verdict of $1,500 for respondent.
2934. In re estate of Ella L. Shelgren, deceased. Legacy to state. Appeal by state from probate court order allowing claim. Claim disallowed.
2939. Arthur E. Simpson vs. William R. Kleven, administrator of estate of John A. Bartlett, deceased. Escheat. Findings filed.
2940. Bennett Mining Company. Occupation taxes. Adjusted by tax commission pursuant to supreme court decision, 166 M. 243.
2941. Gordon Mining Company. Occupation taxes. Adjusted by tax commission pursuant to supreme court decision, 166 M. 243.

Attorney General's Docket Number.	
2942.	Hillcrest Mining Company. Occupation taxes. Adjusted by tax commission pursuant to supreme court decision, 166 M. 243.
2944.	Virginia Ore Mining Company. Occupation taxes. Received $99.48.
2945.	York Iron Mining Company. Occupation taxes. Adjusted by tax commission pursuant to supreme court decision, 166 M. 243.
2946.	International Harvester Company. Occupation taxes. Adjusted by tax commission pursuant to supreme court decision, 166 M. 243.
2947.	Liberty Mining Company. Occupation taxes. Judgment for $1,234.97 entered. Adjusted by tax commission per supreme court decision, 166 M. 243.
2949.	Leetonia Mining Company. Occupation taxes. Dismissed.
2950.	Inter-State Iron Company. Occupation taxes. Dismissed.
2952.	Chippewa Iron Mining Company. Occupation taxes. Tax and penalty abated by order of tax commission.
2953.	The Mead Iron Company. Occupation taxes. Adjusted by tax commission pursuant to decision of supreme court, 166 M. 243.
2960.	Commercial State Bank of Little Falls vs. Elmer A. Kling et al. Nonpayment of taxes. Stipulation for dismissal as to state filed.
2962.	M. Kusick vs. George H. Nettleton. Damages. No further action taken by plaintiff.
2963.	Hammermill Paper Company. Timber. Dismissed.
2966.	James F. Hayes vs. A. D. Johnson, auditor of Beltrami County. Mandamus; county commissioner's mileage. Dismissed.
2967.	Summit Sand & Gravel Company vs. Duluth and Iron Range Railroad Company. Discrimination in rates on sand and gravel. No action to be taken by this office until further notice.
2969.	In re application of St. Paul Title & Trust Company to distribute its assets to stockholders. Hearing held; commissioner of insurance to return securities held by him to trust company.
2970.	Charles A. Fisher vs. James F. Gould, game and fish commissioner. Replevin. Dismissed.
2977.	Lado Land Company vs. State et al. To quiet title. Dismissed as to state.
2979.	In re application by State Board of Control to pay into court under provisions of Sec. 9262, G. S. 1923, certain moneys earned by J. A. McDonald Construction Company. Notices mailed to creditors.
2980.	Higgins Manufacturing Company vs. Dairy and Food Commissioner. Injunction; chapter 495, Laws 1921. Check for $11.48 received.
2984.	J. J. Sullivan vs. John Kehoe et al. Foreclosure of mortgage; binding twine debt. Motion to set aside judgment denied.
2988.	In re claim of Nelson, Fulton & Nelson, Inc., vs. State. Arbitration; highway commission. Stipulation that award of arbitrators be ratified. Order for judgment signed.
2989.	Farmington Realty & Investment Company vs. Duluth Casualty Association et al. Mutual casualty association deposit fund. Judgment of dismissal entered.
2990.	In re application of Independent School District No. 35, St. Louis County, vs. State. Condemnation school house site. $1,000 received.
2994.	Lake Shore Telephone Company et al. Physical connection of toll lines. Connection ordered made.
2995.	Henry Fugleberg vs. Commissioner of Highways et al. Damages. Demurrer sustained.
2998.	Attorney General vs. St. Louis County Farmers Mutual Fire Insurance Company. Forfeiture of franchise. Receiver appointed.
3000.	Sarah L. T. Searles vs. John R. Mitchell et al. Foreclosure of mortgage on land taken for highway. Dismissed as to state.
3002.	City of Red Wing vs. Railroad and Warehouse Commission. Consolidation of Tri-State Telephone Company exchanges and rate increase. Consolidation permitted.
3004.	J. A. McMahon. Injunction; Douglas Lodge lease. Order filed granting plaintiff permanent injunction against defendant without damages.
3005.	Prairie River Power Company. Enforcement of delinquent taxes. Settled.
3006.	Itasca Paper Company. Enforcement of delinquent taxes. Settled.
3007.	Joshua and Margaret Wright vs. Northern Securities Building Loan Association. Breach of contract. Dismissed.
3009.	George Weaver vs. F. J. Raleigh. Quo warranto. Information signed. Settled.
3013.	Axel Th. Nelson vs. Gladstone Land Company et al. To quiet title. Demurrer filed.
3018.	Pidgeon River Lumber Company vs. Poplar Land Company, State et al. Partition. Dismissed as to state.
3020.	Town Board of Thomson, Carlton County, vs. Duluth, Missabe & Northern Railway Company. Grade crossing; Order of commission sustained.

Attorney General's Docket Number.	
3022.	Attorney General vs. Barnes Brothers. Injunction; selling debenture bonds. Settled.
3023.	In re Rutherford-Brede Company. Department of agriculture inspection fees. $197.76 received.
3024.	Charles F. Gustafson vs. County of Hubbard. Damages; sand and gravel taken. Settled.
3025.	In re arbitration between McGough Brothers and Board of Control. Building and construction contract. Judgment entered affirming award of arbitrators.
3029.	Attorney General vs. Leonard Koelmen et al. Highway option. Dismissed.
3030.	Arrowhead Parcel Transfer Company et al. Injunction; operating bus line; chapter 185, Laws 1925. Law held constitutional.
3032.	A. M. Kipp et al. vs. State et al. Partition. Dismissed as to state.
3035.	Gopher Coach Line and Paul W. Perkins. Injunction; bus transportation. Dismissed.
3037.	A. Guthrie and Company vs. State. Highway arbitration. Settled.
3038.	M. M. Nelson et al. (Little Sauk State Bank). Sureties on depository bond. Verdict of $8,259.58 for state.
3039.	Thomas M. George et al. (First National Bank of Lancaster). Sureties on depository bond. Dividend check for $488.86 received; judgment for $4,888.64 entered.
3040.	N. C. Christensen et al. (Farmers State Bank of Lake Wilson). Sureties on depository bond. State entitled to judgment.
3041.	Claus J. Gunderson et al. (First National Bank of Alexandria). Sureties on depository bond. Dividend of $1,217.70 received.
3042.	A. H. Kemper et al. (First State Bank Walnut Grove). Sureties on depository bond. Judgment for $15,449.76 entered.
3043.	Willis M. West et al. (Security State Bank of Grand Rapids). Sureties on depository bond. Claim paid.
3047.	Stone Ordean Wells Company vs. Highway Commissioner et al. Garnishment. Release and dismissal signed.
3049.	Otto Olson vs. State et al. To clear title. Dismissed as to state.
3050.	Leonard T. Peterson et al. vs. State et al. To quiet title. Dismissed as to state.
3052.	In re inheritance taxes in estate of Charlotte Hill Slade. Tax on bonds and certificates. Check for $10,586.33 received.
3057.	Minnesota Arrowhead Power & Light Corporation vs. State et al. Condemnation. Notice of appearance on behalf of state filed.
3059.	City of St. Paul vs. St. Paul City Railway. Increased rate of fare. Dismissed as to city.
3064.	C. A. Baker et al. (Merchants National Bank of Detroit). Sureties on depository bond. Checks for $2,500.00 and $2,256.87 received.
3065.	Henry Reinhardt et al. (Merchants National Bank of Detroit). Sureties on depository bond. See No. 3064.
3066.	In re Lake Shetek. Attorney General vs. Ed. C. Mason et al. Condemnation for construction of a dam. Report of commissioners confirmed and final decree signed.
3068.	Bellingham State Bank vs. State et al. Foreclosure of mortgage. State not a party to action.
3069.	In re M. Olson Company, Madelia, Minn. Claim of state filed with N. W. Jobbers Credit Bureau.
3070.	Claus M. Raap vs. City of Alexandria et al. Damages on account of establishment of highway. Verdict in favor of City of Alexandria.
3074.	In re application of Canadian National Railways to close station at Pitt, Minn. C. U. Taylor et al. vs. Canadian National Railways. Settled.
3075.	Yellow Cab Company. Transportation for hire; chapter 185, Laws 1925. Temporary injunction issued.
3077.	Barbara E. Hastings vs. State. In re Adam Butter estate. Inheritance tax. Tax paid.
3079.	V. B. Vye vs. Arden Dairy Products. Claim of state. Petition in intervention and preferred claim of state filed.
3088.	Buckman State Bank vs. State et al. Foreclosure of mortgage. Dismissed as to state.
3089.	H. G. Schmahl et al. (First National Bank of Redwood). State depository bond. Check for $15,423.84 received.
3096.	Fred W. Pearce & Company et al. Injunction; dredging Excelsior Bay, Lake Minnetonka. Restraining order vacated and annulled.
3097.	New Hampshire Fire Insurance Commonwealth Insurance Company vs. Theodore W. Beulke and Commissioner of Insurance. Injunction; cancellation of license; section 3264, G. S. 1913. Plaintiff entitled to judgment.
3098.	J. A. Clark. Ejectment from state land. Settled.

Attorney General's Docket Number.	
3099.	Farmers Cooperative Company vs. Baldwin Chain & Manufacturing Company, State et al. Adverse claim. Dismissed as to state.
3101.	W. J. Thompson et al. vs. State Board of Deposit (First State Bank of Walnut Grove et al.). To compel board of deposit to file claim. Demurrer sustained.
3103.	In re Federal Surety Company claim. Highway contract. Petition filed.
3111.	Attorney General vs. Farmers Mutual Live Stock Insurance. Forfeiture of corporate franchise. Temporary injunction issued restraining defendant from carrying on business and receiver appointed.
3116.	Julius Gaenslen vs. Commissioner of Banks. Rejected claim; closed bank. Special attorney appointed to look after case.
3120.	North American Accident Insurance Company vs. State Commissioner of Insurance. Injunction to restrain revocation of license. Dismissed.
3122.	Southern Surety Company vs. National Citizens Bank of Mankato et al. Highway contract. Service upon highway commissioner set aside.
3123.	Henry F. Otto et al. Violation livestock sanitary board quarantine. Defendants Otto found guilty.
3125.	Simon and Mary Secares vs. State et al. To quiet title. Demurrer on behalf of state filed.
3128.	Evelyn Vanderburgh and William G. Graves vs. William H. Vanderburgh, State et al. Foreclosure of mortgage. Demurrer on behalf of state filed.
3129.	Herman Herzog et al. (Ulen State Bank). Depository bond. Judgment $13,022.35 entered.
3137.	Mesaba Transportation Company, Eagle Transportation Company vs. Railroad and Warehouse Commission. Motor vehicle transportation; chapter 185, Laws 1925. Order of commissioner affirmed.
3138.	Royal Indemnity Company vs. Commissioner of Highways. Injunction; money on contract. Motion granted.
3146.	Andrew J. Lefebvre vs. Railroad and Warehouse Commission. Motor vehicle transportation; chapter 185, Laws 1925. Affirmed.
3149.	In re Giefer family. Discharge of guardian. Settlement arranged.
3151.	John Fleming and Maryland Casualty Company. Timber. Check for $735.57 received.
3152.	American Surety Company vs. William Devine, C. M. Babcock et al. Injunction. Service set aside.
3159.	D. E. LaBelle vs. Mike Holm and Guy Howard. Injunction. Plaintiff not entitled to relief.
3165.	State Securities Commission vs. Minnesota Fur Colonies Company. Injunction; chapter 192, Laws 1925. Permanent injunction filed.
3167.	L. M. Lesches vs. George Freeman, superintendent St. Peter Insane Asylum. Habeas corpus. Writ discharged.
3168.	Village of Robbinsdale vs. Minnesota Tax Commission. Certiorari; unjust assessment. Check for $6.00 received.
3170.	J. H. Finley; George and Thos. H. Martin, garnishees. Timber. Dismissed.
3171.	North American Accident Insurance Company vs. Commissioner of Insurance. Revocation of license. Restraining order filed.
3173.	In re insolvency of Farmers State Bank of Spring Valley, Minn. Receivership. Petition dismissed.
3175.	Minneapolis, St. Paul & Sault Ste. Marie Railway Company vs. Edward W. Stark, state treasurer. Recovery of mortgage registry tax. Dismissed.
3181.	Gust Franson, Magnus Erickson, and A. Anderson. Timber. Pending.
3184.	J. L. McCauley vs. Farmers State Bank of Anoka. Garnishment. Discharged.
3185.	C. G. Mellquist vs. Farmers & Merchants State Bank of Cokato, N. W. National Bank of Minneapolis, and First National Bank. Garnishment. Brief on behalf of state filed.
3186.	Ross Noble, Northern Cedar & Lumber Company, garnishee. Timber trespass. $123.32 collected.
3194.	Minnesota and International Railway Company. Damages to tractor. Check for $2,166.42 received.
3197.	H. D. Garrett vs. Anoka County et al. Quo warranto; taxation of island by two counties. Dismissed.
3199.	State and University vs. Noah E. Lewis et al. Condemnation for field house. Awards of commissioners made.
3200.	Northern Pacific Railway Company vs. State et al. Condemnation. Proceedings not to affect any rights claimed or held by state.
3202.	Commissioner of Banks vs. J. G. Thaung et al., garnishee. Claim paid.
3204.	Attorney General vs. Arcade Investment Company et al. Quo warranto; chapter 86, Laws 1925. Findings for defendant.
3206.	G. W. Lind. Timber. Papers served.

Attorney General's Docket Number.	
3208.	John and Albert Peterson and Maryland Casualty Company. Timber. $1,326.49 and $133.09 received from casualty company.
3210.	George Cochran. Timber trespass. Judgment for $541.18 entered.
3211.	George Cochran and U. S. Fidelity & Guaranty Company. Timber sale. $1,427.57 received.
3212.	George W. Cochran and John B. Meagher. Timber. $401.66 received.
3213.	Rose Zayachek vs. Maple Lake State Bank. To require commissioner of banks to satisfy judgment obtained against bank. Order to show cause discharged.
3216.	Hudson Bay Fur Company vs. Charles Kauppi, game warden. Unlawful possession of beaver skins. Verdict for defendant. Appealed to supreme court.
3223.	John Fleming and Southern Surety Company. Timber. $2,763.15 received.
3224.	P. G. Phillips. Fire fighting costs. Demurrer overruled.
3228.	Truman Independent Oil Company. Gasoline tax. Judgment for $584.85 docketed.
3229.	T. E. Harber. Gasoline tax. Transcript of judgment filed.
3234.	In re Myrtle Lunde Howard, feebleminded. Order discharging board of control as guardian reversed.
3237.	Three Star Oil Company. Gasoline tax. $3,700.00 received.
3238.	Pyramid Oil Company. Gasoline tax. $496.74 received.
3239.	Quackenbush-Riebe Oil Company. Gasoline tax. Judgment for $378.99 entered.
3243.	Florence M. Cannon vs. Game and Fish Commission. Injunction. Pending.
3246.	G. B. Hawley. Gasoline tax. Judgment for $1,551.13 entered.
3247.	Citizens Oil Company of Duluth. Gasoline tax. Judgment entered.
3249.	Maryland Casualty Company (Peoples State Bank of Duluth). State depository bond. $10,301.00 received.
3258.	J. L. Shiely Company vs. Chicago, Milwaukee & St. Paul Railway Company. Switching charges; appeal from order of railroad and warehouse commission. No action to be taken by state.
3259.	W. L. Hursh vs. Great Northern Railway Company. Discontinuance of passenger trains. Order of commission effective.
3260.	Daniel Nordstrom et al. (State Bank of Alvarado). Depository bond. $9,644.08 received.
3261.	Henry Anderson, John E. Waldemer et al. (First State Bank of Watson). Depository bond. $3,971.22 received.
3262.	H. Muetzel, R. G. Reierson et al. (Farmers State Bank of Belview). Depository bond. Pending.
3263.	Edward Larson, J. W. Jacobson et al. (First State Bank of New York Mills). Depository bond. Proof of claim filed.
3264.	Harry L. Wood et al. (State Bank of Grygla). Depository bond. Plaintiff to judgment.
3269.	S. A. Gausman et al. Gasoline tax. $1,140.00 received.
3273.	J. H. Finley et al. Determination of boundary line. Reply served.
3274.	Attorney General vs. Minnesota Mutual Indemnity Company of Minneapolis, Minn. Forfeiture of charter and appointment of receiver. Pending.
3279.	Goodrich vs. Miles C. Johnson; in re Robert Wallace Erps. Habeas corpus. Erps to be returned to custody of board of control.
3280.	Estate of Martha Rasmuson Solem, Antonette Marie Gunderson et al. Escheat. Findings in favor of petitioners.
3281.	In re guardianship of Jacob Pullkinen, incompetent. Guardianship. Settled.
3283.	Great Northern Life Insurance Company vs. Commissioner of Insurance. Revocation of license. Dismissed.
3284.	Saint Paul Trust Company vs. Commissioner of Banks. Judgment entered.
3286.	N. T. Nelson and Alma Nelson vs. Commissioner of Banks et al. To compel sheriff to make levy. Demurrer served.
3287.	Rose Zayachek vs. Commissioner of Banks et al. To compel sheriff to make levy. Demurrer served.
3288.	Anderson Canning & Pickle Company et al. vs. Industrial Commission. Injunction; chapter 422, Laws 1923. Pending.
3292.	State Live Stock Sanitary Board vs. John Otto. Injunction; cattle test. Note of issue filed.
3293.	State Live Stock Sanitary Board vs. Henry F. Otto. Injunction; cattle test. Note of issue filed.
3296.	R. P. Thomas, as executor of last will and testament of Harry L. Wood, deceased. Depository bond. Judgment for state.

Attorney General's Docket Number.	
3297.	Herman Beske vs. A. D. Sackett, state weed inspector. Damages on account of arrest for violation of chapter 377, Laws 1925. Verdict of $250.00 for plaintiff.
3298.	In re estate of Henry R. Taylor. Inheritance tax. Appeal taken from order of attorney general in re findings.
3299.	In re Roy Vervillo. Habeas corpus. Writ discharged.
3300.	John W. Peterson vs. Game and Fish Commissioner. Certiorari; Frontenac game refuge. Order to show cause discharged.
3301.	Louis C. Carlson vs. Game and Fish Commissioner. Certiorari; Frontenac game refuge. Order to show cause discharged.
3304.	Harold Hutchinson vs. Game and Fish Commissioner. Replevin. Note of issue filed.
3305.	H. H. Reindl (Odessa Oil Company). Gasoline tax. Judgment for $574.71 docketed.
3308.	Superintendent of Banks, State vs. M. Roy Knauft and Marie C. Knauft. Findings for plaintiff. Appealed to supreme court.
3310.	W. F. Mackay vs. Edward Florence et al., State of Minnesota, Intervener. Intervention; trunk highway No. 6. Pending.
3313.	Tora Holm vs. Mike Holm, secretary of state. Mandamus; drunken driver. Dismissed.
3317.	Duluth Street Railway Company vs. City of Duluth. Appeal from order of railroad and warehouse commission establishing seven-cent token fare (8 cents cash) in Duluth received.
3320.	Gust Lundgren and Aetna Casualty and Surety Company. Timber. $4,528.00 received from surety company.
3321.	Carrie M. Nelson vs. State et al. To quiet title. Demurrer on behalf of state filed.
3326.	Charles F. Bier, as guardian for Sophia C. Okius, vs. George R. Okius, State of Minnesota et al. Partition.
3331.	J. Roswell Smith vs. Clarence E. Kelley et al. To quiet title. Dismissed as to state.
3334.	Board of Control vs. D. M. Harding. Garnishment. $1,908.48 received.
3335.	J. E. Barr Packing Company. Recovery of inspection fees. $100 received on account.
3336.	In re petition of Mark Insko of Amboy for an order requiring the Willow Creek Telephone Company to install a telephone in his farm residence. Appeal from order of railroad and warehouse commission received.
3339.	Paul Bataglia et al. Railroad and warehouse maintenance headquarters; to quiet title. Order filed that state is owner in fee.

DISTRICT COURT HIGHWAY CONDEMNATION CASES

2843.	William W. Wrabek et al. Report of commissioners filed.
2956.	Quinn Land Company et al. Awards paid.
2958.	Harry A. Kampsen et al. Dismissed.
2959.	Kasmier Swidzinski et al. Awards paid.
2973.	R. A. McClelland et al. Report of commissioners filed.
2974.	Emma G. Peterson et al. Report of commissioners filed.
2975.	Daniel E. Sullivan et al. Awards paid.
2987.	Helge T. Burtness et al. Report of commissioners filed.
3001.	Michael J. Moriarity et al. Judgment entered.
3003.	Bertha Billings et al. Awards paid.
3010.	Freda Gerkin Brinkman et al. Judgment entered.
3012.	H. A. Hela. Motion of Hela to be joined as a codefendant in State vs. Hodgman denied.
3016.	John Peterson et al. Awards paid.
3017.	James Alfred Maxwell et al. Awards paid.
3028.	Ole Amundson et al. Report of commissioners filed.
3031.	Otto Schatz et al. Report of commissioners filed.
3034.	F. E. Voll et al. Report of commissioners filed.
3045.	Marcus D. Munn et al. Awards paid.
3060.	Andrew Brattland et al. Report of commissioners filed.
3061.	Mrs. Christopher Zimmerman et al. Report of commissioners filed.
3062.	Minnie Tucker et al. Awards paid.
3063.	Susie C. Robinson et al. Awards paid.
3071.	Albert Pollman. Dismissed.
3076.	William H. Quinn et al. Awards paid.
3080.	Tena Polzin et al. Report of commissioners filed.
3081.	Augustus H. Lamb et al. Report of commissioners filed.
3082.	John A. McKinney et al. Dismissed.
3083.	Andrew Strom et al. Dismissed.
3084.	Lillian Noble et al. Awards paid.
3093.	Grace S. Heron. Appeal tried. Award reduced.

Attorney General's Docket Number.	
3094.	Christine Pries et al. Report of commissioners filed.
3095.	Elva R. Jackman-Albert Kasper et al. Report of commissioners filed.
3106.	Oscar Boysen et al. Report of commissioners filed.
3107.	Mary Ann Shortall et al. Dismissed.
3108.	John Thornquist et al. Awards paid.
3110.	Ina F. Sims et al. Awards paid.
3112.	Charles G. Bradford et al. Report of commissioners filed.
3117.	Andrew O. Quam et al. Awards paid.
3135.	Nathan Wightman et al. Awards paid.
3136.	John Ostensen et al. Awards paid.
3139.	Octavia Lambert et al. Appealed to supreme court.
3140.	J. W. Erickson et al. Awards paid.
3153.	Daniel Mecklenburg et al. Report of commissioners filed.
3154.	Paul F. Sabrowski et al. Report of commissioners filed.
3160.	Leo F. Schmitt et al. Report of commissioners filed.
3166.	H. L. Gorder et al. Report of commissioners filed.
3172.	J. D. White et al. Report of commissioners filed.
3174.	Henry G. Page et al. Report of commissioners filed.
3176.	Paul Mahlke et al. Awards paid.
3177.	Swen Pierson et al. Awards paid.
3178.	Victor A. Johnson et al. Report of commissioners filed.
3179.	Robert Boles et al. Report of commissioners filed.
3182.	Augusta Sohms et al. Awards paid.
3191.	John N. Morrill et al. Report of commissioners filed.
3192.	Winslow C. Chambers et al. Report of commissioners filed.
3193.	Robert E. Gadola et al. Report of commissioners filed.
3209.	William Bren et al. Report of commissioners filed.
3220.	T. J. Chappell et al. Report of commissioners filed.
3225.	Frank E. Anderson et al. Award paid.
3226.	Basil J. Ward et al. Award paid.
3227.	Louis Furlie et al. Report of commissioners filed.
3240.	Anton B. Budde. Report of commissioners filed.
3241.	The Barnet & Record Company et al. Dismissed.
3244.	Andrew Binner et al. Report of commissioners filed.
3253.	Lewis L. Alrick et al. Report of commissioners filed.
3254.	Jane E. Branchaud et al. Awards paid.
3256.	Maria Skaug et al. Report of commissioners filed.
3257.	Adonis Glime et al. Report of commissioners filed
3267.	Pardon Jeffers et al. Report of commissioners filed.
3270.	Nicolas Leibfried. Report of commissioners filed.
3275.	Joseph O. Carlson et al. Dismissed.
3276.	Ella J. Meyer et al. Dismissed.
3277.	Henry Weeber et al. Awards paid.
3278.	Edward B. Troseth et al. Report of commissioners filed.
3282.	William H. Tarbox et al. Report of commissioners filed.
3285.	August C. Fischer et al. Report of commissioners filed.
3289.	Wayzata Holding Company et al. Report of commissioners filed.
3290.	Farmers State Bank of Kimball et al. Report of commissioners filed.
3291.	George R. Smith et al. Report of commissioners filed.
3294.	Walter M. Hallberg et al. Report of commissioners filed.
3303.	Sarah Jane Harsch et al. Petition filed.
3306.	William E. Hopfe et al. Report of commissioners filed.
3307.	S. W. Welch-Jule Planer et al. Report of commissioners filed.
3311.	Alex McNeil et al. Report of commissioners filed.
3312.	John J. Cook et al. Report of commissioners filed.
3314.	Philip P. Stein et al. Petition filed.
3315.	Nicholas P. Doffing et al. Petition filed.
3318.	William R. Atchison et al. Report of commissioners filed.
3322.	Carl Edward Schutt-Charles Pagel et al. Petitions filed.
3324.	Hattie F. Hoyer-Otto L. Peterson et al. Petitions filed.
3325.	Henry J. Heidman-D. R. Spieker et al. Petitions filed.
3327.	A. W. Winter & Son, Inc., et al. Petition filed.
3328.	Montevideo Golf Club et al. Petition filed.
3332.	Joseph Princen et al. Petition filed.
3333.	Albert G. Loewe et al. Petition filed.

DISTRICT COURT CRIMINAL CASES

348A.	John Edwin Edstrom. Murder second degree. Plead guilty.
355A.	Theo. S. Nelson. Larceny. Plead guilty.
357A.	Fred Joecks. Obtaining credit by false writing. Found guilty.
374A.	George H. Mallon. Inducing a witness to withhold testimony. Acquitted.
375A.	Arthur R. Ferrin. Violation corrupt practices act. Acquitted.
376A.	Walter Swanson. Petit larceny of county gasoline. Acquitted.

Attorney General's Docket Number.

378A. G. A. Eaton. Forgery; false bank report. Found not guilty.
383A. Harry Hrabik. Murder. Jury disagreed.
389A. Herman Lesch. Manslaughter. Found guilty.
395A. Edward Broberg. Manslaughter (automobile). Found guilty.
396A. Mayme Hodges. Murder. No bill returned by grand jury.
402A. Joe Shanahan. Carnal knowledge. Found guilty.
403A. E. P. Modin. Arson. Plead guilty.
410A. F. M. Conklin. Embezzlement; bank officer. Found guilty of grand larceny second degree.
428A. William Weekly. Manslaughter second degree. Case ordered to be resubmitted to grand jury.
440A. A. J. Zimmerman. Making false entries. Grand larceny second degree. Plead guilty.
441A. Ira Cox. Rape. Found guilty. Appealed to supreme court.

MUNICIPAL AND JUSTICE COURTS, CRIMINAL CASES

368A. Maitland E. McKee. Selling insurance without license. Dismissed.
337A. Robert Hanson. Larceny third degree; presenting false claim. $162.25 received.
338A. Emil Krusell. Presenting false claims. Check received.
422A. Otto Persig. Violation rules of livestock sanitary board. Found guilty.

PROBATE COURT

2914. In re Daniel H. Carroll estate. Escheat. $182.72 received.
2934. In re estate of Ella L. Shelgren. Legacy to state. Claims allowed and some disallowed. Appealed to district court.
2954. In re Carrie Halvorson, feebleminded. Discharge of guardian. Petition granted.
2972. In re Etholine Bathelor, feebleminded. Guardian discharged.
2978. In re estate of Priscilla McNeil. Escheat. $5,375.18 received.
2991. In re H. V. Bentley estate. Escheat. Legislature passed chapter 425 (section 150), Laws 1925.
3051. In re Mary Magdalene Seltz, feebleminded. Discharge of guardian. Petition denied.
3067. In re estate of James Branch. Escheat. Pending.
3086. In re Helen Peterson, feebleminded. Discharge of guardian denied.
3100. In re alleged feeblemindedness of Mary B. Johnson. Discharge of guardian denied.
3118. In re Everett McDaniels, feebleminded. Discharge of guardian denied.
3124. In re estate of Lizzie or Elizabeth Snyder. Escheat. Depositions to be taken.
3127. In re estate of George C. Sherman (Ulen State Bank). Depository bond. Judgment filed.
3144. In re estate of M. J. Dahlsten. Claim for care of insane allowed.
3148. In re Emma Grohman, feebleminded. Discharge of guardian denied.
3158. In re estate of James Sawyer. Claim of state for maintenance at Soldiers' Home allowed. $1,047.00 received.
3162. In re guardianship of Robert Harrison Van Cleave et al. Guardianship. Petition denied.
3195. In re estate of Thomas Cahill. To prove second will. Order filed.
3252. In re estate of Thor Evansted. Escheat. $5,896.19 received.
3329. In re estate of Alonzo T. Rand. Inheritance tax on property in trust. Statement of facts filed.
3337. In re guardianship of David Geske. For an accounting. Order filed.

STATE DEPARTMENTS

2898. In re liquidation of Farmers and Merchants Bank of St. Vincent. Claim of state board of deposit. Claim paid.
2899. In re liquidation of Merchants and Farmers State Bank of Hastings. Claim of state board of deposit. Claim paid.
2907. In re petition of F. J. Richards vs. State, T. H. 10, Dist. 8, A. F. E. Claim for workmen's compensation. Legislature passed chapter 121, Laws 1925.
2908. In re petition of Lester M. Hislop vs. State, A. F. E. 14, Dist. 8, T. H. 28. Claim for workmen's compensation. Legislature passed chapter 121, Laws 1925.
2961. In re Minnesota Mechanical Equipment Company. Contractor's bond. Stipulation of settlement signed disposing of fund in hands of board of control.

Attorney General's Docket Number.	
2964.	Minnesota Wheat Growers' Cooperative Marketing Association vs. Commander Elevator Company. Discrimination in receiving grain for storage. See 204 N. W. 314.
2965.	Attorney General vs. Phillips N. Lundmark, sheriff Blue Earth County. Quo warranto. Application denied.
2986.	In re W. F. Winter and John B. Mooney. Binding twine note. Request made to bring action on note.
3190.	First National Bank of St. Cloud, Minn. Foreclosure of collateral pledged for state deposit. Sale held.
3196.	J. J. Sullivan, as warden of Minnesota State Prison, vs. Omaha Railway Company et al. Rates on implements and binding twine. Complaint dismissed.
3203.	Edward A. Lee vs. Edward W. Stark, state treasurer of Minnesota. Workmen's compensation; chapter 82, Laws 1921. Awarded $7,720.00.
3221.	Minnesota State Sanatorium vs. Minnesota & International Railway Company. Freight and passenger depot at Ah-Gwah-Ching. Application denied. To be appealed.
3235.	In re petition of Commissioner of Highways for order separating grades of Trunk Highway No. 69 and tracks of Soo Line in Wright County. Dismissed.
3248.	Lars Gooding vs. State Treasurer. Workmen's compensation. Award of compensation made.
3268.	Carrol Carpenter vs. Minnesota Highway Department. Workmen's compensation. Petition denied.
3319.	In re petition of Commissioner of Highways for an investigation of the separation of grades of Trunk Highway No. 37 and tracks of Northern Pacific Railway Company in Morrison County. Order filed.

UNITED STATES DEPARTMENTS

3046.	In re import duty on goods imported by state university. Hearing held and ruling of United States Treasury Department filed.
3105.	In re international boundary water level and storage reservoir project. Hearing held before International Joint Commission.
3115.	Mississippi River Pollution. Hearing held at St. Paul before Joint Committee.
3150.	In re rate structure investigation; I. C. C. Decision in favor of state commissions.
3272.	In re motor carrier investigation; I. C. C. Docket No. 18300. Hearing held at St. Paul.
3302.	In re reduced rates on grain and grain products. Six-cent case; I. C. C. Order filed requiring respondents to cancel schedules and discontinuing proceeding.
3316.	In re general revision of class rates in western trunk line territory. Ex Parte 87, Sub. 1, I. C. C. No. 17000, and related cases. Hearings held.

TABLE No. 1

TABULATED STATEMENT SHOWING CRIMINAL CASES IN ENTIRE STATE AS REPORTED BY COUNTY ATTORNEYS FOR THE YEAR, 1925

	IN DISTRICT COURT				IN MUNICIPAL AND JUSTICE COURTS				
Nature of Accusation.	Pleaded Guilty.	Found Guilty.	Acquittals.	Nolle Prosequi.	Pleaded Guilty.	Found Guilty.	Acquittals.	Dismissals.	Under the Influence of Intoxicating Liquors.
Murder in first degree	9	8	7	5	.....	1	.....	.....	1
Murder in second degree	2	.....	1	.....	.....	.....	.....	.....	1
Murder in third degree	1	1	.....	1	.....	.....	.....	.....	.....
Manslaughter in first degree	1	4	1	3	1	.....	.....	.....	2
Manslaughter in second degree	3	3	8	7	.....	.....	.....	.....	1
Assault in first degree	16	3	4	10	.....	5	.....	4	.....
Assault in second degree	33	18	13	18	.....	.....	1	22	8
Assault in third degree	18	4	2	1	337	135	31	103	90
Maiming	.....	.....	1	.....	1	.....	1	1	.....
Robbery in first degree	46	8	2	39	.....	.....	.....	2	.....
Robbery in second degree	5	.....	1	2	.....	.....	.....	2	.....
Robbery in third degree	5	.....	.....	1	.....	.....	.....	4	.....
Entering banking room	.....	.....	.....	1	.....	.....	.....	.....	.....
Arson in first degree	.....	1	.....	2	.....	.....	.....	1	.....
Arson in second degree	1	3	1	2	.....	.....	.....	3	.....
Arson in third degree	6	5	1	1	.....	.....	.....	.....	.....
Burglary in first degree	1	.....	.....	.....	.....	.....	.....	1	.....
Burglary in second degree	7	.....	.....	2	.....	1	.....	.....	3
Burglary in third degree	102	8	7	12	.....	1	2	23	6
Grand larceny in first degree	91	19	10	67	1	1	1	10	1
Grand larceny in second degree	314	40	24	82	4	2	2	56	5
Petit larceny	26	5	1	.....	265	60	16	85	6
Receiving stolen property	20	4	.....	13	.....	.....	.....	3	.....
Forgery in first degree	8	.....	.....	.....	1	.....	1	1	.....
Forgery in second degree	119	2	4	26	.....	.....	.....	9	2
Forgery in third degree	30	2	2	6	.....	.....	.....	2	1
Rape	5	4	3	6	.....	.....	.....	1	1
Carnal knowledge	16	5	5	9	2	.....	.....	5	.....
Child under ten years	1	.....	.....	.....	1	.....	.....	.....	.....
Child under fourteen years	5	3	1	2	.....	2	.....	2	.....
Child under eighteen years	64	7	5	20	.....	.....	.....	8	9
Indecent assault	21	4	3	10	3	1	1	4	2
Bigamy	7	.....	.....	2	.....	.....	.....	1	.....
Adultery	16	1	.....	8	.....	.....	.....	11	.....
Fornication	4	.....	.....	.....	12	5	2	3	.....
Incest	11	2	1	.....	.....	.....	.....	.....	.....
Abduction	4	1	.....	.....	.....	.....	.....	5	.....
Seduction	.....	.....	.....	.....	1	.....	.....	2	.....

TABLE No. 1—Continued

Nature of Accusation.	IN DISTRICT COURT				IN MUNICIPAL AND JUSTICE COURTS				
	Pleaded Guilty.	Found Guilty.	Acquittals.	Nolle Prosequi.	Pleaded Guilty.	Found Guilty.	Acquittals.	Dismissals.	Under the Influence of Intoxicating Liquors.
Kidnapping	.....	.....	.....	1	.....	.....	.....	3	.....
Bastardy	211	40	9	24	4	7	.....	22	.....
Sodomy	5	.....	1	1	.....	.....	.....	1	.....
Keeping house of ill-fame	3	1	.....	7	.....	.....	.....	3	.....
Abortion	1	2	.....	7	.....	.....	.....	.....	.....
Perjury	10	4	2	6	.....	.....	.....	4	.....
Extortion	2	1	1	7	.....	.....	.....	.....	.....
Bribery	2	1	1	4	.....	.....	.....	.....	.....
Violation of game and fish laws	2	.....	.....	.....	746	88	16	27	1
Violation cigarette laws	.....	.....	.....	.....	5	.....	.....	.....	.....
Violation of pure food laws	.....	.....	.....	.....	51	15	1	.....	.....
Violation of liquor laws	1,189	127	71	142	870	161	17	261	132
Drunkenness	1	3	.....	.....	1,782	188	18	36	1,328
Sabbath breaking	.....	.....	.....	.....	.....	6	1	.....	6
Defrauding hotelkeeper	.....	.....	.....	.....	16	2	.....	3	.....
Language tending to provoke breach of peace	.....	.....	.....	1	127	41	9	30	77
Criminal slander or libel	.....	1	.....	1	4	4	2	9	.....
Non-support	7	.....	.....	3	71	30	8	25	1
Abandonment wife or child	118	5	2	33	10	3	.....	20	.....
Malicious mischief	6	1	.....	1	39	2	1	13	5
Swindling	2	.....	1	2	2	.....	.....	1	.....
Cruelty to animals	.....	.....	.....	.....	10	.....	1	2	.....
Gambling	11	.....	.....	1	98	2	4	12	.....
Vagrancy	1	.....	.....	.....	66	13	.....	7	1
Unlawful assembly	.....	.....	.....	.....	7	.....	.....	.....	.....
Carrying concealed weapons	15	.....	2	2	10	2	.....	2	1
Violation of auto laws	62	1	3	9	1,807	281	132	57	190
Distributing obscene literature, etc.	2	.....	.....	2	.....	.....	.....	.....	.....
Operating lottery	5	.....	.....	11	1	1	.....	.....	.....
Operating gift enterprise	.....	.....	.....	.....	.....	1	.....	1	.....
Presenting fraudulent claim	.....	.....	.....	.....	.....	.....	.....	2	.....
Checking on bank without funds	115	1	5	33	52	7	7	145	4
Miscellaneous	130	45	23	83	945	229	46	208	136
Totals	2,918	398	229	739	7,352	1,297	321	1,268	2,021

TABLE No. 2

TABULATED STATEMENT SHOWING CRIMINAL CASES IN ENTIRE STATE AS REPORTED BY COUNTY ATTORNEYS FOR THE YEAR, 1926

	IN DISTRICT COURT				IN MUNICIPAL AND JUSTICE COURTS				
Nature of Accusation.	Pleaded Guilty.	Found Guilty.	Acquittals.	Dismissals.	Pleaded Guilty.	Found Guilty.	Acquittals.	Dismissals.	Under the Influence of Intoxicating Liquors.
Murder in first degree	.....	2	3	3	.....	.....	.....	3	.....
Murder in second degree	1	1	.....	1	.....	.....	.....	.....	1
Murder in third degree	.....	2	.....	.....	.....	.....	.....	2	.....
Manslaughter in first degree	2	4	.....	3	.....	.....	.....	1	2
Manslaughter in second degree	3	4	3	5	.....	1	.....	2	1
Assault in first degree	8	3	5	4	8	1	.....	3	.....
Assault in second degree	30	10	15	15	9	4	2	14	6
Assault in third degree	17	5	1	1	310	81	30	93	54
Maiming	.....	.....	.....	1	6	.....	.....	.....	.....
Robbery in first degree	34	14	4	4	1	.....	.....	.....	.....
Robbery in second degree	1	.....	.....	.....	.....	.....	.....	.....	.....
Robbery in third degree	3	.....	.....	2	.....	.....	.....	1	.....
Entering banking room	4	5	1	.....	.....	.....	.....	.....	.....
Arson in first degree	.....	.....	2	2	.....	.....	.....	1	.....
Arson in second degree	2	1	2	1	.....	.....	.....	.....	.....
Arson in third degree	10	5	5	2	.....	6	.....	1	.....
Burglary in first degree	1	.....	1	1	.....	.....	.....	1	.....
Burglary in second degree	3	1	.....	.....	.....	.....	.....	.....	.....
Burglary in third degree	105	7	2	12	3	.....	.....	9	3
Grand larceny in first degree	102	31	24	23	4	3	.....	24	.....
Grand larceny in second degree	309	35	16	65	11	.....	.....	49	3
Petit larceny	15	.....	4	4	308	57	19	58	6
Receiving stolen property	25	3	3	7	3	3	.....	7	1
Forgery in first degree	6	1	2	.....	4	.....	.....	2	.....
Forgery in second degree	160	8	1	13	.....	.....	.....	12	1
Forgery in third degree	39	.....	.....	.....	.....	1	.....	1	1
Rape	5	4	2	.....	1	.....	.....	2	.....
Carnal knowledge	27	4	6	1	.....	.....	.....	1	.....
Child under fourteen years	2	3	2	2	.....	.....	.....	2	1
Child under eighteen years	60	12	5	25	.....	.....	.....	9	.....
Abandonment wife or child	110	6	6	42	6	2	.....	14	1
Abduction	5	4	.....	.....	1	.....	.....	1	.....
Abortion	3	1	1	2	.....	.....	.....	1	.....
Adultery	5	2	5	11	3	.....	.....	5	.....
Auditing fraudulent claim	.....	1	.....	3	.....	.....	.....	.....	.....
Bigamy	2	.....	.....	1	.....	.....	.....	.....	.....
Bribery	2	.....	.....	.....	.....	1	1	.....	.....
Carrying concealed weapons	20	1	4	3	8	2	1	1	.....
Chattel mortgaged property, sale of.	11	4	3	11	3	.....	.....	13	.....

TABLE No. 2—Continued

Nature of Accusation.	IN DISTRICT COURT				IN MUNICIPAL AND JUSTICE COURTS				
	Pleaded Guilty.	Found Guilty.	Acquittals.	Dismissals.	Pleaded Guilty.	Found Guilty.	Acquittals.	Dismissals.	Under the Influence of Intoxicating Liquors.
Checking on bank without funds....	85	1	.....	26	36	4	1	77	.....
Contempt of court	1	2	.....	.....	3	13	.....	2	1
Counterfeiting	1	.....	.....	.....	.....	.....	.....	.....	.....
Criminal slander or libel.....	.....	2	.....	.....	6	.....	.....	7	.....
Cruelty to animals.....	.....	.....	.....	2	21	7	4	7	.....
Defrauding hotelkeeper	.....	.....	.....	.....	12	4	.....	7	.....
Delinquency of minor, contributing to	.....	.....	.....	.....	6	.....	.....	1	.....
Drunkenness	2	1	8	5	1,812	264	8	36	1,348
Violation Corrupt Practices Act.....	.....	.....	.....	.....	.....	.....	1	1	.....
Escape	7	.....	1	1	12	1	.....	.....	.....
Extortion	4	1	.....	1	.....	.....	.....	.....	.....
Falsifying accounts (public officer)	2	2	.....	7	.....	.....	.....	.....	.....
Fornication	2	1	.....	2	15	3	.....	4	2
Fraud in management of corporation	1	1	.....	2	.....	.....	.....	.....	.....
Fraudulent claim, presentation of..	.....	.....	.....	.....	2	.....	.....	1	.....
Gambling	2	.....	.....	.....	50	12	.....	2	.....
Habitual offender	2	.....	1	.....	1	.....	.....	.....	1
Incest	5	2	.....	3	1	1	.....	1	.....
Keeping house of ill-fame.....	3	1	.....	2	2	1	.....	3	.....
Kidnapping	1	.....	.....	.....	.....	.....	.....	1	.....
Language tending to provoke breach of peace	.....	1	.....	.....	102	16	7	26	21
Lottery, operation of.....	.....	.....	.....	.....	1	.....	.....	.....	.....
Malicious mischief	5	.....	1	.....	28	9	1	10	4
Non-support	7	2	.....	1	85	18	2	37	.....
Obscene literature, distribution of, etc.	3	.....	.....	.....	3	.....	.....	1	.....
Oppression	.....	.....	.....	.....	.....	.....	.....	1	.....
Perjury	1	1	.....	1	2	.....	.....	2	.....
Property, removal of from mortgaged land	.....	.....	1	.....	2	.....	.....	2	.....
Public nuisance	.....	.....	.....	.....	62	58	.....	6	1
Resisting an officer.....	4	.....	2	1	27	1	2	1	8
Seduction	.....	.....	.....	.....	.....	.....	.....	1	.....
Sodomy	5	.....	.....	.....	.....	.....	.....	1	.....
Swindling	1	1	.....	.....	1	.....	.....	4	.....
Unlawful assembly	.....	.....	.....	.....	9	.....	.....	1	1
Unlawful discrimination	.....	.....	.....	.....	.....	1	.....	.....	.....
Unlawful entry of building.....	12	.....	.....	.....	.....	.....	.....	1	.....
Vagrancy	2	.....	.....	.....	71	23	.....	4	1

Violations:									
Banking laws	1	1	.....	2	.....	.....	.....	1	.....
Blue sky law	5	1	.....	3	.....	.....	.....	.....	.....
Cigarette law	.....	.....	.....	.....	6	1	.....	.....	.....
Compulsory education law	.....	.....	.....	.....	22	4	.....	10	.....
Dance hall law	.....	1	1	.....	58	9	.....	1	6
Forestry laws	.....	.....	.....	.....	82	21	4	2	.....
Game and fish laws	8	1	.....	.....	643	130	10	58	.....
Health laws	.....	.....	1	1	11	1	1	1	.....
Illegitimate child law	158	24	7	35	6	.....	.....	23	.....
Insurance laws	.....	.....	.....	.....	.....	.....	.....	.....	.....
Labor laws	.....	.....	.....	.....	6	1	.....	2	.....
Motor vehicle laws (intoxicated driver)	6	7	2	2	373	82	14	22	290
Motor vehicle laws (speed, etc.)	26	1	3	3	1,219	119	15	32	19
Prohibition laws (abatement)	5	50	.....	19	.....	.....	.....	.....	.....
Prohibition laws (confiscation)	2	14	13	4	.....	.....	.....	.....	.....
Prohibition laws (general)	740	104	58	131	137	46	4	72	54
Prohibition laws (nuisance)	80	3	7	15	533	51	7	145	27
Pure food laws	.....	.....	.....	.....	36	3	4	1	.....
Weights and measures laws	.....	.....	.....	.....	4	.....	.....	.....	.....
Attempts to commit (state offense):									
Adultery	2	.....	.....	.....	.....	.....	.....	.....	.....
Assault	4	.....	.....	.....	1	.....	.....	.....	.....
Barbering without license	.....	.....	.....	.....	.....	.....	.....	1	.....
Burglary third degree	4	.....	.....	.....	.....	.....	.....	.....	.....
Carnal knowledge	2	.....	.....	.....	.....	.....	.....	.....	.....
Escape from penal institution	4	.....	.....	.....	.....	.....	.....	.....	.....
Forgery second degree	.....	.....	.....	.....	.....	.....	.....	1	.....
Grand larceny first degree	5	1	.....	.....	.....	.....	.....	.....	.....
Indecent assault	1	.....	.....	.....	.....	.....	.....	.....	.....
Influencing juror	.....	.....	.....	1	.....	.....	.....	.....	.....
Possession of narcotics	1	.....	.....	.....	.....	.....	.....	.....	.....
Rape	.....	1	.....	1	.....	1	.....	2	.....
Miscellaneous	182	.....	24	40	673	92	13	82	13
Total	2,526	445	258	581	6,871	1,159	151	1,038	1,878

TABLE No. 1

PROSECUTIONS REPORTED BY COUNTY ATTORNEYS FOR YEAR 1925, SHOWING COUNTIES SEPARATELY

	IN DISTRICT COURT				IN MUNICIPAL AND JUSTICE COURTS				
	Pleaded Guilty.	Found Guilty.	Acquittals.	Nolle Prosequi.	Pleaded Guilty.	Found Guilty.	Acquittals.	Dismissals.	Under the Influence of Intoxicating Liquors.
Aitkin—D. A. Scott	24	3	5	2	64	1	5	1	26
Anoka—Will A. Blanchard	9	3	1	3	142	5	107	1	.....
Becker—A. O. Sletvold	No Report		.....	.....	.....	.....	.....	.....	.....
Beltrami—Graham M. Torrance	23	2	1	.....	3	1	1	.....	.....
Benton—E. W. Swenson	16	1	1	2	199	12	2	8	.....
Big Stone—Chas. H. Bolsta	5	1	1	.....	54	29	4	2	56
Blue Earth—Frank E. Morse	76	5	3	.....	238	36	3	47	17
Brown—T. O. Streissguth	15	6	2	6	30	4	1	5	13
Carlton—J. E. Green	39	6	4	4	35	47	6	14	39
Carver—W. F. Odell	8	1	.....	.....	45	1	.....	.....	.....
Cass—Edw. L. Rogers	2	14	8	.....	.....	39	.....	58	.....
Chippewa—A. E. Kief	16	5	.....	4	27	3	.....	.....	.....
Chisago—S. Bernhard Wennerberg	7	2	.....	1	111	8	.....	2	26
Clay—W. George Hammett	73	13	5	.....	29	66	5	111	28
Clearwater—Oscar T. Stenvick	2	1	.....	.....	10	.....	1	2	7
Cook—S. C. Murphy	3	.....	.....	.....	53	20	3	10	43
Cottonwood—O. J. Finsted	13	5	.....	.....	3	26	4	3	7
Crow Wing—W. F. Wieland	65	7	1	20	75	6	5	11	45
Dakota—Alfred M. Joyce	11	9	2	.....	948	235	28	69	325
Dodge—John Swendiman, Jr.	6	2	1	.....	41	1	.....	4	1
Douglas—Constant Larson	10	.....	1	2	68	8	1	.....	.....
Faribault—H. C. Lindgren	15	1	.....	2	46	41	.....	59	48
Fillmore—S. C. Pattridge	20	3	1	.....	31	.....	.....	.....	.....
Freeborn—John O. Peterson	34	2	.....	7	76	44	2	.....	73
Goodhue—Theodore N. Ofstedahl	27	5	.....	5	92	4	1	12	44
Grant—R. J. Stromme	4	.....	.....	.....	16	10	.....	.....	2
Hennepin—Floyd B. Olson	608	71	52	293	.....	.....	.....	.....	.....
Houston—Wm. E. Flynn	16	1	1	3	27	1	.....	1	12
Hubbard—R. O. Webster	2	2	.....	.....	36	3	.....	5	.....
Isanti—Henry L. Soderquist	12	8	.....	4	28	.....	.....	24	10
Itasca—Ralph A. Stone	42	5	.....	2	109	43	2	9	29
Jackson—B. E. Grottum	14	2	2	2	126	9	.....	9	.....
Kanabec—P. S. Olsen	9	.....	1	8	27	2	3	.....	7
Kandiyohi—Charles Johnson	22	.....	2	2	124	8	.....	18	.....
Kittson—A. D. Bornemann	9	.....	.....	.....	21	5	4	4	.....
Koochiching—Franz Jevne	20	.....	.....	7	144	41	9	12	.....
Lac qui Parle—Theo. S. Slen	8	2	1	11	63	8	3	9	37
Lake—J. A. Walstrom	14	3	2	.....	16	.....	.....	.....	1
Lake of the Woods—E. C. Middleton	6	.....	.....	3	28	1	1	1	4
Le Sueur—L. W. Prendergast	5	15	.....	2	28	1	.....	6	2

Lincoln—A. K. Stauning	12	1	2	13	27	2	1	5	5
Lyon—A. R. English	24	3	.....	3	27	.....	.....	24	17
McLeod—Wm. O. McNelly	13	6	2	3	46	.....	1	3	18
Mahnomen—L. A. Wilson	7	1	1	3	25	3	.....	1	15
Marshall—W. O. Braggans	21	2	3	.....	23	2	.....	4	21
Martin—John W. Lovell	25	3	2	3	115	12	9	9	78
Meeker—Ray H. Dart	21	5	.....	.....	2	68	.....	.....	2
Mille Lacs—A. D. Smith	12	.....	4	7	38	4	2	3	11
Morrison—D. M. Cameron	26	5	5	14	83	16	2	27	32
Mower—Otto Baudler	27	1	2	2	100	8	1	.....	.....
Murray—A. W. Tierney	12	2	.....	1	17	13	2	.....	1
Nicollet—Geo. T. Olsen	7	2	.....	.....	34	18	.....	4	23
Nobles—John F. Flynn	26	2	5	5	47	4	.....	3	1
Norman—M. A. Brattland	21	.....	3	3	20	3	.....	.....	3
Olmsted—W. W. Smith	64	13	12	17	188	6	4	32	.....
Otter Tail—Leonard Eriksson	17	6	1	14	204	.....	1	35	.....
Pennington—Theo. Quale	4	3	1	6	18	2	2	9	.....
Pine—Albert Johnson	6	1	2	2	49	32	2	15	7
Pipestone—Chas. Dealy	11	4	1	2	27	7	3	.....	.....
Polk—James E. Montague	74	8	.....	2	18	5	3	3	.....
Pope—E. R. Selnes	9	1	1	1	25	.....	.....	.....	17
Ramsey—Harry H. Peterson	361	19	11	64	53	.....	.....	123	.....
Red Lake—Chas. E. Boughton, Jr.	16	.....	.....	1	18	.....	.....	.....	17
Redwood—Geo. A. Barnes	22	1	1	2	21	.....	.....	1	.....
Renville—James B. Baker	14	.....	.....	.....	42	3	3	9	26
Rice—Lucius A. Smith	54	.....	16	.....	148	.....	18	47	.....
Rock—E. H. Canfield	8	1	1	2	20	2	1	1	14
Roseau—M. J. Hegland	17	.....	.....	2	41	16	1	1	3
St. Louis—Mason M. Forbes	341	50	16	120	550	23	18	166	.....
Scott—Jos. L. Hilgers	11	.....	2	4	47	5	2	4	7
Sherburne—Robert A. Hastings	8	2	3	5	266	1	.....	2	23
Sibley—O. S. Vesta	10	11	10	2	19	2	.....	3	3
Stearns—James J. Quigley	19	1	4	12	212	155	10	14	208
Steele—Harold S. Nelson	11	2	.....	2	42	4	5	35	2
Stevens—R. G. Cushing	2	1	2	.....	17	.....	.....	7	11
Swift—J. A. Lee	2	3	1	.....	15	.....	.....	3	.....
Todd—Wm. M. Wood	62	6	2	.....	145	1	.....	5	.....
Traverse—W. B. Mitton	2	.....	.....	.....	16	2	.....	1	9
Wabasha—John R. Foley	43	1	1	5	26	.....	.....	9	35
Wadena—John H. Mark	22	1	3	3	69	1	.....	1	47
Waseca—George E. Child	15	3	2	.....	29	4	4	15	5
Washington—P. M. Lindbloom	23	1	.....	5	142	23	5	37	12
Watonwan—J. L. Lobben	11	.....	1	3	69	.....	.....	8	51
Wilkin—H. G. Wyvell	3	3	.....	1	46	37	.....	2	7
Winona—Morris J. Owen	42	5	5	.....	860	36	18	76	386
Wright—Tom Welch	36	6	2	7	49	5	2	3	2
Yellow Medicine—Paul D. Stratton	14	6	1	3	44	3	.....	1	.....
Totals	2,918	398	229	739	7,352	1,297	321	1,268	2,021

TABLE NO. 2

PROSECUTIONS REPORTED BY COUNTY ATTORNEYS FOR YEAR 1926, SHOWING COUNTIES SEPARATELY

	IN DISTRICT COURT				IN MUNICIPAL AND JUSTICE COURTS				
	Pleaded Guilty.	Found Guilty.	Acquittals.	Dismissals.	Pleaded Guilty.	Found Guilty.	Acquittals.	Dismissals.	Under the Influence of Intoxicating Liquors.
Aitkin—D. A. Scott	11	3	1	2	81	5	4	3	17
Anoka—Will A. Blanchard	5	10	1	8	172	.....	.....	.....	.....
Becker—A. O. Sletvold	No Report		.....	.....	.....	.....	.....	.....	.....
Beltrami—G. M. Torrance	43	8	.....	.....	8	4	.....	.....	9
Benton—E. W. Swenson	20	5	1	2	177	7	1	2	.....
Big Stone—Chas. H. Bostla	4	.....	.....	.....	11	5	1	1	4
Blue Earth—Frank E. Morse	34	2	6	6	306	30	2	48	17
Brown—T. O. Streissguth	10	7	3	9	46	1	1	9	14
Carlton—Victor J. Michaelson	37	19	1	3	18	38	3	17	18
Carver—John J. Fahey	14	1	1	.....	28	2	2	5	.....
Cass—Edw. L. Rogers	14	1	3	9	46	2	1	3	.....
Chippewa—A. E. Kief	21	1	.....	1	21	2	.....	.....	6
Chisago—S. Bernhard Wennerberg	15	5	1	2	58	6	.....	.....	26
Clay—W. George Hammett	55	13	5	1	5	66	4	73	18
Clearwater—Geo. P. Jones	7	1	.....	.....	46	.....	5	5	15
Cook—S. C. Murphy	.....	.....	1	.....	.....	41	1	10	4
Cottonwood—O. J. Finstad	3	17	2	.....	27	3	2	.....	3
Crow Wing—W. F. Wieland	43	4	3	29	57	9	5	14	27
Dakota—Alfred M. Joyce	30	.....	.....	5	884	128	1	56	251
Dodge—John Swendiman, Jr	8	1	3	4	19	.....	.....	3	4
Douglas—Constant Larson	26	2	.....	2	48	.....	.....	1	.....
Faribault—H. C. Lindgren	33	1	6	6	97	6	1	50	46
Fillmore—S. C. Pattridge	23	3	1	.....	70	.....	.....	.....	23
Freeborn—John O. Peterson	30	3	1	7	48	57	.....	14	15
Goodhue—Theodore N. Ofstedahl	23	4	2	1	74	.....	1	6	32
Grant—R. J. Stromme	9	1	.....	1	28	1	.....	1	1
Hennepin—Floyd B. Olson	534	62	48	46	.....	.....	.....	.....	.....
Houston—Wm. E. Flynn	8	1	.....	2	34	1	.....	.....	7
Hubbard—R. O. Webster	13	3	2	2	51	3	2	.....	16
Isanti—Henry L. Soderquist	11	1	.....	4	42	6	.....	15	18
Itasca—Ralph A. Stone	13	2	1	2	69	73	4	11	40
Jackson—B. E. Grottum	26	5	1	7	38	2	.....	11	10
Kanabec—P. S. Olsen	15	4	.....	8	19	3	2	1	11
Kandiyohi—Charles Johnson	30	1	.....	.....	274	9	5	33	24
Kittson—A. D. Bornemann	9	.....	.....	1	35	1	1	.....	.....
Koochiching—Franz Jevne	14	14	.....	9	139	184	.....	20	12
Lac qui Parle—Theo. S. Slen	18	6	.....	2	51	3	1	6	.....
Lake—J. A. Walstrom	2	5	.....	.....	33	7	.....	1	13
Lake of the Woods—E. C. Middleton	3	.....	.....	4	15	2	.....	12	6
Le Sueur—L. W. Prendergast	4	3	2	4	61	4	1	4	30

Lincoln—A. K. Stauning	13	1	3	8	30	.....	1	1	16
Lyon—A. R. English	30	7	4	7	16	2	1	4	.....
McLeod—Wm. O. McNelly	11	3	2	3	33	.....	.....	5	17
Mahnomen—L. A. Wilson	8	.....	.....	3	17	1	.....	.....	21
Marshall—W. O. Braggans	27	1	.....	.....	.....	.....	.....	.....	.....
Martin—John W. Lovell	20	4	3	16	131	16	9	22	61
Meeker—Ray H. Dart	7	3	.....	2	.....	63	.....	.....	.....
Mille Lacs—A. D. Smith	20	4	5	5	52	8	2	7	12
Morrison—D. M. Cameron	16	8	5	22	63	7	3	16	21
Mower—Otto Baudler	31	4	.....	3	45	4	1	3	.....
Murray—A. W. Tierney	6	4	1	5	21	4	.....	.....	2
Nicollet—Geo. T. Olsen	12	2	1	2	42	12	.....	1	12
Nobles—John F. Flynn	23	2	5	6	41	6	5	13	.....
Norman—M. A. Brattland	13	.....	1	3	26	3	.....	3	6
Olmsted—W. W. Smith	41	20	8	17	51	7	4	32	21
Otter Tail—Leonard Eriksson	16	9	5	8	110	70	4	50	49
Pennington—Theo. Quale	4	1	.....	1	7	1	.....	.....	.....
Pine—Albert Johnson	10	3	.....	6	35	5	3	12	6
Pipestone—Chas. Dealy	16	3	.....	.....	33	1	1	1	.....
Polk—James E. Montague	42	6	1	1	58	1	.....	.....	.....
Pope—E. R. Selnes	10	2	.....	2	25	2	2	.....	23
Ramsey—Harry H. Peterson	333	12	68	68	112	2	.....	40	.....
Red Lake—Chas. E. Boughton, Jr.	4	1	1	1	28	.....	.....	.....	1
Redwood—Geo. A. Barnes	52	.....	.....	8	56	3	.....	9	.....
Renville—James B. Baker	1	5	6	1	16	8	1	1	13
Rice—Lucius A. Smith	36	1	3	8	123	9	.....	34	38
Rock—E. H. Canfield	5	1	3	2	10	2	1	1	10
Roseau—M. J. Hegland	7	4	3	1	36	.....	.....	2	17
St. Louis—Mason M. Forbes	208	80	21	104	468	6	12	199	.....
Scott—Jos. L. Hilgers	No Report		.....	.....	.....	.....	.....	.....	.....
Sherburne—Robt. A. Hastings	5	.....	1	3	200	1	.....	7	2
Sibley—O. S. Vesta	11	4	.....	3	24	4	.....	1	17
Stearns—James J. Quigley	31	.....	1	18	345	75	4	22	168
Steele—Harold S. Nelson	20	2	2	9	54	1	.....	19	6
Stevens—R. G. Cushing	5	1	.....	.....	40	.....	1	8	34
Swift—J. A. Lee	12	.....	1	.....	22	.....	.....	3	.....
Todd—Wm. M. Wood	41	1	.....	2	111	14	.....	2	.....
Traverse—W. B. Mitton	1	.....	1	.....	19	.....	.....	.....	9
Wabasha—John R. Foley	19	3	1	26	53	1	.....	30	22
Wadena—John H. Mark	13	1	.....	2	66	3	.....	.....	48
Waseca—Geo. E. Child	35	.....	3	5	40	14	5	4	12
Washington—P. M. Lindbloom	16	1	1	5	59	7	4	3	8
Watonwan—J. L. Lobben	8	.....	.....	1	52	1	3	1	39
Wilkin—H. G. Wyvell	12	12	.....	.....	36	33	9	5	.....
Winona—Morris J. Owen	36	4	2	5	717	31	20	42	392
Wright—Tom P. Welch	19	4	.....	.....	62	1	2	.....	28
Yellow Medicine—Paul D. Stratton	2	2	.....	.....	50	19	2	.....	10
Totals	2,526	445	258	581	6,871	1,159	151	1,038	1,878

1

BANKS—Commissioner of Bank—Amount invested in banking house.

It is claimed by a certain bank that the 40 per cent of its capital and surplus which it may invest in a bank building is exclusive of any mortgage indebtedness against such building. You state that you do not agree with this contention.

I believe that you are right in your position, and that the amount which a state bank may invest in its banking house is 40 per cent of its capital and surplus and that both the cash investment and incumbrances must not exceed that amount. Any other construction of the statute would defeat the purpose thereof.

I am also of the opinion that neither the banking house nor any portion of the investment therein, including incumbrances thereon, may be carried as "other real estate."

WILLIAM H. GURNEE,
April 7, 1926. Assistant Attorney General.

2

BONDS—Public contractor cannot give certificate of deposit in lieu of.

L. A. Wilson, County Attorney.

Dear Sir:

You state that the town board of the town of Twin Lakes in your county entered into a contract with a public contractor for the construction of a road. This contractor failed to give the bond required by statute, and in lieu thereof delivered to the town authorities a bond in the usual form except that instead of having sureties thereon he attached to the bond a certificate of deposit, endorsed payable to the town.

You ask if this is a valid bond or whether the town should require a bond to be executed with proper sureties.

Section 9700, G. S. 1923, provides that contracts for the doing of public work shall not be valid for any purpose unless a bond is given in compliance with the provisions of this section. Clearly, section 9700 was not complied with in the case you refer to. Unless the town board requires a valid bond to be executed and filed, or securities to be deposited under the provisions of section 9679, G. S. 1923, in case of default, the town would be liable to subcontractors and material-men under the provisions of section 9702.

WILLIAM H. GURNEE,
July 22, 1925. Assistant Attorney General.

3

BUILDING AND LOAN ASSOCIATIONS—Usury—What constitutes loan on stock.

Superintendent of Banks.

You state the following facts:

X owns twenty shares of installment stock in a certain building and loan association on which he has paid $580.00 above his membership fee. He has asked for a loan of $500.00 on his stock, and the association required

him to pledge his shares as collateral. Such pledge, however, has not disturbed the earnings on these shares. He has been granted a loan of $500.00 at the rate of ten per cent per annum. You asked whether or not this constitutes usury.

Section 7754, G. S. 1923, provides:

> "No premiums for loans made by such association shall be considered or treated as interest or render it amenable to usury laws."

The operations of building and loan associations have been under consideration by our supreme court in a number of cases. In Central Building and Loan Association vs. Lampson, 60 Minn. 422, the court, referring to the statute I have cited, said:

> "To entitle mutual building and loan associations to the benefit of this exemption from the usury laws they must conduct their business in good faith and loan their funds only to bona fide members. They cannot loan their funds to strangers upon usurious terms, practically exclude them from participating in the advantages and profits of the mutual system in which outlay and return are intimately blended, and then claim the benefit of the statute as a cover for the transaction. Otherwise they would become simply associations of legalized usurers availing themselves of the privileges and exemptions of the statute intended only for strictly mutual building and loan associations."

There appears to be no question but that the association under consideration is a strictly mutual building and loan association, and that the loan referred to was made to a bona fide member. In Zenith Building and Loan Association vs. Heimbach, 77 Minn. 97, our supreme court sustained a finding of the trial court to the effect that the association under consideration in that case was a mutual building and loan association within the meaning of the statutes exempting such associations from the usury laws of the state; and that a mortgage which bore interest in the excess of the rate permitted by law was valid. In Maudlin vs. American Savings & Loan, 63 Minn. 358, the court said:

> "If the legislature has enacted unwise laws the courts are not responsible for it. These associations must be protected in all the rights which the statutes give them, but it is the duty of the courts to see that they do not exercise powers which they do not possess, or abuse those which they have."

In Jenkins vs. Union Savings Association, 132 Minn. 19, the court had under consideration a foreign building and loan association, but said:

> "Moreover there is no finding that the loan would offend even our statute against usury. It is true that adding the monthly premium of fifty cents for each $100.00 of the loan to the stipulated 6 per cent interest it would call for 12 per cent, but it is found that the earnings are required by law and defendant's articles of incorporation to be distributed each year to the stockholders and since plaintiff like every borrower from defendant became a stockholder as a condition precedent to obtaining the loan, he has participated in this annual distribution of earnings, and there is no showing as to the amount so placed to his credit. It may have reduced the interest to an amount far below 10 per cent."

It is quite obvious that the transaction in question is not a simple loan of $500.00 on which the borrower pays 10 per cent per annum. It is more than that. The borrower, who is a member of the association and a stockholder, participates in the earnings of the company to the extent of his stock. It may be that the amount will be placed to his credit in excess of the interest he will be required to pay on his loan. At any rate, his share of the earnings of the company should be regarded as an offset to the amount of interest he is required to pay upon the loan. I do not think under the decisions of our court that this transaction would be regarded as a usurious one. See Black vs. Tompkins, 39 S. W. 553; 1914 C. Ann. Cas. 1305; LeMars, etc. vs. Burgess, 129 Iowa 422; Fidelity Savings vs. Shay, 55 Pac. 1022; Simpson vs. Ky. etc., 101 Ky. 496.

CLIFFORD L. HILTON,
Attorney General.

May 19, 1925.

4

CHATTEL MORTGAGES—Receipts under chapter 68, Laws 1925.
Rolland Mathews, County Attorney.

Calling attention to chapter 68, Laws 1925, you inquire:

1. "Is it necessary to have the mortgagor sign in a separate place for his receipt on chattels?"

Answer: The chattel mortgage must "contain a receipt of the mortgagor." I take it that the receipt may be contained in the mortgage.

2. "Also on conditional sales contracts, where they contain a chattel mortgage clause?"

Answer: Yes, if they contain a chattel mortgage clause.

3. "Also conditional sales contracts, where they do not contain a chattel mortgage clause?"

Answer: No. See letter of date of May 1, 1925, addressed public examiner, copy enclosed.

4. "Also conditional sale notes of all descriptions?"

Answer: No. Unless they contain chattel mortgage clauses.

ALBERT F. PRATT,
Assistant Attorney General.

May 8, 1925.

5

CORPORATIONS—CO-OPERATIVES—Permanent surplus—Limit of.
Commissioner of Agriculture.

You state:

"The co-operative accounting division of this department is auditor for a co-operative association organized under the general co-operative law, chapter 326, Laws 1923.

This act limits the permanent surplus of a co-operative association to an amount equal to the paid-in capital. Owing to the nature of its business a large paid-in capital is not necessary for this association. It is, however, desirable to carry a reserve for contingencies larger than the permanent surplus permitted. At present this reserve is carried in three accounts entitled: building reserve, educational fund and opera-

ting surplus. The directors wish to be advised if there is any legal objection to combining these accounts in the account entitled 'operating surplus.'"

The statute, section 7 of chapter 326, Laws 1923, is specific with reference to the limitation placed upon the "reserve for permanent surplus." That reserve must be kept separate and distinct from any other "reserve" or "surplus." Doubtless the provisions relating to the creation of this fund and limiting the amount of the same were advisedly inserted by the legislature, as incident to the operation of a co-operative, presumably to prevent the accumulation of a large permanent surplus, at the expense of patrons, which might be subject to distribution among the stockholders instead of the patrons, upon a dissolution of the association, thereby indirectly accomplishing the payment of dividends upon stock in excess of the rate permitted by law, which could not be directly accomplished. So much for that fund.

Section 7 is also quite specific with respect to other deductions and other funds.

The statute first defines "income." From "income" the costs of operation are to be deducted; also a reasonable and adequate reserve for depreciation of physical properties and other possible losses. The balance of "income" remaining after such deductions is "gross income."

From the annual "gross income" there is deducted "interest" on the stock at not to exceed the maximum rate prescribed by law, but such "interest" may not be cumulative (section 7, last paragraph) and may be paid "only when the net income of the association for the previous fiscal year is sufficient." From such "gross income" may also be deducted and set aside such amounts as may be required to provide for the erection of new or additional buildings or for additional machinery or equipment or to pay indebtedness incurred for such purposes.

The balance of the "gross income" remaining after such deductions and settings aside is defined as "net income." From the " net income" is set aside the "reserve for permanent surplus," above referred to.

Then, "in addition to such reserve for permanent surplus," from the annual "net income," there may be deducted not to exceed five per cent thereof, "which shall be used for the purposes of promoting and encouraging co-operative organization."

And the balance of the annual "net income" remaining after making all the deductions and settings aside, above referred to, is the "undivided surplus," which shall be distributed among the patrons on the basis of patronage.

You will note in the last paragraph of section 7 the penalties following the causing of the "income" of the association "to be apportioned or distributed in any other or different manner than herein provided.

I cannot tell from your inquiry just what the several funds referred to, except the educational fund, consist of, or at what stage of the application of the "income" they are severally created. The "building fund" may be the reserve for depreciation, etc., deducted from "income" under the first paragraph of section 7, or it may be the reserve for new buildings, etc., deducted

from the "gross income" under the second paragraph of section 7. Probably the latter. I cannot locate the "operating surplus" fund at all, unless it comprises the reserve for depreciation, losses, etc., created under the first paragraph of section 7, or is a temporary surplus made up of deductions for "the costs of the operations" covering present and anticipated costs of operation of a temporary nature, created and expendable from month to month or other limited periods pursuant to said first paragraph. Otherwise there appears to be no authority in the statute for the creation of such a fund.

While the totals of these various "reserves" and "surpluses" may exceed the limit provided by statute for the "reserve for permanent surplus," the several funds created by those various deductions and settings aside as authorized by statute may not be commingled.

The statute answers your inquiry in the negative.

ALBERT F. PRATT,
Assistant Attorney General.

May 17, 1926.

6

CITIES AND VILLAGES—Assessments—Sewer—Collection of.

Peter Anderson, Village Recorder.

Referring to delinquent instalments of special assessments for sewers, you inquire how the village may compel their payment.

Unless you have a village charter with special provisions covering the collection of such special assessments, and you probably have not, although you do not state what law you are working under, the procedure is as follows:

One installment, with interest on the principal, is certified by the recorder to the county auditor each year, to be collected the same as county, state and village taxes. The auditor puts these amounts on the tax books against the various lots and tracts, along with other taxes. The books go to the treasurer for collection. If not paid, they become delinquent and penalties are added the same as on other taxes.

The 1920 instalment went on with the 1920 taxes, in the 1921 books. If not paid, the lands were advertised for auction sale in May, 1922, when everyone had a chance to bid. If no one bid, there was no sale, and the lots were "bid in to the state." The same with the 1921 instalment, delinquent in 1923, the 1922 instalment, delinquent in 1924, and so on, except that after one sale and no bidders, the land is not advertised again until sold to an actual purchaser or redeemed. Anyone may go to the auditor's office now and buy a state assignment certificate, and in May, 1925, he may serve notice of expiration of redemption. If no redemption is made, he gets a tax title.

The village, however, cannot use the tax money for that purpose, except under some special provision of law.

After the taxes and assessments accumulate to more than the property is worth and it is so certified by the state tax commission, there is a chance to bid in for less than the total at the annual forfeited sale held by the

county auditor in each year. At those sales, special assessments may not be cut, except pursuant to resolution of the village council. See chapter 208, Laws 1925.

But if no one wants the property at what it will cost at tax sale, your assessments simply lie there uncollected, the same as general taxes.

The situation is that the taxes and assessments amount to more than one is willing to pay for the property, at auction sale or otherwise, and take his chances on a tax title.

General taxes do not outlaw, and I do not think that special assessments do, so you will continue to have a lien. If the property should become of value someone will buy in at tax sale, or the owners will redeem.

The only way I know of to protect the "live" taxpayers, as you call them, from the failure to pay taxes by delinquents, is for the "live" ones to bid in the property of the delinquents, at the tax sales, or buy assignments of the tax certificates. If the property is worth more than the taxes and assessments (including instalments not yet due), anyone who bids in will likely make some money; otherwise, he will lose. I know of no other way to force payment. Real estate taxes and assessments do not become a personal liability of the landowner, as do personal property taxes, but constitute a lien only against the land assessed.

ALBERT F. PRATT,
Assistant Attorney General.

January 29, 1925.

7

CITIES AND VILLAGES—Assessments—Streets—Sprinkling and oiling of.

The Village Attorney, Mora.

You state that your village council desires to sprinkle certain streets of the village of Mora with oil and to assess the abutting property owners for at least a part of the expense thereof, and you inquire whether such improvement may be made and assessment levied without a petition under G. S. 1923, section 1186, subdivision 8, or whether a petition is required as provided by section 1205.

If the village of Mora has accepted and is operating under G. S. 1923, chapter 9, as permitted by sections 1109 and 1110, it is my opinion that the village council may proceed under either section. The last paragraph of subdivision 8, permitting assessments for the sprinkling or oiling of streets without petition from the property owners, was enacted by Laws 1917, chapter 406. That enactment is subsequent to section 1205 (except for an amendment of the latter by Laws 1925, chapter 309, which, however, relates to matters other than sprinkling). Under the authority of Borgerding vs. village of Freeport, 166 Minn. 202, it may safely be said that both of the provisions referred to are in effect, and that either method may be adopted by the council. There may be some question whether the word "sprinkling" as used in section 1205 includes sprinkling with oil, but that point is not important here.

I have not been able to ascertain under what law your village is operating. Laws 1885, chapter 145, contains no provision for sprinkling with water or oil. It is assumed that any other law (other than G. S. 1923, chapter 9) under which the village may be organized contains no specific reference to the assessment of the cost of sprinkling and oiling. Laws 1917, chapter 48 (G. S. 1923, section 1208) makes applicable the provisions of sections 1205, 1206, and 1207, "relating to the sprinkling or oiling of streets," to villages organized otherwise than under G. S. 1923, chapter 9. If your village is organized otherwise than under chapter 9, then it must proceed under section 1205, et seq., which require a petition before the cost of the sprinkling may be assessed against the abutting property, and subdivision 8 of section 1186 has no application.

G. A. YOUNGQUIST,
Assistant Attorney General.

April 29, 1926.

8

CITIES AND VILLAGES—Assessments—Sprinkling streets with oil.

E. J. Hiniker, City Attorney.

You quote a section of your city charter authorizing the city council to cause the streets to be sprinkled and to pay the cost thereof by levy of special assessments. You inquire whether the city may sprinkle the streets with oil.

If your city is of the fourth class and not operating under a home rule charter, I call your attention to chapter 285, Laws 1917, which specifically authorizes the use of oil for sprinkling purposes.

I take it, however, that your city is operating under a home rule charter; hence the above mentioned act is not applicable. I have been unable to find any statute expressly authorizing cities of the fourth class, except as above, to use oil upon the streets. However, I am inclined to the opinion that the word "sprinkle," as used in the quoted section of your charter, may fairly include the use of oil where the sole purpose is to lay the dust. As I understand, it is spread through a process of sprinkling and serves the same purpose of water except that it is effective for a much longer period.

Of course, a different situation arises when oil or other substance is placed on the roadbed for the purpose of improving the same for travel.

CHARLES E. PHILLIPS,
Assistant Attorney General.

May 2, 1925.

9

CITIES AND VILLAGES—Assessments—Time for filing duplicate roll with auditor is directory only.

Chas. H. Bolsta, County Attorney.

You state that your city has just recently perfected assessments for certain local improvements, and you inquire whether it becomes the duty of the auditor to spread the same this year, if the duplicate assessment roll is now filed with him.

You quote section 143 of your charter, which, so far as here material, reads:

> "The city clerk shall record all assessment rolls of special assessments in books to be kept by him for that purpose, and shall, on or before the tenth day of October of every year, deliver to the county auditors of the counties of Big Stone and Lac qui Parle, all such assessment rolls, and the said county auditors shall extend the assessment in proper columns against the property assessed, and such assessment shall be collected and the payment thereof enforced with and in like manner as other taxes."

I am inclined to the opinion that the date specified for the filing of the roll with the county auditor is directory only, and that upon the filing thereof at a later date it becomes the duty of the auditor to spread the same if it is reasonably possible so to do.

CHARLES E. PHILLIPS,
Assistant Attorney General.

November 27, 1926.

10

CITIES AND VILLAGES—Assessments—Water mains—Levying of without vote of people.

Lee S. Byard, Village Attorney.

You state that the village of Robbinsdale was incorporated under chapter 145, Laws 1885, and has not reincorporated under later laws. You call attention to the tenth paragraph of section 21 of the above chapter, which gives to the village council power "to provide protection from fire by the purchase of fire engines and all necessary apparatus for the extinguishment of fires and by the erection or construction of pumps, water mains, reservoirs or other water works." Also to the provisions of section 1229, G. S. 1923, whereby, upon approval of the voters, any village may erect waterworks and issue bonds therefor.

Also to the provisions of section 1236, et seq. G. S. 1923, authorizing the levying of special assessments by the village council of any village "now or hereafter having a waterworks system."

Also to the provisions of chapter 425, Laws 1921, authorizing the village council of any village to "lay water mains and appurtenances" along any street or public alley therein, the cost thereof to be assessed against abutting property, on the basis of benefits.

Your village proposes to lay water mains in certain of its streets and public alleys, connecting the same with water mains of the adjoining city of Minneapolis, whereby water will be supplied to the inhabitants of Robbinsdale, under a contract between the two municipalities. You suggest that the provisions in the General Statutes above referred to have no application to the situation; that chapter 425, Laws 1921, seems to be applicable in all respects; and you ask for our views.

The quoted provisions from chapter 145, Laws 1885, quite clearly cover fire engines, water works, etc., purchased or constructed for fire protection purposes, at the expense of general taxation.

Section 1229, G. S. 1923, also quite clearly covers waterworks, etc., erected, purchased, or leased at the expense of the general taxpayers. Section 1236, et seq. G. S. 1923, appear to cover cases where waterworks systems have been acquired, and to authorize special assessments on benefitted property in front of which water mains are laid. Chapter 425, Laws 1921, quite clearly covers all cases where it is desired to lay water mains to be paid for by special assessments on benefited property, and does not require a vote of the people before entering upon the project. The interested parties have their day in court and full opportunity to be heard, under sections 3 and 7.

ALBERT F. PRATT,
Assistant Attorney General.

March 17, 1925.

CITIES AND VILLAGES—Financial Statement—Letting to newspapers outside limits of municipality.

State Expert Printer.

You refer to section 1069, G. S. 1894, which provides for annual financial reports to be made and filed by the treasurers of cities organized and operating under title II of chapter 10, G. S. 1894, and that "a copy of the same (shall be) published in one or more of the city newspapers, or in the paper published nearest to said city." Also to the provisions of section 1085, G. S. 1894, to the effect that the "common council shall have the management and control of the finances and all the property of the city," etc.

You inquire if the common council of such city may, in its discretion, cause such report to be published at not to exceed legal rates in a legal newspaper published nearest to said city, notwithstanding there is a legal newspaper within the city willing to publish the report at legal rates.

From the plain reading of the statute it appears that the inquiry must be answered in the affirmative. The statute is too plain to permit of statutory "construction" to the contrary. The remedy is with the legislature, by way of amendment, or with the common council, through the exercise of its discretion.

The statute in question was enacted in 1870, and has remained the same ever since. You will recall the later statute, passed while you were serving in the legislature, relating to publication of the official proceedings of independent school districts (chapter 360, Laws 1915), wherein it is provided that such proceedings shall be published once "in some newspaper published in such school district, **or if there be no newspaper so published therein, then in some newspaper published in the county.** * * *"

Accordingly it appears that the publication may be made in a newspaper published outside the district only "if there be no newspaper so published therein" (in the district).

However, by the language used in the 1870 act, whatever its intention was, the legislature just as clearly left it optional with the common council, in its discretion, to cause the publication to be made either in one or more of the newspapers published in the city, or in a newspaper published outside the municipality but nearest thereto.

ALBERT F. PRATT,
Assistant Attorney General.

July 19, 1926.

12

CITIES AND VILLAGES—Financial statement—Publication of.

The Public Examiner.

You ask whether villages organized under the 1885 law are authorized or required to publish an annual financial statement.

Section 19, chapter 145, Laws 1885, prescribes the general duties of the village treasurer. Section 20 requires the treasurer one week previous to the annual village election, to make a detailed statement in writing of moneys received and disbursed by him, and provides that such statement be filed by him in his office, for the inspection of any taxpayer residing within the village. It will be observed that there is no requirement in this law for the publication of a financial statement of the village.

Section 19 was carried forward into G. S. 1894 as section 1219, and section 20 was carried forward as section 1223. The legislature at the session of 1905, amended section 1223 so as to require the treasurer to make such written financial statement two weeks previous to the annual election, to file the same in his office for public inspection, and to cause the same to be published at least one week prior to the village election in a newspaper published in the village, if there be one. If there be no newspaper so published, then it requires the treasurer to post copies of such statement in three public places in the village. Chapter 74, Laws 1905.

At the 1905 session, Revised Laws 1905 were adopted. It will be observed that section 717 thereof is substantially a recodification of sections 1219 and 1223, G. S. 1894. This section is one of several sections of a general village code. Section 698, R. L. 1905, expressly provides that any village existing at the time the revised laws became effective, under special legislative charter or under any general law, should continue thereunder and in all things continue to be governed by such general or special laws. Thus any village previously organized under chapter 145, Laws 1885, would continue to be governed by such law as originally enacted and amended.

It will be observed that section 717, R. L. 1905, requires the village treasurer to make out and file with the clerk for publication a detailed account of his receipts and disbursements. A village organized under the village code was not required to publish its financial statement.

This brings us down to the 1911 legislative session, at which chapter 352, Laws 1911, was enacted. In considering the purpose and effect of this chapter it seems important to bear in mind the fact that villages incorporated under the 1885 act were required to publish a financial statement, while villages organized under the revised code were not so required. Chapter 352, amends section 717, R. L. 1905. It requires the treasurer to make out and file with the clerk a detailed report. After such report is filed by the treasurer with the clerk, the latter is required to prepare a detailed statement of the financial affairs of the village. It is provided therein that such statement shall be filed in his office for public inspection and shall be published at least one week prior to the village election in a newspaper published in such village, if there is such a paper; otherwise that it shall be posted in

the three most public places within the village. Section 3 thereof expressly repeals chapter 74, Laws 1905, which required the villages organized under the 1885 act to publish a financial statement.

Considering chapter 352 by itself, it appears to relieve villages organized under the 1885 act of duty to publish a financial statement, at the same time imposing upon the villages organized under the code provisions the duty of publishing such a statement. Was this the legislative intent? It can hardly be assumed that the legislature intended to release one class of villages from an existing statutory duty to publish a financial statement and at the same time impose a statutory duty upon another class to publish such a statement, the latter class being therefore under no requirement so to do. In arriving at the legislative intent the title is significant, if not controlling. It reads, "an act providing for the making, filing and publishing or posting of annual financial statements of villages, and to that end amending section 717, Revised Laws of 1905 and repealing chapter 74, General Laws 1905." The declared purpose of the act is to provide for "the making, filing and publishing or posting of annual financial statements of villages." It seems clear that it was the purpose of the legislature to make the act applicable to all villages and to require all villages to publish a financial statement. Having so declared its purpose, the title says, "and to that end amending section 717, Revised Laws 1905, and repealing chapter 74, General Laws 1905."

Apparently the legislature, having in view the purpose to require all villages to publish a financial statement, undertook to place such legislalation upon the statute books by amending section 717. Undoubtedly chapter 74, Laws 1905, was expressly repealed, not for the purpose of relieving villages organized under the 1885 law from the duty of publishing a financial statement, but for the purpose of requiring such statement to be prepared by the clerk and to impose upon him the duty of causing such statement to be published. Under the repealed law the treasurer prepared and published such statement.

I am of the opinion that villages organized under the 1885 law are required by virtue of chapter 352, Laws 1911, to publish a financial statement as therein provided.

CLIFFORD L. HILTON,
Attorney General.

June 4, 1926.

13

CITIES AND VILLAGES—Fire protection—Governmental duty to furnish to property of corporations taxed on a gross earnings basis—Ordinance would be invalid

C. E. Gilmore, City Attorney.

You state that quite often cars belonging to railroad companies catch fire and the local fire department is called out to extinguish the fire. You suggest that such companies pay no local taxes but are taxed on a gross earnings basis, and you inquire if an ordinance requiring railroad companies to pay the municipality for extinguishing such fires would be valid.

Answer: Such an ordinance would be wholly invalid. The furnishing of proctection from fire is one of the governmental functions of municipalities, to be paid for from general taxation, irrespective of whether or not the property protected pays any taxes at all.

ALBERT F. PRATT,
Assistant Attorney General.

October 12, 1925.

14

CITIES AND VILLAGES—Firemen's relief association—Use of funds provided by section 3725, G. S. 1923, for health insurance.

Insurance Commissioner.

You inquire whether funds received by a municipality under the provisions of G. S. 1923, section 3725, and to be disbursed under the provisions of section 3726, may be used for the payment of premiums on health, accident, and life insurance policies issued to members of a firemen's relief association on the group plan, the benefits payable under such policies being the same as those now being paid by the relief association for the relief of sick, injured, or disabled members of the fire department, their widows, and orphans.

Subdivision 2 of section 3726 relates to the use of the fund for departmental purpose and is of no consequence here.

Subdivision 1 provides that the payment so made to the municipality shall be kept as a special fund "and disbursed only for the following purposes: (1) For the relief of sick, injured or disabled members of such fire department, their widows and orphans." In my opinion the sickness, disability, injury, or death must occur before the funds may be disbursed. It may be said that the payment of a premium on insurance against such sickness, injury, or death is a disbursement for such relief; but I think the answer is that the relief association fund is itself an insurance fund, and that its use is by statute limited to the giving of relief directly and not by the purchase of other insurance.

Your inquiry is answered in the negative.

G. A. YOUNGQUIST,
Assistant Attorney General.

August 6, 1925.

15

CITIES AND VILLAGES—Funds—No power to purchase county bonds with.

Ivan O. Hansen, City Attorney.

You state that the city of Luverne has about $100,000.00 on deposit which it desires to use in the purchase of certain bonds about to be issued by Rock county. You ask our opinion as to the power of the city to make such an investment.

The law directs that city funds shall be deposited in banks to be designated as provided by law, and these banks are required to furnish security for the safe keeping of the money entrusted to them. There is no statutory authority for loaning or investing municipal funds. Municipal corporations have only such powers as are granted by the legislature creating them. Powers not granted are withheld, and powers granted are strictly construed. See City of Fergus Falls vs. Fergus Falls Hotel Co., 80 Minn. 165.

In the absence of express legislative authority, it is my opinion that the city of Luverne has no power to purchase these bonds.

WILLIAM H. GURNEE,
Assistant Attorney General.

December 31, 1925.

16

CITIES AND VILLAGES—Judgments—Payment out of current fund—Levy of tax therefor.

Frank M. Talus, Village Attorney.

You state that there are a number of judgments against the village of Chisholm, and you inquire whether, if such judgments are paid out of funds now on hand, the council may hereafter make a special levy for the payment of such judgments for the purpose of re-placing the moneys so used.

No.

I call your attention to section 1834, G. S. 1923. You will note therefrom that it becomes the duty of the village treasurer to pay a judgment upon a certified copy thereof being presented, if there are moneys in the treasury, or coming into the treasury, not otherwise appropriated, sufficient for the payment thereof without using moneys necessary to meet current expenses. In other words, if there are funds in the village treasury not actually needed for current expenses and which are not appropriated for some special use, the village treasurer must forthwith pay such judgment. He and his bondsmen are liable for the amount of the judgment if he fails to do so.

Section 1836 provides that if at the time of the annual levy there remains unpaid any judgment, unless the proper officers have otherwise provided sufficient funds for the payment thereof before the time for the collection of the tax levy, a special levy should be made. My understanding of this is that the council is authorized and directed to make a special tax levy only where judgments cannot be paid, as provided in section 1834. Hence, if the judgments are now paid out of the moneys on hand, the authorization of a tax levy is not applicable.

This does not mean that the council may not at the time of making the next succeeding tax levy for municipal purposes levy a tax sufficient to meet all current expenses of the village, providing it may be done within the statutory limits. Hence, if moneys which would otherwise be available for such current expenses have been depleted by the payment of these judgments, the council may levy a correspondingly larger amount if necessity therefor exists.

CHARLES E. PHILLIPS,
Assistant Attorney General.

April 20, 1925.

17

CITIES AND VILLAGES—Liability because of asserted actionable negligence.

Maurice C. Dale, City Attorney.

Relating to claim for compensation on the part of one A because of infected eyes resulting from exposure to sewer gas while employed in cleaning a septic tank forming a part of the sewer system of your city, I note

from your statement of the case that A made claim for allowance under the workmen's compensation act and that the industrial commission disallowed his application; also that the claimant has indicated his intention of starting an action against the city for damages, claiming liability on the part of the city because of asserted actionable negligence. You wish to be advised whether the city may be held liable in such an action.

The supreme court somewhat recently passed upon the general question whether all common law remedies are abolished when the employe is within the compensation act.

> "So far as it covers the rights and remedies in the field of industrial accident and occupational disease, the act is exclusive of all common law remedies. But inasmuch as it allows compensation only for the occupational diseases expressly enumerated, an employe who has become afflicted with a disabling ailment, not among those enumerated through negligence of the employer amounting to the omission of a statutory duty, has an action at law for damages."
>
> Donnelly vs. Minneapolis Manufacturing Co., 161 Minn. 240.

As I read the decision in that case, the common law remedy which the court says is preserved and open to the injured employe is not confined to injury sustained through "the omission of a statutory duty." It would rather seem that if A can show to the satisfaction of the court and jury that in the course of his employment he was injured through some negligent act of omission or commission on the part of his employer (the diseased condition not being within the class of occupational diseases specified in the statute), he is entitled to maintain an action at law for the recovery of the resulting damage.

I trust you will understand that I am not advising that there is a liability in this case. I am merely expressing the general view concerning a right of action for damages on account of a non-compensable disease suffered in the course of employment because of established negligence on the part of the employer.

JAMES E. MARKHAM,
Deputy Attorney General.

December 13, 1926.

18

CITIES AND VILLAGES—Light and water commission—Powers of.

O. E. Lewis, Village Attorney.

You state that a few years ago a light and water commission was created by your common council under chapter 412, Laws 1907, as amended; that the village owns and operates a municipal water and light plant, and the purchase of considerable new and additional equipment is now deemed advisable.

You inquire whether the commission is authorized, on its own initiative and by a majority vote of its members, to contract for this new and additional equipment involving an expenditure of perhaps $8,000.00.

The powers and duties of the commission are defined by section 1857, G. S. 1923. You will note therefrom that the commission is given full,

absolute, and exclusive control over the water, light and power plant or plants, and all parts, attachments, and appurtenances thereto or used in connection therewith, with power to operate the same and to extend, add to, change, or modify the same, and to do any and all things in and about the same which it may deem necessary for a proper and commercial operation of such plants. The commission is also given express authority to buy all material and employ all help necessary in the operation thereof.

It seems clear, therefore, that it was the legislative intent to clothe said commission with all power necessary to fully enable it to carry on and operate the plant, including power to purchase all materials and equipment necessary and proper in the premises. Your first inquiry is, therefore, answered in the affirmative.

You further inquire whether the commission may issue warrants on the village treasurer in payment of the purchase of such equipment. Section 1858, G. S. 1923, authorizes and directs said commission to audit all claims and provides that the secretary thereof shall draw his warrant upon the treasurer of said city or village for the amount allowed by said commission, said warrant to be countersigned by the president of said commission. If there are moneys available for the payment of the cost of such equipment, it is the duty of the commission to audit claims therefor; and upon such claims being approved it is the duty of the secretary to draw and sign a proper warrant for the payment thereof and the duty of the president to countersign the same. When this has been done, the village treasurer is authorized to honor such warrants.

It is a general rule of law that village warrants may be drawn only when there are funds available for the payment thereof or taxes have been levied and are in process of collection, the proceeds of which will be available for the payment of such warrants. This rule applies to warrants issued for the above purpose.

You also inquire whether the commission must proceed to advertise for the purchase of this equipment, or whether it may purchase privately at its own good judgment.

> It has heretofore been held that section 1199, G. S. 1923, providing that "all contracts involving 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,"

applies to the commission in making purchases under the power conferred upon it.

CHARLES E. PHILLIPS,
Assistant Attorney General.

August 26, 1925.

19

CITIES AND VILLAGES—Light, water and power—Commission—Accounts of. Harlan E. Leach, City Attorney.

Your city charter provides, among other things, that a "utilities commission shall have the entire management and control of all water, electric light, power, heat and gas plants now owned, or hereafter to be acquired by

the city of Owatonna, and of all the building, erecting, constructing and equipping of such plants." The commission is given authority to invest its funds, to exercise the power of eminent domain, to fix rates, to make rules and regulations, to employ necessary help, fix their compensation, and discharge same at will, and in general to build and manage public utilities plants within the city. The members of this commission, who are appointed by the mayor and confirmed by a majority of the city council, may be removed by the council for misconduct. You also state that the charter contains a provision, in section 15, chapter 4, that "the city council shall examine and adjust the accounts of all city officers and agents of the city."

Your question is whether the city council has the authority under section 15, chapter 4, of the charter, to examine and adjust the accounts and financial statements of the public utilities commission; whether the council may, by disallowing any item in the financial statement of the commission, cause the same to be legally rejected; and whether the commission must obtain the consent of the council as to each item of funds expended.

The amendment of 1924, being chapter 13 of the charter, is a later expression of the will of the voters than the original charter. Its language is clear and explicit. Under it the utilities commission has "entire management and control" of such public utilities as are placed under its jurisdiction and of the erection and equipment of such plants. It is given authority, among other things, to make rates, to institute condemnation proceedings, to hire and discharge help; and there is nothing in chapter 13 indicating that the city council has any authority, supervision, or jurisdiction over the commssion other than to approve the appointment of the members thereof and to remove said members in case of misconduct.

The utilities commission is charged with the duty of keeping books, which are open to public inspection, and of filing annual reports with the city clerk. In case of a deficiency arising by reason of insufficient revenue derived from operation of the plants under the control of the commission, the city council is charged with the duty of causing a special levy to be made upon the taxable property of the city in order to raise the necessary funds.

If it had been the intention of the voters to give the council additional supervision or control over the commission, such intention could and should have been expressed in chapter 13. I consider that the adoption of this amendment in its present form deprives the council of the right, which it would otherwise have under section 15 of chapter 4, to examine, adjust, and approve or disapprove the accounts of the commission.

After a full consideration of the provisions of the charter and particularly of the amendment thereto creating the utilities commission, I am of the opinion that the case of American Electric Company vs. city of Waseca, 102 Minn. 329, controls, and that the expenditures and contract of the public utilities commission are not subject to the supervision of the city council. See opinion 152, 1920 report.

WILLIAM H. GURNEE,
Assistant Attorney General.

August 14, 1925.

20

CITIES AND VILLAGES—Officers—Clerks—Removal of.

Mayor.

You state that your village was incorporated under sections 1111-1117, G. S. 1923, and acts amendatory thereof, and inquire whether the council has power to remove the village clerk from office for non-performance of his official duties.

It appears that the clerk is an elective statutory officer of your village; therefore the council has no power to remove him from office in the absence of a statute expressly conferring such power upon it. I have been unable to find any such statute, and I am obliged to advise you that the council is without power to remove.

You also inquire whether the council may now reduce the clerk's salary to the minimum prescribed by law.

Referring to section 1178, G. S. 1923, which section, I believe, is applicable to your village, it will be noted that it provides:

> "For his services he shall receive such compensation as may be fixed at the beginning of his term by resolution of the council."

The council having once fixed the clerk's salary by resolution, it may not thereafter change or reduce the same.

CHARLES E. PHILLIPS,
Assistant Attorney General.

December 29, 1925.

21

CITIES AND VILLAGES—Officers—Constable—Compensation and expenses in serving search warrant.

S. C. Murphy, County Attorney.

You inquire whether a village constable is entitled to any fees, other than twenty-five cents for service of a warrant and ten cents per mile for travel to and from the place of search, in executing a search warrant under the prohibition law.

Your inquiry is answered in the negative.

You also inquire whether the county is liable for the expense of automobile hire or the services of an assistant incurred by the constable in executing such warrant.

This inquiry is also answered in the negative.

CHARLES E. PHILLIPS,
Assistant Attorney General.

February 11, 1925.

22

CITIES AND VILLAGES—Officers—Constable—Service of district court writs of attachment—Execution.

R. K. Stebbins, Esq.

You inquire if a constable is authorized by law to serve or enforce a writ of attachment or a writ of execution issued out of the district court.

The inquiry is answered in the negative, as to both classes of writs. See sections 9345-9351, G. S. 1923, as to writs of attachment, and sections 9419-9422, G. S. 1923, as to writs of execution.

ALBERT F. PRATT,
Assistant Attorney General.

August 24, 1926.

23

CITIES AND VILLAGES—Officers—Employes of state hospital not disqualified from holding city office—Section 4407, G. S. 1923.

W. W. Smith, County Attorney.

You state that an employe of the state hospital for the insane at Rochester was recently elected alderman at large of the city of Rochester. You call attention to section 4407, G. S. 1923, and ask if the effect of this statute is to disqualify the newly elected alderman from holding his position with the state.

The evident purpose of section 4407 was to prevent members, officers, and employes of the board of control from pernicious political activity. I do not believe that the section prevents an employe of the state hospital at Rochester from holding an elective municipal office, the duties of which are not incompatible with his duties as such state employe.

WILLIAM H. GURNEE,
Assistant Attorney General.

March 18, 1926.

24

CITIES AND VILLAGES—Officers—Entering into contract with newspaper to publish official notices.

A. W. Spellacy, Village Attorney.

You inquire whether the village council may enter into a contract with a newspaper to publish all official notices and advertisements and to do all printing for the village for a term of three years.

No. The general rule is that a village council may not contract beyond the current term of such body, except in those cases where the subject matter is such that a short time contract would be unreasonable and against the interest of the village. Our supreme court has not directly passed upon the question; the case of State vs. McCardy, 62 Minn. 509, left the question undetermined. The cases generally recognize this rule and the above mentioned exceptions. Thus, contracts for public utility service, etc., for longer periods have been recognized as valid.

I am inclined to the view that the subject matter involved in the contract mentioned does not bring the case within the exception.

CHARLES E. PHILLIPS,
Assistant Attorney General.

April 1, 1926.

25

CITIES AND VILLAGES—Officers—Failure of member of council to qualify.
Village President.

You are advised that where a village president-elect fails to qualify and refuses to serve the former president continues to act until the vacancy is filled as provided by law. Where the former president was elected a member of the council and has qualified as such, he is not entitled to act as president. In such a case there would be a vacancy to be filled by appointment. Section 1134, G. S. 1923. The appointment is for the remainder of the village year.

ROLLIN L. SMITH,
Assistant Attorney General.

March 25, 1925.

26

CITIES AND VILLAGES—Officers—Marshal—Must be citizen and resident.
Theo. Nelson.

You inquire if the marshal of a village must be a resident of the state and of the village for a certain length of time in order to be qualified for the office.

A village marshal is a public officer. State vs. Schram, 82 Minn. 420.

Being a public officer, to be qualified therefor he must be an elector of the village. For qualifications of an elector see Constitution, section 1 of article VII. Among them are six months' residence in the state and thirty days in the election district.

ALBERT F. PRATT,
Assistant Attorney General.

July 16, 1925.

27

CITIES AND VILLAGES—Officers—May not employ attorney to appear before tax commission.
Public Examiner.

You are advised that a village council has no authority to employ an attorney to appear before the tax commission to oppose the petition of an individual taxpayer for reduction in the valuation of his property.

The principles laid down in the case of Grannis vs. County Board, 81 Minn. 55, that a county has no authority to employ a person to ferret out unlisted property for taxation, would seem equally applicable to the situation suggested.

CHARLES E. PHILLIPS,
Assistant Attorney General.

June 16, 1925.

28

CITIES AND VILLAGES—Officers—May not write public contractors' bonds to the city under terms of charter.
Henry M. Lamberton, City Attorney.

You inquire whether the city prosecutor, a city officer appointed by the city council and paid out of the funds of the city treasury, may as the local

agent for a bonding company write bonds for contractors on public improvements in your city.

It appears that your charter contains a provision in part as follows:

> "No officer of the city shall be a party to or interested in any contract with the city, express or implied, and any such contract to which any such officer shall be a party, or in which he shall be directly or indirectly interested, shall be void."

It appears from your statement that the city prosecutor is a city officer, and it seems clear that a contractor's bond constitutes a contract between the principal and surety thereon and the city. It is my opinion that a local agent for a bonding company, who receives a commission on bonds written by his company, has a direct financial interest in all bonds written by his company through him. In such event he is prohibited by the charter provision above quoted from writing such bonds. I do not think it materially changes the situation that the bond is not written by him, but is first transmitted by him to the company and written direct. In either case he receives his commission.

CHARLES E. PHILLIPS,
Assistant Attorney General.

June 9, 1925.

29

CITIES AND VILLAGES—Officers—Mayor—Movie house proprietor—Whether disqualified as interested in contract.

N. L. Glover, Attorney.

Section 11 of your city charter declares that one who is "interested in any contract with the city to which he is a party, either individually or as a firm," is not eligible to hold a city office, and then defines a contract as follows: "The term 'contract' as used in this section shall be construed to include any transaction of sale, barter or exchange by which any property is transferred or acquired by said city, or labor or services are performed for said city."

Section 12 forbids an officer or employe of the city to vote for or make any "contract" on behalf of the city with himself or with any firm of which he is a member, and from being directly or indirectly interested in any "contract," under penalties, such as rendering the contract void or subjecting him to a forfeiture of his office, etc.

A movie license transaction is not a "contract" as defined in section 11. Section 12 does not define "contract," so it is to be given its usual and ordinary definition.

Without going into any extended discussion of what is the legal relation between the licensing authority and licensees under licenses issued under the police power, I think you will agree with me that it is not a "contract" relation. Many lines of business are now subject to licenses—public dance halls, public dances, pool halls, restaurants, hotels, peddlers, auctioneers, milkmen and milk dealers, soft drink dealers, junkmen, produce dealers, ice dealers, slaughter house operators, groceries and restaurants (under some charters), and so on. One would hardly suggest that a person otherwise

qualified could not hold an elective office in a city because he sells milk to the citizens and is required to have a state license therefor, for which he pays $1.00, and a city license, for which he pays a nominal or perhaps no fee.

Quite another question may arise as to the right of an applicant for a license to vote upon the question of issuance of a license to himself or for a business in which he is interested. That matter involves an entirely different rule of law from that involved in the "contract" proposition, and you will find plenty of authority along that line. See opinion 328, Report 1914.

The signing of a license or permit is merely a ministerial act, when duly issued by authority of the council or other licensing body, and neither of the above questions is involved in that.

ALBERT F. PRATT,
Assistant Attorney General.

April 13, 1925.

30

CITIES AND VILLAGES—Officers—Soldiers' Preference Law—Application to.

J. A. Lee, County Attorney.

You inquire if in the opinion of this office the soldiers' preference act, chapter 192, Laws 1919, sections 4368, 4369, G. S. 1923, has application to appointments to village offices not filled by election by the people and to public employments and positions in villages.

The title of the original act was:

> "An act regulating appointments, employment and removals in public departments and upon public works in the state of Minnesota, and the counties, cities, and towns thereof, relating to state, judicial, county, township, city and town officers."

The act by its terms applies "in every public department and upon all public works in the state of Minnesota, and the counties, cities and towns thereof."

By section 10933, subdivision 22, G. S. 1923, it appears that

> "The following words and phrases, used in the Revised Laws or in future legislative acts, shall have the meaning herein given, unless another intention clearly appears. * * *
>
> 22. The word 'town' may include cities, villages, boroughs and districts, unless such construction would be repugnant to the provisions of any act especially relating thereto."

See Odegaard vs. City of Albert Lea, 33 Minn. 351, 353. Tucker vs. Board, 90 Minn. 406, 408.

In the first case it is said:

> "Our statute expressly provides that each incorporated city shall have and exercise within its limits, in addition to its other powers, the same powers conferred upon towns. G. S. 1878, chapter 10, section 112. Hence the word 'town' is often used as a generic term, embracing all such primary municipal corporations as incorporated cities and villages; and, independently of any statutory provision, it has become a well

settled rule of construction that the term 'town' when used in a general statute, may include cities, unless the contrary appears from the whole statute to have been the intent of the legislature. 1 Board of Commissioners, 114; Road in Milton, 40 Pa. St. 300; Board of Commissioners vs. McGurrin, 6 Daly, 349; Peck vs. Weddell, 17 Ohio St. 271; State vs. Glennon, 3 R. I. 276; Flinn vs. State, 24 Ind. 286; Abb. Law Dictionary, 'town.' This rule of construction is in this state expressly adopted by statute. 'The word "town" may include cities and districts, unless such construction would be repugnant to the provisions of any act especially relating to such cities or districts.' G. S. 1878, chapter 4, section 1."

The statutory definition as above noted, now covers villages and boroughs.

In the second case it is said:

"We have held that unless a contrary intention appears, the three classes of primary political divisions—towns, cities and incorporated villages—either may be expressed by or included in the term 'town,' when used in a statute. A city or incorporated village constituted the unit of political organization." Citing Odegaard vs. City, supra, and quoting therefrom.

Authorities to the same effect in other jurisdictions are numerous. Here no "contrary intention appears," unless it appears from the use of the terms "counties" and "cities."

But the act is a general act and no good reason has been suggested from either a legal or practical standpoint, whereby it is required to be said that a "contrary intention appears" and that the legislature intended the act to apply to "towns" and "townships" as such, and to cities, as such, and not to incorporated villages and boroughs, which occupy a position as municipalities intermediate between cities and "towns" or "townships."

In my opinion the term "towns" as used in the act under consideration is used in its generic sense and includes villages and boroughs and your inquiry is answered in the affirmative.

ALBERT F. PRATT,
Assistant Attorney General.

October 20, 1925.

31

CITIES AND VILLAGES—Officers—Soldiers Preference Law, chapter 192, Laws 1919—Application to retention in employment.

Frank M. Talus, Village Attorney.

You state:

"Because of the rapid exhaustion of the moneys collected by last year's tax levy a reduction must be made in the expenditures to remain within the limits provided by law a number of employes must be discharged. This reduction will include men in all branches of the village such as the police department, fire department, etc. A number of our employes are ex-service men. They are paid on a monthly basis. When

appointed no fixed term was stated. (1) Without taking into consideration the soldiers preference act does the village incur any liability for any such discharges? (2) Now as to the ex-service men, what, if any, liability will the village incur in discharging them? None of them has in any form notified the council that they are men holding honorable discharges from the service during the World War. They will not be discharged except that finances of the village will not permit them to be kept and no others will be put in their places."

It does not appear under which one of the numerous acts relating to the incorporation of villages, your village is incorporated and operating. So the answer to your first inquiry may necessarily be somewhat general.

It is assumed that your village is not operating under civil service as to appointments or removals from office or employment.

The principal Minnesota cases on soldiers preference are State vs. Scott, decided May 8, 1925, applicable only in certain cases under civil service. Johnson vs. Pugh, 152 Minn. 437, 189 N. W. 257; State vs. Miller, 66 Minn. 90; State vs. Copeland, 74 Minn. 371; Boyd vs. Mattson, 193 N. W. 30, 155 Minn. 137; State ex rel vs. Board, 149 Minn. 322, 183 N. W. 521. The last was also a civil service case. Please see these cases.

In answer to your first question, I have to state that if you are organized under any village law with which I am familiar, the appointing power acting in good faith may abolish the positions in question or terminate employments therein under the circumstances outlined by you, without incuring liability therefor.

Coming to the second question, the matter of whether or not former service men qualified as provided by law, now or hereafter employed in such positions, are entitled as such to the preference or retention in employment, over non-service men employes.

This office has frequently ruled to the effect that they are entitled to such preference if claiming, or known to the discharging authority to claim, the same. The fact that they did not specifically claim such preference on the original employment is not material, as they may make the claim in connection with any move to separate them therefrom. The law has a double application, first, preference in original employment, and second, preference of retention in employment.

As the court said in the Matson case:

"This (preference provision) undoubtedly means that when, aside from his military service, he (the service man) and other applicants have an equal right to be retained in employment or to be promoted, he (the service man) shall be preferred over such other applicants."

And again in the same case:

"But when several appointees hold the same position and perform the same work and only a part of them are to be retained, it gives him (the service man) the right to be preferred over a non-soldier, their rights being equal in other respects."

And again in the same case:

"By force of the soldiers preference act, the positions held by the soldiers could not be abolished so long as a position held by a non-soldier appointed at the same time or later, was continued."

As you will note, the Matson case was decided against the soldier strictly under the civil service rules governing appointments and discharges and the order of taking effect of discharges, and that part of the case is not in point in your case. The general rules above quoted are applicable in your case.

I think there can be no question that the service men holding the positions you mention are entitled to the benefit of the preference given by chapter 192, Laws 1919.

As to remedies, the statute provides a remedy by mandamus, as well as by action for damages. Johnson vs. Pugh, supra, was a mandamus case. In a case growing out of Johnson vs. Pugh, involving pay for several months' service while laid off, I understand that Johnson got his full pay out of the city. That case did not reach the supreme court.

You will note that, as held in the Matson case, where the position itself is abolished, the service man holder thereof is not entitled to a hearing on stated charges for misconduct or incompetency, if the action abolishing the position be taken in good faith for some legitimate purpose, and not as a subterfuge to oust him from the position. But you will also note that as between soldiers and non-soldiers holding the same position, of whom a certain number are to be dropped, the soldier is entitled to the preference of being one of those retained, so long as any one is to be retained to fill the position.

ALBERT F. PRATT,
Assistant Attorney General.

June 5, 1925.

32

CITIES AND VILLAGES—Officers—Term of appointee to fill vacancy.
John C. Hessian, Village Attorney.

You state that at the March, 1925, election a trustee was elected for a three-year term; that about six weeks ago he removed from the state and resigned; that your village was incorporated under chapter 73, Laws 1883, and reorganized under section 1110, G. S. 1923. You inquire as to the term of the appointee named by the council.

Under section 1134, G. S. 1923, the council is given authority to fill vacancies for the remainder of the year. Village elections are held annually in March. The year referred to is the balance of the current year; that is, until the following March election. Therefore, the vacancy should be filled by the electors at the coming March election, the person so electing to serve the balance of the three-year term commencing April, 1925.

CHARLES E. PHILLIPS,
Assistant Attorney General.

January 14, 1926.

33

CITIES AND VILLAGES—Officers—Vote required to constitute a majority where mayor is member of council but possesses no power to vote.

Karl L. Rudow, City Attorney.

You call attention to certain sections of your charter and inquire what vote is necessary under its provisions requiring a majority vote of all the council and a three-fourths majority of all the council.

By section 23 it is provided that the mayor shall be a member of the council, but shall have no vote except in case of a tie. Section 59 provides that the legislative power of the city shall be vested in a council which shall be composed of a mayor and aldermen. It is clear from these provisions that the mayor is a member of the city council, which is, therefore, composed of six members. While the mayor is a member of the council, he does not possess the power to vote except in case of a tie.

The intent of the framers of your charter is not clear, but I am inclined to the opinion that, notwithstanding the words, "all of the members of the council" and "whole council," the provisions mentioned have reference to the voting members only. Hence, three would constitute a majority of the whole council and four would constitute a three-fourths majority.

I have been unable to find any authority directly in point, but this seems to be a reasonable interpretation. For instance, if the charter required the unanimous vote of the council, it could hardly be contended that it required six votes when in fact the mayor was expressly disqualified from voting.

CHARLES E. PHILLIPS,
Assistant Attorney General.

April 16, 1925.

34

CITIES AND VILLAGES—Ordinances—Right to refuse building permit.

James A. Garrity, City Attorney.

You inquire concerning the power of the city council of Moorhead to refuse a building permit under the following circumstances:

The city of Moorhead has by its charter the usual power to prescribe where wooden buildings shall not be erected; in other words, the right to establish fire limits. Pursuant to this power an ordinance has been adopted which provides in part that if application is made to the building inspector for a permit to erect a building outside the fire limits "to be used other than exclusively for dwelling or private garage purposes, or in such other cases as the building inspector deems necessary; then in that case the said building inspector shall immediately refer said application to the city council for their approval or rejection." It is further provided that upon such action being taken by the building inspector the council shall give written notice to each of the residents living within the block where the proposed building is to be erected providing that objections, if any, shall be made in writing or in person to the city council at a date fixed in said notice. The council then hears the objections and determines whether or not the said building permit shall be granted.

In my opinion, this portion of the ordinance is invalid. It purports to vest in the council an absolute, arbitrary authority to prescribe what buildings shall or shall not be erected on private property outside of the fire limits. The ordinance provides no general rules or principles, and the exercise of the authority vested by the section of the ordinance above quoted might result in depriving citizens of their property without due process of law.

The city council may lawfully prescribe fire limits in the exercise of its sound discretion by reason of the police power. Under the authority of the police power it may protect health and property by prescribing certain limits within which certain kinds of buildings may not be erected. I do not believe, however, that any court has ever held that a council could exercise such broad and arbitrary powers as are sought to be bestowed by the ordinance in question.

WILLIAM H. GURNEE,
Assistant Attorney General.

April 9, 1925.

35

CITIES AND VILLAGES—Property—Authority to lease.

Geo. L. Engh.

You state:

> "The village of M owns some property and we should like to have your opinion whether or not there is any law forbidding the village from leasing out this property to an individual to be used for a private business."

In villages organized under R. L. 1905 (and those organized under the 1885 General Laws have similar powers), the village council "shall have power to adopt, amend, or repeal all such ordinances, rules and by-laws as it shall deem expedient for the following purposes: * * * 5. To control and protect the public buildings, property and records, and insure the same."

See section 1186, G. S. 1923.

In Nerlien vs. Village of Brooten, 94 Minn. 361, at the suit of a taxpayer the village was enjoined from leasing the village hall for conducting therein a mercantile business and dealing in flour, grain, feed, and cereals. That lease was made without any money rental.

The last case that I know of, in our courts, is Anderson vs. Montevideo, 137 Minn. 179. Montevideo is a city, but certain of the general principles discussed in that case apply to villages.

It is there stated that "when a municipal corporation, in good faith, erects a building for municipal purposes, and includes therein an auditorium which is no longer needed for public use, and the leasing thereof will lighten the burden of taxation, the municipality has a legal right to lease the same for private use."

In that case the auditorium was leased for moving pictures.

The court further said that the city would have no right to put up the building for leasing purposes.

I do not know of any legal objection to a village renting the village hall, when not needed for public purposes, for entertainments, dances, political meetings, and the like.

Or, suppose you have built a new village hall and have the old one on hand and not needed for public use, I do not see any legal objection to renting it for some proper business, temporarily at least, until the proper time arrives to sell it to advantage.

No leasing is permissable which substantially interferes with the proper use of the building by the public for public purposes.

ALBERT F. PRATT,
Assistant Attorney General.

February 7, 1925.

36

CITIES AND VILLAGES—Property—May acquire outside of village limits by eminent domain for public dumping grounds.

The Village Attorney, Winnebago.

You ask:

"Has a village a right to condemn private property outside its corporate limits for the use of a public dumping ground?"

While the question is not entirely free from doubt, I am of the opinion that the inquiry should be answered in the affirmative.

You do not state the law under which the village of Amboy was incorporated and hence, the question is answered as a general proposition and without reference to any specific law under which the village may have been organized. I call your attention to section 1117, G. S. 1923, which provides that villages organized under chapter 145, Laws 1885, and all others governed by that chapter, have the power

"to take, purchase, lease and hold such real and personal property, either within or without its corporate limits as the purposes of the corporation may require."

While there is no direct statutory authorization for a village to acquire land to be used as a public dumping ground, there is little doubt that a proper conservation of the health of the village may require the village to provide a proper place for the disposition of its refuse and other material detrimental to the public health. While it is the duty of each individual to take care of any refuse or waste accumulated by him, it may be admitted that the designation of a proper place for its disposal assists in the performance of this duty and is a safe-guard to the health of the inhabitants of the village generally.

It would seem, therefore, that the village may acquire the necessary ground to be used as a public dumping ground by the village. Such being the case, I call your attention to section 1829, G. S. 1923, which reads in part as follows:

"All cities and villages may exercise the right of eminent domain for the purpose of acquiring private property within or without the corporate limits thereof for any purpose for which it is authorized by law to take or hold the same by purchase or gift."

These two statutes, considered together in the light of the need of a public dumping ground, would seem to authorize the village to acquire by eminent domain and establish such place outside of the corporate limits.

CHARLES E. PHILLIPS,
Assistant Attorney General.

June 4, 1925.

37

CITIES AND VILLAGES—Property—Power of eminent domain in accordance with chapter 41, G. S. 1923.

George F. Sullivan, City Attorney.

You state that an attempt was made in February, 1902, to incorporate the city of "M" under the provisions of chapter 10, G. S. 1894. "M" was not entitled to be so incorporated because it had less than 2,000 inhabitants. This city is now proposing to exercise the power of eminent domain in accordance with the provisions of said chapter 10. You inquire if it may lawfully do so, or if it must proceed under the general provisions of law found in chapter 41, G. S. 1923.

Conceding that the municipality failed to incorporate under chapter 10, G. S. 1894, its existence was nevertheless legalized by the passage of chapter 56, Laws 1902, Special Session. Upon the approval of this act, on March 10, 1902, "M" became possessed of all the powers, franchises, and liabilities of a municipality lawfully organized under said chapter.

Said chapter 10 contains provisions for exercising the right of eminent domain different from those set forth in chapter 41, G. S. 1923. Chapter 41, G. S. 1923, relates to the exercise of the right of eminent domain and prescribes that private property may be acquired for public use in the manner therein set forth. See section 6537, G. S. 1923. This section contains a further provision that "nothing herein shall apply to the condemnation of property by any incorporated place whose charter provides a different mode of exercising the rights of eminent domain by it possessed." The city of "M" has no charter. It is organized under a general law. Did the legislature, in section 6537, G. S. 1923, use the word "charter" synonymously with "law?" I think not. The conclusion is that the word "charter" as used in this section, refers to a written charter especially applicable to some municipality and not to a special or general law. See opinion 137, report 1920. This view is sustained by our supreme court in In re Hull, 163 Minn. 439. The question decided is closely analogous to your problem and indicates that you should proceed under chapter 41 of the 1923 laws.

WILLIAM H. GURNEE,
Assistant Attorney General.

September 23, 1925.

38

CITIES AND VILLAGES—Property—Procedure to Convey.

Department of Highways.

Section 1117, chapter 9, G. S. 1923, authorizes villages to convey real estate, but does not set forth any procedure whereby such conveyance may be made. The procedure to be followed in selling real estate owned by towns is set forth in chapter 8, G. S. 1923. In the absence of a method of procedure in

chapter 9, it is my opinion that the procedure set forth in chapter 8 is the proper one to be followed. You are therefore advised that in order for a village to convey real estate there must be an election authorizing the village council to make such conveyance. The authorization must be approved by a majority of the voters voting at said election. Thereafter the village council is required to adopt a resolution empowering its officers to execute the conveyance. The conveyance should be executed by the chairman and attested by the clerk of the village council.

The opinion in the preceding paragraph is based upon the assumption that the land to be conveyed was not conveyed to but required to be held by the village for a special purpose. If the village is the owner of land for limited purposes only, then a conveyance inconsistent with such purposes is unauthorized and cannot be made.

An unincorporated village cannot be the owner of land, and a conveyance which purports to sell land to such a village conveys title at the most to the various individuals composing such village.

CLIFFORD L. HILTON,
Attorney General.

January 7, 1926.

39

CITIES AND VILLAGES—Property—Sale of when not needed.

Ralph S. Thornton, City Attorney.

You state that your city owns in fee a small tract of land which was acquired by the city for use as a storage place in connection with the water and light plant; that the city has discontinued such use and has no further need for the property; that it has received an offer of purchase at a price which is deemed fair and adequate by the city council; that your city is operating under a home rule charter which contains no provision authorizing the city to sell or dispose of real estate. You inquire whether the city may sell the same.

Your inquiry is answered in the affirmative. In the absence of any restrictions in your city charter, I am inclined to the opinion that the city possesses inherent power to sell and dispose of real estate owned in fee by it and for which it has no use. A different question might arise if the property had been acquired by the city for some purpose in which the inhabitants of the city have an interest in trust, such as park purposes, etc. I take it, however, that this property was held by the city in a proprietary rather than a sovereign capacity. I call your attention to the inherent powers of a municipality outlined by Blackstone. Among these is the power to purchase property needed for public purposes and to sell and dispose of the same when no longer required.

CHARLES E. PHILLIPS,
Assistant Attorney General.

July 13, 1925.

40

CITIES AND VILLAGES—Sewer—Connecting with private system.

Commissioner of Agriculture.

It appears that a creamery situated in a village which is installing a sewer system is desirous of connecting up with such system, but that the

village authorities refuse to permit the connection to be made. You inquire if the creamery may compel the village to permit the connection.

It does not appear whether or not the creamery property was subjected to special assessment for benefits from the construction of the sewer system. If it was, there is little doubt of its legal right to connect up. If it was not subjected to special assessment, and the creamery is simply a general taxpayer of the village, as your inquiry suggests, the situation may be quite different, and may involve the determination of questions of fact. The village may claim and prove to the satisfaction of the court, that it would be improper and unsafe, from the standpoint of public health, to permit the connection; that a nuisance, public or private or both, would be created thereby, through overtaxing the capacity of the disposal plant and contaminating the waters constituting the outlet; and so on. While the creamery may show to the contrary.

There may be much law as well as fact involved in the question.

There is no doubt that ordinarily the village may compel connection. See note, L. R. A. 1918 C, p. 258.

But the other situation presents a more difficult question, the answer to which may depend largely on the facts.

See Springmyer vs. State, 1 Ohio Cir. Ct. 501, Ohio Cir. Dec. 279, and Meyler vs. Meadville, 23 Pa. Co. Ct. 119, to the effect that a citizen has the right to make the connection; and State vs. Board, 6 Ohio. Dec. (Reprint) 769, 8 Am. L. Rept. 24, to the effect that it is discretionary with the council.

Mandamus is the proper remedy. Counsel for the creamery may get the facts together, look up the law, and go ahead or not, as the facts warrant.

The creamery will have the advantage that public policy requires connection with public sewers where possible; but that advantage might be overcome by a showing on the part of the village of results along the lines indicated above.

ALBERT F. PRATT,
Assistant Attorney General.

July 27, 1925.

41

CITIES AND VILLAGES—Sidewalks need not extend through entire block.

Andrew Finstuen, Village Attorney.

You state that the village of Dennison was incorporated under the laws of 1885, but is under the general statute relating to villages. You call attention to section 1205, G. S. 1923, as amended by chapter 309, Laws 1925, and inquire whether the village may build a sidewalk terminating in the middle of a block.

I have examined the statutes referred to and find nothing therein indicating that a village may not terminate a sidewalk in the middle of a block. In fact, the language would seem to indicate that it may. It will be noted that the petition must be signed by a percentage of abutting property owners on the street or portion thereof to be improved.

It is my opinion that the sidewalk may be terminated other than at the end of the block.

CHARLES E. PHILLIPS,
Assistant Attorney General.

September 9, 1926.

42

CITIES AND VILLAGES—Streets—Temporary closing of to permit pavement dance.

James A. Garrity, City Attorney.

You state that the American Legion has requested permission of the city council to use a certain portion of a paved street for dances one night a week. You inquire whether it would be lawful for the council to permit the use of a certain blind street for such purpose without an interference with traffic.

I call your attention to the case of Owens vs. Atkins, 34 A. L. R. 267, and particularly to the annotations which follow the same. You will note the conflicting decisions bearing upon the question. After a consideration of the same I am inclined to the opinion that the temporary closing of this street for the purpose mentioned, assuming it to be a fact that this street may be temporarily closed without any substantial interference with traffic, may be granted by the city council. The rule seems to be that a street may be closed temporarily to permit its use for purposes of sport or entertainment where such use is for the public welfare or benefit, and is not unreasonable. It would seem that the use here is of public benefit, in that it provides entertainment for the citizens of Moorhead and the surrounding community, and that it is not an unreasonable interference with the purposes for which a street is dedicated in view of the fact that traffic would not be substantially interfered with. However, I call your attention to the case of Ihlen vs. Village of Edgerton, 140 Minn. 322, which is to the effect that the city must exercise reasonable care in closing off a street so as to avoid injuries to persons who may attempt to use it for street purposes.

CHARLES E. PHILLIPS,
Assistant Attorney General.

April 16, 1925.

43

CITIES AND VILLAGES—Streets—Vacation of.

Ralph S. Thornton, City Attorney.

You state that request has been made of the city council for permission to build a fence across a certain public street for the purpose of using the street as a pasture. You advise that the street proposed to be cut off from use is used by one person only. You wish to know if the city council may lawfully take such action without a formal vacation of the street.

The city has no proprietary rights in this street, and whatever rights it has are merely held in trust for the public. The public has a right to use the street for highway purposes. The citiy council is without power to grant any use of the street for a private purpose and to cut it off from public egress. In my opinion, before the street may be used as a pasture, it must be vacated.

WILLIAM H. GURNEE,
Assistant Attorney General.

August 13, 1925.

44

CITIES AND VILLAGES—Taxes—When poll tax must be levied.

Franz Jevne, County Attorney.

It appears that in a certain village, organized and operating under the general law, the council met and assessed a poll tax and that the meeting was held on the twenty-second day following the annual village election.

Having in mind the provision in section 1216, G. S. 1923, to the effect that such meeting should be held within twenty days after the annual village election, you inquire if the meeting was held in time.

There are decisions to the effect that the time specified by statute within which taxes shall be levied or assessed are directory and not mandatory; and if it be the fact that this meeting at which these taxes were assessed was held twenty-two days after the annual village election, that fact of itself will not invalidate the assessment.

It is assumed that this village is so organized as to be within the provisions of sections 1215-21, G. S. 1923.

It may be noted, however, that the resolution calls for a commuted payment at the rate of $2.00 per day, while section 1217 specifies commutation at the rate of $1.50 per day, whereby some difficulty may arise.

It may also be noted that section 1215 limits the assessment to be made upon every male inhabitant of villages organized and operating under general laws, between the ages of 21 and 50 years, except paupers, insane persons, and others exempted by law. The resolution does not confine the assessment to male inhabitants nor to persons of any particular age. It might be a good plan to hold a properly called meeting and adopt a resolution in accordance with the statute.

ALBERT F. PRATT,
Assistant Attorney General.

April 23, 1926.

45

COUNTIES—Agricultural Societies—State aid.

Public Examiner.

It appears that adjoining counties, "A" and "B," have each a county agricultural society; "B" county association, for two years past, has not held a county fair, but the exhibitors from "B" county have entered their exhibits in "A" county's fair and received premiums thereon; both county fair associations are named in chapter 47, Laws 1925, as entitled to receive state aid to the amount therein stated, on compliance with the requirements therein prescribed.

You inquire whether or not, with the consent of the county agricultural association of "B" county, that part of the state aid which would be payable to such association, in case it put on a county fair and otherwise complied with the provisions of chapter 47, may be paid to the county agricultural association of "A" county wherein the exhibits from "B" county were or may be entered.

Section 7886, G. S. 1923, as amended by chapter 47, Laws 1925, provides that:

"All sums hereafter appropriated to aid county and district agricultural societies and associations, shall be distributed to the following named agricultural societies, or associations: (naming them) when not receiving specific state appropriations, pro rata, to be paid out in premiums at the fairs of only such society or association as have an annual membership of twenty-five or more, maintain an active existence, hold annual fairs on enclosed grounds owned or leased by such societies or associations, to which a fixed charge of admission is made; provided that they (the named associations) shall have paid out in premiums to the exhibitors during the year as much as they received from the state, and provided further that no such county or district agricultural society shall receive in any year from the state for the purpose of reimbursing it for the amount of premium paid at its fairs, a sum in excess of seventeen hundred ($1,700.00) dollars. Such pro rata distribution shall be in accordance with the following method: the premiums paid out by the said societies or associations * * * shall be added together, but in case any society or association shall have paid out a sum in excess of $1,700.00, in making such total amount the sum of $1,700.00 shall be taken in place of the amount actually paid out. The total amount available for distribution shall be divided by such amount of premiums paid out. * * * The amount of the premiums so paid out by each society shall then be multiplied by this rate, and the amount each society shall receive shall be in that manner determined, * * *. All payments authorized under the provisions of this act shall be made only * * * upon examination and certificate of the public examiner that it (the society) has in every respect complied with the requirements of this act relating to state aid."

The "A" county association, of course, receives credit for premiums paid on exhibits entered from "B" county, and shares in the state aid accordingly, but on the facts stated it does not appear that the "B" county association has paid or will pay out any premiums at all.

The statute (quoted above) is clear that the state aid is payable only to those of the named societies (and to certain others not named) who pay out premiums and meet certain other requirements, and by way of reimbursement for premiums so paid out, in connection with fairs held by them.

As the "B" county association holds no fairs and pays no premiums and does not fulfill any other of the requirements which are prerequisite to the reception of state aid, it does not appear that the "B" county society has any right of reimbursement which it may consent to transfer.

Unless some substantial legal suggestion can be advanced to the contrary, the inquiry must be answered in the negative.

Perhaps under section 7885, G. S. 1923, a district agricultural society may be incorporated by the citizens of the two counties jointly, but that would count one fair for state aid, and "A" and "B" associations could not get it. Besides it would be necessary to get the name of the new district association on the statutory list or hold fairs for two years, before it would share in the appropriations, as the law now stands.

ALBERT F. PRATT,
Assistant Attorney General.

June 23, 1926.

46

COUNTIES—Agricultural Societies—Voting upon question to pay off indebtedness upon buildings deeded to county for use of.

Public Examiner.

You call attention to section 668, G. S. 1923, subdivision 9, and state as follows:

> "Will you kindly advise this department whether the county board, under the law above referred to, could call an election for the purpose of voting upon the question
>
> 1. Of paying off the indebtedness upon the buildings located upon the fifty acres owned by the county.
>
> 2. Of purchasing from the society five acres owned by it and paying the mortgage thereon."

Subsection 9 authorizes the county board

> "to purchase or condemn land with such improvements, if any, as may be thereon, for the purpose of holding thereon agricultural fairs and exhibitions, and to appropriate money in payment therefor."

You will observe that this is clearly a grant of authority to purchase or acquire only the land itself. As I understand your first question, it relates to the power of the board to pay off certain indebtedness which the association has incurred in making improvements upon the land itself, which indebtedness is not even a lien upon the land. It seems clear that this may not be done under the statute in question.

Your second inquiry presents a more difficult question. I am inclined to the view, however, that the authority herein granted is to purchase or condemn land not already devoted to the uses mentioned. It is my opinion that the power to purchase is no greater than the power to condemn, and that land may not be purchased which would not be subject to condemnation. I think it is extremely doubtful if a county board, acting under this statute, could proceed to condemn land for the purpose of holding agricultural fairs and exhibitions thereon which is already devoted to that same public use and purpose. The fact that the legislature has from time to time enacted special statutes authorizing the county to purchase from agricultural associations lands already owned and used by the association for such purpose, suggests that it is not the legislative understanding of this statute that a purchase may be made thereunder. I appreciate, of course, that this is not conclusive and perhaps not very persuasive. The fact remains, however, that if lands already owned by the association and devoted to such use were purchased under this statute, it would be a mere transfer of the naked legal title from the association to the county, and would not in the proper sense be a case of the acquisition of land for the purpose.

Both questions are answered in the negative.

CHARLES E. PHILLIPS,
Assistant Attorney General.

December 31, 1925.

47

COUNTIES—Appropriation for school library.

The County Attorney, Washington County.

You ask whether a county board may lawfully appropriate money to a school library which is open to the public as well, and which is receiving state aid.

Yes, provided the school library in question is maintained by the school board as a free public library under G. S. 1923, section 3017, or other lawful authority. Any appropriation by the county board should be made in accordance with the provisions of G. S. 1923, section 673 (Session Laws 1919, chapter 445), which supersedes the provisions of G. S. 1923, section 5666, in so far as the maintenance of libraries by counties is concerned.

CLIFFORD L. HILTON,
Attorney General.

May 22, 1926.

48

COUNTIES—Appropriations—Moneys remaining unappropriated or unexpended at the end of the fiscal year.

H. H. Peterson, County Attorney.

You direct attention to the action of the board of county commissioners of your county in the month of July, 1925, of including in the budget for 1926 an item of $250,000.00 to cover the cost of construction of the contemplated Sibley Memorial Highway. The amount thus included was raised by taxation during the year 1926 and is now available for the purpose for which it was levied. You submit the question whether, in the event a contract for the construction of the proposed highway is not awarded during the fiscal year ending December 31, 1926, the money thus levied for the indicated purpose may be carried over for use in the following year, either for the purpose of constructing the proposed highway or for other highway purposes.

This question must be answered in the negative. The statute (section 814, G. S. 1923) provides that all moneys remaining unappropriated or unexpended at the end of the fiscal year shall be transferred to a special fund, designated the suspense fund, and that the amount in this special fund on the first day of the succeeding fiscal year shall be apportioned to the different funds in the same manner as other revenues of the county. The result is that if the $250,000.00 levied for the purpose of construction of the proposed highway is not appropriated by the county board to that purpose by the award of a contract during the present fiscal year it automatically goes into the suspense fund and is distributed to the various county funds.

JAMES E. MARKHAM,
Deputy Attorney General.

November 13, 1926.

49

COUNTIES—Appropriations—Soldiers, Sailors, Memorials.

The County Attorney, Madison.

You state that an organization has secured from the war department, pursuant to act of congress, an assignment of two captured guns, which it desires to have placed on the court house grounds; that incidental to securing actual possession of the guns the freight thereon must be paid, and that there will be some expense connected with the proper mounting; in all $100.00 or so; that the organization will transfer to the county full title to the guns, and that on such transfer the county board is willing to have the guns mounted on the court house grounds and to pay the expenses above referred to, if it possesses legal authority therefore, to be in the nature of a memorial to the soldiers and sailors of the nation.

You refer to section 668, G. S. 1923, which gives power to county boards

> "To appropriate * * * a sum not exceeding ten thousand dollars * * * to erect or aid in erecting a monument or other memorial to the soldiers and sailors of the nation, such monument or other memorial to be constructed on the court house square, or in a public park at the county seat, if there be one, or elsewhere at the county seat";

You inquire whether or not this provision confers upon the county board authority to make the necessary appropriation for the indicated purpose.

The inquiry involves questions of fact, to be determined as such by the county board, and does not involve any question of law. If the county board in the exercise of its executive and official discretion determines that the guns so mounted will constitute an appropriate and proper county monument or memorial to the soldiers and sailors of the nation, then authority to make the proposed appropriation is found in the statute referred to.

It may be suggested that consideration may properly be given to possible future action in that connection, as the authority referred to is to erect or aid in erecting "a monument or other memorial." It may happen that it is later desired to erect another county monument or memorial, of a more expensive character, and the question may then arise whether or not the board has not already exercised all the authority it possesses in that connection, in making the appropriation proposed for erecting or aiding in the erection of the present memorial.

ALBERT F. PRATT,
Assistant Attorney General.

May 26, 1926.

50

COUNTIES—Appropriation—To American Legion Posts for Memorial Day observance.

Theodor S. Slen, County Attorney.

You inquire if county boards are authorized by chapter 233, Laws 1921, to appropriate not to exceed $25.00 annually to each American Legion Auxiliary unit organized and existing in their counties, for defraying the expenses of Memorial Day exercises.

Answer, not under that statute. See opinion 131, Attorney General's 1922 report.

However, under section 762, G. S. 1923, county boards have authority to appropriate and expend or cause to be expended, in such manner as they deem best, an amount not exceeding $300.00 annually for the purpose of aiding in the appropriate observance of Memorial Day. Under the authority so conferred, the county board, if it deems best, may appropriate not to exceed $300.00 annually to a unit of the American Legion Auxiliary of its county for the purpose of aiding in the appropriate observance of Memorial Day, to be expended as directed by the board.

In some counties such appropriation is made to a civic committee, and a unit of the auxiliary might be treated as a committee. The board may also appropriate to a post or posts of the Ameican Legion, on the same basis.

Under chapter 233, Laws 1921, so far as the statute is concerned, the money is appropriated and the manner of its expenditure for the purpose stated in the statute is up to the post receiving the appropriation.

Although in practice the board, of course, might appropriate on conditions, or refuse to make the appropriation.

Under section 762 the board may appropriate and expend the money itself, or may appropriate the money and cause it to be expended in such manner as it deems best, by a civic committee, a post of the G. A. R.. a post of the American Legion, a unit of the auxiliary, or for that matter by one or more committees or organizations which the board may select, the aggregate so appropriated and expended not to exceed the limit fixed by the statute.

Section 762 is wide open, while chapter 233 is limited in its application. One supplements the other, and neither is exclusive.

ALBERT F. PRATT,
Asistant Attorney General.

February 25, 1926.

51

COUNTIES—Assessed Valuation—Chapter 306, Laws 1925.

F. E. Morse, County Attorney.

The assessed valuation of personal property of electric light and power companies having a fixed situs outside of the corporate limits of cities, villages and boroughs, as made by the Tax Commission under chapter 306, Laws 1925, is properly included as a part of the total assessed valuation of the county.

CHARLES E. PHILLIPS,
Assistant Attorney General

October 28, 1926.

52

COUNTIES—Audit—Board of—Substitutes.

The County Attorney, Clay County.

You call attention to section 844, G. S. 1923, providing that the county board of auditors shall consist of the chairman of the county board, the county auditor, and the clerk of the district court, and you ask whether the

vice chairman of the county board may act on the board of auditors during the absence or incapacity of the chairman; also who should act in the absence or incapacity of either the auditor or the clerk.

This office held (opinion 36-1910 report) that the office of member of the county board of auditors is an independent office and that the fact that its members are such, by virtue of their holding other offices, does not make the duties performed by them on the board of auditors a part of the duties of their respective offices, which may be performed by their vice-incumbents or deputies.

The statute makes no provision for substitutes for the officers designated as members of the county board of auditors. In view of the fact that the duties of this board are of an intermittent character, it hardly seems necessary that provision should be made for substitutes. A situation would rarely, if ever, arise when it would be impossible to get the designated members of the board together at such times during the year as might be necessary to enable them to discharge their duties.

CHESTER S. WILSON,
Assistant Attorney General.

October 19, 1925.

53

COUNTIES—Audit—Board of—Under chapter 91, Laws 1925, not entitled to additional pay while acting as. Sheriff—entitled to only 9c per mile for use of his car.

D. M. Cameron, County Attorney.

You refer to chapter 91, Laws 1925, and inquire whether the county auditor, clerk of the district court and chairman of the county board, or any of them, are entitled to compensation at the rate of $3.00 per day for sitting as a board of audit.

No. In reference to these three officers you will note that section 14 provides that the compensation herein provided shall be in full compensation for all services rendered or performed for the county. The particular sections relating to these three officers make no provision for any payment for the services mentioned.

The sheriff, in case he uses his own automobile in the performance of any of his official duties is entitled to be compensated at the rate of 9c per mile and is not entitled to receive more.

CHARLES E. PHILLIPS,
Assistant Attorney General.

May 15, 1925.

54

COUNTIES—Auditor—Not entitled to retain fee for game license—Treasurer not entitled to retain commission for sale of school lands.

D. M. Cameron, County Attorney.

You call attention to chapter 91, Laws 1925, and inquire whether the county auditor may retain the fee of 10c for game licenses issued by him.

This inquiry is answered in the negative. It will be noted that section 2 fixes the salary of the county auditor at a definite sum. Section 14 provides:

"The compensation herein provided shall be in full compensation for all services rendered or performed for the county in connection with their respective offices."

If there were no other provisions I would be inclined to the opinion that the auditor might retain the fee in question, as such fee is not collected by him for services rendered for and in behalf of his county. However, the new law further provides:

"All fees provided by law and authorized to be collected by the treasurer and auditor shall belong to and be the property of the county."

The fee in question is clearly provided for by law and the auditor is expressly authorized to collect the same. The fee clearly comes within the provisions of the last quoted language. It was apparently the legislative intent to require the auditor to turn into the county every fee collected by him under authority of law and I see no escape from the conclusion reached.

You further inquire whether the treasurer may retain the commission of moneys collected from the sale of school lands. All that has heretofore been said in reference to the auditor applies equally to the treasurer and this question is likewise answered in the negative.

CHARLES E. PHILLIPS,
Assistant Attorny General.

May 6, 1925.

55

COUNTIES—Claims—Power to compromise.

M. J. Hegland, County Attorney.

I am of the opinion that the board of county commissioners is authorized to compromise the judgment in question, provided that, in the exercise of their honest judgment, they are of the opinion that the same may not be collected in full and that it is for the best interest of the county to make the composition in question.

Collins vs. Welch, 58 Ia. 72;
Hagler vs. Kelly, 103 N. W. 629;
Farnham vs. City of Lincoln, 106 N. W. 666;
Agnew vs. Brall, 16 N. E. 230;
Mills County vs. Railroad, 47 Ia. 66.

CHARLES E. PHILLIPS,
Assistant Attorney General.

March 21, 1925.

56

COUNTIES—Claims against—Appeals from allowance—Duty of county attorney.

Oscar T. Stenvick, County Attorney.

You state:

"1. The taxpayers have made an appeal on the allowance of the bill of the printer for the publishing of the financial statement and the

delinquent tax list for Clearwater county, and have served notice on me as county attorney and I filed the same with the county auditor. This is a bill left by the county commissioners for the county printing.

2. Now I would like to know for which party I am to appear, for the county commissioners or for the tax payers.

3. I further would like to know if the paper that publishes these statements for the county are entitled to draw the money by giving the county a sufficient bond."

1, 2. The county commissioners are not interested in the appeal. Under the statute, the county attorney appears "on behalf of," "in the name of" and "for the county" on his own motion or on demand of taxpayers as the case may be. I take it that in this case the appeal is taken pursuant to demand of taxpayers.

The proceeding is for a "review" of the action of the board. See Thomas vs. Scott County, 15 Minn. 324, (Gil. 254).

It is up to the county attorney to fight the claim on behalf of the county and against the recovery thereof, as a defendant. The claimant is the plaintiff. See the above case as to nature of pleadings and the statute, section 675, G. S. 1913, section 647, G. S. 1913, as to directions to plead.

3. Answer, No. "and thereafter (after the appeal is taken) no order shall be issued in payment of any part of such claim until a certified copy of the judgment of the court shall be filed in the office of the auditor."

See section 674, G. S. 1913, section 646, G. S. 1923.

ALBERT F. PRATT,
March 27, 1925. Assistant Attorney General.

57

COUNTIES—Clerk of Court—Deposit of money with, under G. S. 1923—Section 6546—Interest on deposits.

R. L. Meyers, Clerk of District Court.

You state that there has been deposited with you, pursuant to the provisions of G. S. 1923, section 6546, providing for depositing with clerks of court of awards made in condemnation proceedings, a number of warrants or checks and inquire

(1) May the clerk of court endorse warrants or checks deposited with him under said statute and convert the money to interest bearing securities in a bank and carry "the special amounts with said bank until such a time as the said amounts are claimed by the parties entitled to receive them?"

No. Under the provisions of G. S. 1923, section 192, the clerk of the district court, unless a court depositary has been provided in accordance with the provisions of that section, is the official custodian of all moneys whether public or private paid into court and bound to safely keep them and pay them out on the order of the court, or deliver them to his successor.

Nor. Pac. Ry. Co. vs. Owens, 86 Minn. 188, 194; 90 N. W. 371.

2. Who is entitled to retain the interest for such period?

Where money is deposited in the bank under the provisions of G. S. 1923, section 192, the interest earned by such money belongs to the person entitled to the money itself.

CLIFFORD L. HILTON,
Attorney General.

February 26, 1926.

58

COUNTIES—Clerk of Court—Fees from county in civil suits in which the county is a party.

John Swendiman, County Attorney.

If the clerk of your district court comes under chapter 229, Laws 1919, you are advised that he is not entitled to any fees for services rendered to the county in any suit in which the county is a party, whether such suit be criminal or civil.

CHARLES E. PHILLIPS,
Assistant Attorney General.

January 26, 1926.

59

COUNTIES—Clerk of Court—Fees—Condemnation proceedings.

Carl P. Manderfeld, Clerk of Court.

In re clerk's fees commission on deposits in court in highway condemnation proceedings. I take it that you refer to section 192, G. S. 1923. This section provides as follows:

> "Where money is paid into court to abide the result of any legal proceedings, the judge, by order, may cause the same to be deposited in some duly incorporated bank, to be designated by him, or such judge, on application of any person paying such money into court, may require the clerk to give an additional bond, with like condition as the bond provided for in section 191, in such sum as said judge shall order. For receiving and paying over any money deposited with him the clerk shall be entitled to a commission of 1 per cent, on the amount deposited, one-half of such commission for receiving, the other for paying, the same to be paid by the party depositing such money, provided, that where money is paid or deposited in any court by or for a city of the first class, no fee or commission shall be paid to or for the clerk for any service performed by him in receiving or paying over any such money deposited with him."

It is the opinion of this office that section 192 does not apply to moneys deposited in condemnation proceedings.

Your attention is called to section 6987, G. S. 1923, and especially to subdivision 47 thereof, which provides:

> "In actions for partition of land or proceedings in assignments for the benefit of creditors, **and proceedings under the right of eminent domain,** the court, or a judge thereof, may by order from time to time fix the amount which may be charged and collected, which may be in excess of the amounts hereinbefore provided."

Your attention is further called to section 6546, G. S. 1923, which provides in effect:

> "If the party to whom damages are awarded be not a resident of the state, or his place of residence be unknown, or he be an infant or other person under legal disability, or, being legally capable, refuses to accept the money, or if for any reason it be doubtful to whom any award should be paid, the petitioner (in this case, the state) may pay the same to the clerk to be paid out under the direction of the court, and unless an appeal is taken such deposit with the clerk shall be deemed payment of such award."

It would seem from the above provisions that the only fees of the clerk that are not provided for by section 6987, **supra,** will have to be fixed, both as to items and amounts, by the judge in whose court the condemnation proceedings are pending before any other fees than those provided in said section of the statute can be legally charged. We take it from your communication that no order has been made fixing such commission by the judge and that, therefore, such charge is not one authorized by law.

The above disposes of the matter without considering whether section 192, **supra,** applies to proceedings in which the state is a party. It is quite doubtful, to say the least, that such statute is applicable since cities of the first class are expressly excepted therefrom. Even more serious doubt exists as to the applicability of section 192, **supra,** to condemnation proceedings, since by the express terms of such statute it would relate to the deposit of money before a proceeding is determined and to abide the result of a legal proceeding, but in view of what has heretofore been stated it is not necessary to pass upon this feature of the situation.

VICTOR E. ANDERSON,
Assistant Attorney General.

December 24, 1925.

60

COUNTIES—Clerk of Court—Fees in delinquent personal property tax and bastardy proceedings.

M. A. Brattland, County Attorney.

You call attention to sections 2090 and 2097, G. S. 1923, as to the authority of the clerk for collecting his fee in connection with delinquent personal property taxes.

There can be no question as to the duty of the clerk to tax and enter in the judgment the fee prescribed by section 2097, nor the duty of the sheriff to collect the twenty-five cent fee as provided in section 2090. Each of these sections has been the law of the state for a great many years.

These fees, however, when collected now belong to the county and not to the clerk, at least in those counties where the clerk's compensation is fixed by chapter 229, Laws 1919. It will be observed, therefrom, that the salary therein specified is in full compensation for all services rendered by the

clerk for the county, except in real estate tax proceedings, in lieu of the fees theretofore provided by law. See opinion No. 194, Attorney General Report 1920.

In reference to the right of the clerk to receive fees in bastardy proceedings. See opinion No. 27, Report 1912.

I believe that these two opinions will answer your inquiries.

CHARLES E. PHILLIPS,
Assistant Attorney General.

April 13, 1926.

61

COUNTIES—Clerk of District Court Salary—Chapter 25, Laws 1925.

E. C. Middleton, County Attorney.

You call attention to section 3, chapter 5, Laws 1925, and inquire whether the clerk of your district court is entitled to charge and retain his fees for entering real estate tax judgments in addition to the compensation prescribed by that section.

No. He is entitled under the statute to retain these fees, together with all other fees received by him, but such tax fees must be included in figuring up the total emoluments of the office to determine whether he has any further compensation coming from the county.

CHARLES E. PHILLIPS,
Assistant Attorney General.

December 19, 1925.

62

COUNTIES—Commissioners—Expenses of allowance for outside of counties.

The Public Examiner.

You state that in certain counties the county boards have appointed committees, usually composed of the chairman or other member of the board, the county attorney and the county auditor, to attend upon the legislature in support of pending legislation relating to the refinancing of certain drainage projects in which such counties are financially interested, there being outstanding drainage bonds of the counties which are falling due with no funds to pay them.

You inquire if the expenses incurred by the members of such committees in so attending upon the legislature are lawful charges against their respective counties.

For former rulings on similar questions please see opinion No. 91, 1914 report, letter addressed to County Attorney Pattridge; opinion No. 95, 1914 report, letter addressed to Hon. Andrew E. Fritz, public examiner; and opinion 228, 1920 report, letter addressed to County Attorney Gallagher. The latter two discuss the questions at some length, with citations of authorities.

The above rulings have reference to the expenses of committees composed of members of the county board only, but are applicable to your inquiry. They answer your inquiry in the negative, and it is so answered.

ALBERT F. PRATT,
Assistant Attorney General.

March 18, 1925.

63

COUNTIES—Commissioners' expenses—Not entitled to on trip to consult the attorney general on general legal questions.

Charles H. Bolsta, County Attorney.

You state that the members of the Board of County Commissioners recently came to St. Paul for the purpose of consulting with the legal department in reference to some ditch matters, and that they have now each presented a bill for their expenses in making the trip. You inquire whether these bills may be legally allowed.

I am of opinion that these do not constitute a legal charge against the county.

I understand that your county comes under chapter 487, Laws 1919, which provides that the county commissioners are entitled to their actual and necessary traveling expenses incurred and paid by them in the discharge of their official duties.

The inquiry resolves itself into the question of whether their trip to St. Paul for the purpose of consulting with the legal department in reference to the subject matter is official business, and whether it was necessary to make the trip to properly transact such business.

I assume that the board came to St. Paul to consult with the attorney general on questions of law. Under the law, the county attorney is the legal adviser of all county officials upon county matters, including the board. The law authorizes and directs the attorney general to render a written opinion to the county attorney on matters of public importance, upon written request therefor. See section 115, G. S. 1923. It would therefore seem to follow that if the county board desired legal advice on any matter pending before it, it should have sought the same from the county attorney. He in turn, if deemed advisable, could have asked the opinion of the attorney general. Ordinarily he may and should submit the same on a written statement of facts, if a consideration of facts is involved in the legal questions on which an opinion is sought.

In arriving at the above conclusion I have assumed that the matter could have been handled in the manner above indicated. There may, of course, be complicated situations where the pertinent facts are difficult of advance determination when it would be proper for the county attorney to have a personal conferenee with the attorney general in order to supply the latter with all information necessary to a consideration of the questions of law. I can also conceive of situations where knowledge of the facts lie so peculiarly with the board, that it would be proper for the county attorney to bring one or more members thereof with him. These cases, however, are rather rare.

The above conclusion was reached on the assumption that this was not such a case. Your letter was silent in this respect.

CHARLES E. PHILLIPS,
Assistant Attorney General.

May 29, 1925.

64

COUNTIES—Commissioners—Redistricting districts.

Morris J. Owen, County Attorney.

Reference to the redistricting of your county into new commissioner districts.

I call your attention to chapter 366, Laws 1923, which amends section 679, G. S. 1913. You will note therefrom that the county board in redistricting a county is required to create new districts which will have as nearly as practicable an equal population. In view of the fact that the board derives its power to redistrict the county from this statute, it is my opinion that it may not legally change the commissioner districts by adding additional territory to those districts which already contain an excessive population.

While undoubtedly the decision of the board as to the practicability of dividing the county along certain lines would be conclusive if it made a bona fide effort to create districts having equal population, it is my opinion that any redistricting which did not amount to a bona fide attempt to follow this requirement of the statute would be void.

CHARLES E. PHILLIPS,
Assistant Attorney General.

February 9, 1925.

65

COUNTIES—Commissioners—Salaries—Chapter 143, Laws 1925, not retroactive.

W. Geo. Hammett, County Attorney.

You call attention to chapter 143, Laws 1925, and inquire whether the members of the board of county commissioners are entitled to draw salary from January 1, 1925, upon the basis of the salary specified therein.

This inquiry is answered in the negative. This chapter was approved April 7th and took effect upon said approval. There is no language therein which would indicate any legislative intent that it should be retroactive in effect. Hence, the members of the board are entitled to draw the salary specified therein only from and after April 7th. The compensation of the board from January 1st to such date should be upon the basis of the old salary.

CHARLES E. PHILLIPS,
Assistant Attorney General.

July 1, 1925.

66

COUNTIES—Commissioners' Salaries—Chapter 361, Laws 1921.

County Attorney.

Laws 1921, chapter 361 reads as follows:

"The salary, compensation or allowances of county officers, including judges of probate, their deputies and assistants, as now or hereafter provided by law, shall not be reduced or diminished by reason of reduction in the assessed valuation of property in any county due to the omis-

sion of motor vehicles form the tax rolls thereof, under any law or laws enacted or hereafter enacted pursuant to the provisions of article 16 of the constitution of the state of Minnesota."

This statute fails to prescribe a method to be employed in determining whether the assessed valuation of a county has been lowered because motor vehicles have been taken from the tax rolls, to such an extent as to result in a reduction in the salaries of county officials. The county auditor lacks power to adopt a method; this power is a legislative one and can only be exercised by the law making body. The courts are without power to supply the omission. Due to this omission, the statute is so indefinite as to be unenforcible, and as a consequence is void. Gustafson vs. Rhinow, 144 Minn. 415.

In our opinion chapter 361 should be ignored and the commissioners paid compensation on the basis of the present assessed valuation of the county.

CLIFFORD L. HILTON,
Attorney General.

September 30, 1926.

67

COUNTIES—Commissioners—Vacancy—Right of Vice Chairman of Village Council to act on Board of Appointment.

Wm. O. McNelly, County Attorney.

You state that the mayor of a village has resigned to become a candidate for appointment to fill a vacancy in the office of county commissioner. You inquire whether the vice chairman of the village council is entitled to vote as a member of the appointing board, or whether the office of mayor must be first filled in order to give such village a vote.

I have found no statute providing for a vice chairman to act in the absence of a mayor. If the village is organized under some special law which provides for the appointment of a vice chairman to act in the place of the mayor, his power to act in any particular premises will depend largely upon the wording of such law.

I may say as a general proposition that someone appointed by the council to act in the absence of the mayor would have no right to vote.

CHARLES E. PHILLIPS,
Assistant Attorney General.

July 10, 1925.

68

COUNTIES—Coroner—Removal of.

Wm. M. Wood, County Attorney.

You state that your coroner has left the city for several weeks, and that he did not appoint a deputy coroner.

You inquire whether, in event a murder occurred in your county during his absence, the county board could declare a vacancy in the office and appoint a coroner.

No. It is apparent from your statement of facts that the coroner has not removed from the district, and hence no vacancy resulted from his leaving the county temporarily. The only other possible ground for declaring the office vacant would be non-feasance in office. While the county board has power to fill a vacancy in the office of coroner, it has no authority to declare a vacancy for non-feasance in office. Such proceeding must be had before the governor, under section 6954, G. S. 1923.

CHARLES E. PHILLIPS,
Assistant Attorney General.

November 12, 1925.

69

COUNTIES—County Physician—Appointment—Term of Office, Compensation.

S. C. Murphy, County Attorney.

You say that under appointment of the county board a certain physician held the office of county physician during 1925 at an annual salary of $400.00; that at the meeting of the board in January, 1926, no action was taken on the appointment of a county physician for 1926; that at the February meeting the same physician who held the office in 1925 was appointed for the remainder of the year 1926.

You ask whether or not the incumbent is entitled to his salary for the month of January, 1926.

The answer to this question depends on the terms of the agreement between the county board and the physician with reference to his employment, and also, perhaps, upon the subsequent conduct of the parties. The position of county physician is not an office having a regular term fixed by law. Neither does the statute provide that the incumbent, when appointed, shall hold office until his successor is appointed and qualified. Hence there is no such thing as holding over by the county physician after the expiration of the term for which he was appointed.

Under the statute providing for the appointment of the county physician, G. S. 1923, section 3174, he is appointed by the board, holds office during the pleasure of the board, and receives such compensation as the board may from time to time determine. Under this statute the board really has no authority to fix any definite term of office or to guarantee any specific salary for such term, because if they did so they would be attempting to contract away their statutory power to remove the incumbent at their pleasure and to determine his compensation from time to time. If the board does enter into an agreement to employ a county physician for a fixed term at a specified salary, it is subject to recall or modification at any time, because the law plainly contemplates that the board shall retain full control over the position, and the law is impliedly a part of the contract of employment.

Jensen vs. Ind. Con. Sch. Dist. No. 85, 169 Minn. 233.

Hence if the board appointed the county physician for a definite term at a specified salary, it would mean nothing more than that the appointee would have a right to serve for the specified term unless sooner removed,

and to receive the specified salary unless changed by the board. Of course the board could not make a retroactive change in the terms of employment. As far as past services are concerned, the terms of employment in effect when the services were performed are always binding, since to that extent the contract of employment has been executed.

From the foregoing it is clear that if the appointment of the county physician was for a fixed term, it would automatically terminate at the end of such term. In your case, however, the situation is complicated by the fact that after an interval of one month following the expiration of the previous term, the old incumbent was reappointed. If the incumbent continued to perform the duties of county physician during the month of January, 1926, with the acquiescence of the county board, a situation might arise where there would be an implied agreement on the part of the county to pay at least reasonable compensation for the services so performed.

CHESTER S. WILSON,
Assistant Attorney General.

March 26, 1926.

70

COUNTIES—Farm Bureau Association—What Business Can be Done by. County Farm Bureau Association.

You ask—"1. Is there anything that prevents a farm bureau association from buying alfalfa seed and selling it to members and non-members and later returning to the purchasers any money which might have been saved?

"2. May the farm bureau association buy oils or petroleum products and sell them to members and others and, if any money is made or saved, may any part of saving be returned?

"3. May there be any other products handled such as fence posts, salt, etc., and dealt with in a like manner?"

Your county farm bureau association no doubt was organized under chapter 519, Laws of 1913, now section 6246, G. S. 1923. This statute provides:

> "Corporations to be known as county farm bureaus may be organized to develop and foster the agricultural, social and commercial interests of the citizens of the county in which they are organized by the creation and development of cordial and friendly relations between the residents of the urban and rural districts thereof, by encouraging and aiding the organizations of social and business clubs within the various villages, towns and school districts of the county, by co-operating with the department of agriculture of the United States and the colleges of agriculture in the state of Minnesota in carrying out the plans and purposes of said department, and said colleges in improving the social and business interests of persons engaged in agriculture and by such other means and methods as may be deemed advisable."

The above provision of the statute when analyzed seems to permit and authorize farm bureaus to do the following: (1) Develop and foster the agricultural, social and commercial interests of the citizens of the county, etc.; (2) By encouraging and aiding the organization of social and business clubs, etc.; (3) By co-operating with the department of agriculture of the United States, etc., in improving the social and business interests of persons engaged in agriculture, etc.

We do not believe that it can be seriously contended that the right to engage in any of the business activities enumerated in your letter can be based on either subdivision No. 2 or No. 3 above stated, but such right, if it exists, would have to come under subdivision No. 1 supra.

The usual definition of the word "develop" is to unfold more completely, to develop, the possibilities or power of, to make active, to perfect, advance, further, to make, to increase, to promote the growth of. The word "foster" is defined as : to cherish, to nurse, to promote the growth of, to encourage, to sustain and promote.

If the legislature used the words "develop" and "foster" as above defined, it does not make county farm bureau associations business corporations, in the sense that they are thus authorized and empowered to engage in commercial activities in any of the lines indicated in your letter.

However as to your first inquiry, there is no doubt but what very valuable service can be rendered in attending to the purchase and sale of alfalfa seed and for which service the association could, of course, make a charge. For example, if the farm bureau association, through its manager, generally known as the county agent, knows of alfalfa seed being for sale on the one hand, and has a list of farmers desiring to purchase such seed, on the other hand, and getting these parties together and making it possible for the one to sell, as well as for the other to buy, the association is not engaged in the seed business, but clearly can make a charge for its service, and I do not believe that it would conflict with any law on the subject.

The same would be true, not only of alfalfa seed, but also of any other commodity, which the farmers may buy in large quantities, such as oils, petroleum, fence posts, salt, and other products.

Funds received for its service in this matter or any other similar matter can be pro-rated back to the members or to the patrons, as the association may from time to time determine; however in determining such refund, it might be well to retain sufficient money in the treasury to cover the expense directly involved therein, although I do not feel that this would be absolutely necessary since all such activities would have a tendency to foster and develop agricultural, social and commercial interests of the citizens in the county, and to the extent indicated your several inquiries are answered in the affirmative.

However, it should be expressly understood that the law does not, in our opinion, permit county farm bureau associations to be engaged in what is generally known as business activities, except and to the extent outlined herein.

VICTOR E. ANDERSON,
Assistant Attorney General.

June 10, 1925.

71

COUNTIES—Financial Statement—Publication of.

E. W. Swenson, County Attorney.

You refer to the pamphlet entitled "Laws and Regulations for Publication of Legal Advertising in Newspapers, with Approved Forms" prepared by the state printer and approved by the attorney general, and then inquire as to what extent it is necessary that these forms be followed in drawing up the county financial statement.

Section 667, G. S. 1923, provides for the publication of the financial statement of the county and provides that it shall

> "contain a full and correct description of each item, from whom and on what account received, to whom paid, and on what account expended, together with an accurate statement of the finances of the county at the end of the fiscal year, including all debts and liabilities, and the assets to discharge the same."

Section 7, chapter 484, Laws 1921, provided that within a year after the passage thereof the state expert printer should prepare and issue a pamphlet containing a description and facsimile copy, and style of composition, as near as can be, of all notices required by law to be published by public officials in a newspaper in this state, for distribution. It further provides that such forms, when approved by the attorney general, and so issued, shall become a guide for public officials in the publication of official notices in newspapers.

The statutory requirements of section 667 should be substantially complied with. It was competent for the legislature to prescribe what should be published, and it has done so by use of the above quoted language. It follows that there should be a substantial compliance therewith.

Realizing the difficulty that some county auditors and boards of county commissioners might meet in attempting to prepare forms of their own, and probably to the end that a uniform system of statements might be established, the legislature by the 1921 act authorized the state printer, with the approval of the attorney general, to prescribe forms as a guide to county officials in preparing the financial statement. These forms should also be substantially followed.

You inquire specifically in reference to the necessity of giving the numbers of warrants through which moneys were disbursed. The statute above referred to does not require such numbers to be given, but the forms prepared by the state printer and approved by the attorney general give such numbers. It occurs to me that the better practice is to give the numbers in the financial statement. While such number perhaps means but little to the general public, in perusing the statement, it does enable anyone to check the particular expenditure without difficulty, if he so wishes. However, the failure to give warrant numbers would not impair the validity of the statement.

You enclose the printed statement of your county and ask for the approval of the same by this office. There is no provision of law for approval by the attorney general. This department cannot, without checking

the same in great detail, attempt to pass upon the statement. In glancing over it hastily, I notice that the requirement of the statute that the statement contain a full and correct description of each item has not been complied with in many instances. For instance under the heading "Coroner's Fees and Expenses" there is shown two items, one of $26.80 to Dr. A, and one of $56.80 to Dr. B. There is nothing to indicate the nature of these expenses. The same is true of the expenses of the Child Welfare Board. There is nothing to indicate whether those expenses are for traveling expenses, stationery, postage, or any other authorized expense. What has been said in reference to these two sub-heads is equally true of a great many other ones. In other words, the statement fails to give a full and correct description of the various items as provided by statute.

You also inquire whether the various amounts paid to one firm or person may be combined and shown as a total amount. This cannot be answered without some reference to the particular items which go to make up the sum total. There is no objection to combining items of the same nature in a single statement, as for instance where a particular person furnishes fuel to the courthouse at various times. Thus it occurs to me that the statute would be complied with if "A" furnished two tons in December, two tons in January, and two tons in February, by the giving of a single statement of the total amount as six tons of fuel.

You further inquire in reference to the practice of the county board of approving the statement at the February meeting.

Section 667, G. S. 1923, provides that the board shall annually on the first Tuesday after the first Monday in January make such statement. This is a direction of law and should be complied with, although directory only. If the board fails to follow this direction of the law, it may of course make and publish the statement later, but the law should be complied with unless good and sufficient reasons exist to the contrary.

CHARLES E. PHILLIPS,
Assistant Attorney General.

January 26, 1926.

72

COUNTIES—May not pay expense of furnishing tax list to banks in aid of collection.

George A. Barnes, County Attorney.

You state that the county board has been requested by some of the banks of the county to purchase certain books and records for the listing of real and personal taxes due in the different communities, the books to be delivered to and used by the banks to enable local taxpayers to pay their taxes through the bank.

You inquire as to whether the county may purchase books and records for this purpose.

No. There is no authority in law for the payment of taxes through the medium of banks. Such banks act solely as the agent of the taxpayer. All taxes must be paid to the treasurer, either at his office or at some place

in the county which he visits for the purpose of collecting taxes as provided in section 2066, G. S. 1913. There being no authority in the law for the payment of taxes to the banks, and the treasurer being without authority to designate banks as his agent, I am of the opinion that the county may not pay the expense of preparing tax lists to be used by the bank and the taxpayer can ascertain the amount of taxes due.

I am fully aware of the general practice existing throughout the state of taxpayers paying their taxes through the medium of the banks and the great convenience to the taxpayers resulting from such practice. However, this practice does not affect the principles of law applicable.

CHARLES E. PHILLIPS,
Assistant Attorney General.

November 14, 1925.

73

COUNTIES—Mothers' Pensions—Citizenship—Chapter 435, Laws 1921.

Charles Johnson, County Attorney.

You refer to subdivision "F" of section 1 in chapter 435, Laws 1921, which reads as follows:

> "Whether the mother is a citizen of the United States, or whether she or her husband has made declaration of intention to become a citizen, and has resided two years in the state and one year in the county."

Among other requirements the court must find in the affirmative as to this subdivision before allowing a mother's pension, and you submit the following query:

> "Does the provision 'has resided two years in the state and one year in the county' apply to a mother who is a citizen the same as it does to one who has made declaration to become one?"

I am of the opinion that the requirement as to residence in the state and county applies to a mother who is a citizen as well as to one who has made declaration of intention to become such citizen and your question is therefore answered in the affirmative.

WILLIAM H. GURNEE,
Assistant Attorney General.

February 10, 1925.

74

COUNTIES—Newspaper—Official Paper—Consolidation with another legal newspaper.

Jos. L. Hilgers, County Attorney.

It appears that the county board at its regular meeting in January, 1926, duly designated the Tribune as the official newspaper of the county, pursuant to section 662, G. S. 1923. Recently the Tribune and the Argus, another newspaper of the county, were consolidated under one name and ownership, and the consolidated paper henceforth will be published as the Argus-Tribune.

You inquire if the Argus-Tribune is and will continue to be the official newspaper of the county, or if the board has present authority to designate another newspaper as such.

Assuming that both of the consolidated papers were legal newspapers of the county, we agree with you that the Argus-Tribune is and will continue to be the official newspaper of the county for the remainder of the year, and that the board has no authority to designate another newspaper as such. This under the provisions of section 662, G. S. 1923, referred to by you.

ALBERT F. PRATT,
Assistant Attorney General.

April 5, 1926.

75

COUNTIES—Official Bonds—Fees for recording.

Albert Johnson, County Attorney.

Referring to section 979, G. S. 1923, you inquire if the county should pay the fees for filing or recording town treasurers', village treasurers', or school district treasurers' bonds.

The answer is in the affirmative as to official bonds required by law to be filed or recorded with the register of deeds or clerk of the district court.

In connection with the legal history of section 979, G. S. 1923, see section 1, chapter 181, Laws 1889; section 873, G. S. 1894; section 606, R. L. 1905, and report of the Statute Revision Commission, p. 8. This opinion reverses opinions No. 575, 1910 report and No. 596, 1916 report.

ALBERT F. PRATT,
Assistant Attorney General.

January 2, 1925.

76

COUNTIES—Payment of notarial commission fee by.

R. A. MacDonald, Assistant County Attorney.

You inquire whether the county board has the right to pay the costs of obtaining a notarial commission for one of the employes in the county surveyor's office who verifies all claims coming through the department.

No. A notary public is a state officer and is independent of all state and municipal departments. The county has no power to create such an office nor to pay the costs of obtaining a notarial commission for the convenience of the county, any department thereof, or for private individuals having dealings with the county.

You further inquire whether, if the county may not pay the cost of obtaining such notarial commission, may such employe charge for his services and the county pay the same in connection with verification of claims.

Your letter fails to disclose the character or nature of these claims. I take it, however, that you have reference to claims of individuals or corporations against the county. If such is the case, the county may not pay the notarial charges for verifying such claims. The law imposes the duty

upon claimants against the county to present verified claims, and the burden of preparing and verifying such claims rests upon the individual who has the same.

CHARLES E. PHILLIPS,
Assistant Attorney General.

March 29, 1926.

77

COUNTIES—Poor—Insurance on the lives of—Whether any may be carried by the county.

Morris J. Owen, County Attorney.

You state that an inmate of your county poor farm has a policy of insurance on his life which he has carried for some time but which is of the class which has no substantial surrender value; the county board is of the impression that it would be advantageous to the county to carry the insurance at the expense of the county; and you inquire if the law authorizes such an expenditure on the part of the county.

Your attention is invited to the provisions of chapter 241, Laws 1923, section 669, G. S. 1923. This statute would seem to be broad enough to cover the situation if the county board, in the exercise of its official judgment and discretion, determines that it is to the financial advantage of the county to carry the insurance.

Many questions of fact will of course be for consideration by the board in connection with such determination—the character and class of the policy, whether the county may lawfully be made the beneficiary, cost of carrying, expectancy of life of the insured, financial standing of the insurer, possible future liability on the county for assessments or contributions other than fixed premiums, if an assessment or mutual company, and so on.

On principle the situation is somewhat analagous to the acceptance by the county from such inmate of any other personal property already partially paid for, balance payable in instalments.

So the question is largely one of fact to be resolved by the county board.

No consideration has been given as to whether or not the county has an insurable interest in the lives of the inmates of its poor farm.

See chapter 60, Laws 1925, for claims against estates of poor persons.

It is not against public policy for a pauper voluntarily to indemnify the public authorities against expenses on his behalf, and such pauper may bind himself by special contract so to do.

O'Donnell vs. Smith, 142 Mass. 505, 8 N. E. 350; Church vs. Fanning, 44 Hun. (N. Y.) 302; Lyndon vs. Belden, 14 Vt. 423; Dakota vs. Winneconne, 55 Wis. 522; Chester Co. vs. Melany, 64 Pa. 144; Turner vs. Hadden, 62 Bab. 480; 30 CYC, p. 1139.

The county, of course, may not enter into a bargain with the inmate for support for life in consideration of the assignment of the insurance.

See chapter 321, Laws 1915, for contracts for care and support of aged and indigent, not poor persons. This may be in 1923 G. S. somewhere.

ALBERT F. PRATT,
Assistant Attorney General.

March 23, 1926.

78

COUNTIES—Poor—Moneys and credits to be included in taxable value of property.

James E. Montague, County Attorney.

You inquire whether in arriving at the "taxable value of property" in a town or village under section 3195, G. S. 1923, moneys and credits should be included.

Yes. See Hicken vs. Board of Education, 153 Minn. 120.

CHARLES E. PHILLIPS,
Assistant Attorney General.

November 16, 1925.

79

COUNTIES—Poor—Notice to relatives—Section 3157, G. S. 1923.

Theodor S. Slen, County Attorney.

You inquire whether this office has any forms to be used by the county board in directing the relatives of a poor person to furnish support under section 3157, G. S. 1923. We have no such forms, and the statute does not require any particular form to be used. I would suggest that it would be well for the county board to pass a resolution directing the chairman or clerk to give such notice in the name of the board. It might be well to have the notice served personally, if possible, and I think that substantially the following form would be sufficient:

"To.....:

You are hereby notified that..... is a poor person unable to support himself and that under the provisions of section 3157, G. S. 1923, you, as..... (state relationship—as sister, brother, etc.) of said poor person, are liable to furnish such support.

You are, therefore, directed to forthwith furnish such support to ....., and if you fail to do so, the county will bring action against you.

(Signed).....
.....
.....
.....
Board of County Commissioners."

WILLIAM H. GURNEE,
Assistant Attorney General.

April 2, 1925.

80

COUNTIES—Poor relief—Section 3171, G. S. 1923.

Director of Children's Bureau.

You ask for a construction of the above statute, and make the following inquiries:

"1. Is $200.00 the absolute maximum of county relief (not including mother's allowance) which a board of county commissioners may grant to any one person or any one member of a family in one calendar year?

"2. Is this $200.00 merely the limit which one member of a board may grant to a single case with unanimous consent of the board?

"3. Can the board as a body grant more?"

You will note that this section of the statute relates entirely to temporary relief. In my opinion, relief to the extent of $200.00 may be granted to any one person by resolution unanimously adopted by the county board. The statute does not seem to contemplate that a larger amount shall be allowed under any circumstances to any one individual. I see no reason why, in the discretion of the county board, the maximum relief might not be granted to several individuals, even though they were members of the same family.

WILLIAM H. GURNEE,
Assistant Attorney General.

May 1, 1925.

81

COUNTIES—Poor persons—Settlement of—Not acquired in another county while receiving relief from county of former residence.

County Attorney, Wadena County.

It is assumed that your county has the town system of caring for the poor.

It appears that a certain municipality of your county has been contributing to the relief of a poor person, a resident thereof at the time the relief was originally granted, for some years. During the last three years or more such poor person has actually resided in another county, amount of the relief being forwarded at stated periods to the person who is caring for such poor person in such other county.

You inquire if the original settlement for poor relief will continue so long as the relief is furnished by such municipality, irrespective of place of actual residence.

Section 3161, G. S. 1923, seems to answer your inquiry in the affirmative.

"Each month during which he (the poor person) has received relief from the poor fund of any county or municipality, shall be excluded in determining the time of residence hereunder."

The reasons for the statute are obvious.

See also the late case reported in 207 N. W. 323.

ALBERT F. PRATT,
Assistant Attorney General.

May 10, 1926.

82

COUNTIES—Register of Deeds—Clerk hire for recopying records.

D. M. Cameron, County Attorney.

You call attention to chapter 97, Laws 1917, and inquire whether there is anything in said chapter which will bar the county board from allowing extra clerk hire to the Register of Deeds under section 15, chapter 91, Laws 1925, in the event the board contracts with register of deeds to recopy such records.

You are advised that in my opinion the county board may under chapter 91 allow extra clerk hire to the register of deeds in the event any contract is made with the register of deeds to recopy any substantial portion of the records, if in their judgment such extra work justifies such clerk hire.

CHARLES E. PHILLIPS,
Assistant Attorney General.

June 27, 1925.

83

COUNTIES—Register of Deeds—Fees.

You call attention to chapter 351, Laws 1921, and inquire whether a register of deeds in a county under such statute is entitled to retain fees for recording chattel mortgages, calling attention to section 3, chapter 143, Laws 1913.

Your inquiry is answered in the negative.

CHARLES E. PHILLIPS,
Assistant Attorney General.

September 22, 1926.

84

COUNTIES—Register of Deeds—Photographic method of recording instruments—Legal to use.

Harry H. Peterson, County Attorney.

You inquire whether it is legal for the register of deeds to use the photographic method of copying and recording instruments required by law to be recorded in his office.

Section 884, G. S. 1923, reads in part as follows:

"He (register of deeds) shall keep suitable books, and record at large, word for word, all instruments left with him for record."

The statute does not prescribe the method to be used in effecting the record, and its conditions are complied with when the instrument is recorded, (1) in a suitable book, (2) at large, word for word.

The register of deeds is a statutory officer, clothed with a general discretion as to the manner in which he shall discharge the duties imposed upon him by law. In the absence of a legislative direction as to the method to be used, it would seem to follow that he may adopt any method dictated by a sound, intelligent discretion, so long as such method results in the instrument being recorded in a suitable book, at large, word for word.

Under the photographic process, it is not practicable to photograph the instrument upon a page of a bound book, but each instrument must be reproduced upon a loose sheet of specially prepared paper. These sheets are preserved separately until a sufficient number are accumulated to make a book and then bound. You advise that the quality of the paper is such that it is capable of being bound into a book as permanent, if not more so than the ordinary record book now in use. Assuming these facts, I am of the opinion that the statutory requirement that the instruments be recorded in a "suitable book" is met. It is equally clear that a true, eligible photographic reproduction of the entire instrument satisfies the legislative direction that it shall be "recorded at large, word for word."

Is there anything in the practical application of the method to the work of the office that renders its adoption an abuse of discretion? Assuming that it is practicable to make clear, eligible photographs of the instruments to be recorded, which photographs have the quality of permanency which will withstand the effects of time, questions of fact upon which this office does not pass, the only other question that suggests itself is whether the method lends itself to a reasonably prompt recording of the instrument. The instrument is not recorded until the photographic sheet is bound in the permanent volume. The statute requires "deeds, mortgages and other instruments" to be recorded in separate books. It follows that each class of instruments must be presented for record with such frequency as to permit a volume thereof to be bound without unreasonable delay and within thirty days. See section 894, G. S. 1923.

The record of all instruments must be completed within thirty days under this statute. Notwithstanding sufficient photographic sheets might be accumulated to make a book within such period, yet it might be an abuse of discretion to adopt the method if it would result in an unreasonable delay in completing the record as compared with the old system.

You state that in your county deeds and mortgages are received in such numbers as to make a book within three or four days at the longest. If such is the fact, it is the opinion of this office that the photographic system may be used for recording such instruments, although it might be an abuse of discretion to use the system for recording other classes of instruments where delay would result in making up a book.

CHARLES E. PHILLIPS,
Assistant Attorney General.

December 30, 1925.

85

COUNTIES—Register of Deeds—Photostatic machine—Purchase of.

Harry H. Peterson, County Attorney.

You inquire as to whether the county board could legally purchase a photostatic machine for the use of the register of deeds.

Your attention is called to section 664, G. S. 1923, which authorizes the board to provide an office at the county seat for the register of deeds, "with suitable furniture therefor," and fuel for heating same, also safes and vaults for the security and preservation of books and papers belonging thereto.

It will be seen from the above quoted statute that general authority is vested in the board to provide whatever equipment is reasonably necessary and proper in their judgment to enable the register of deeds to properly perform the functions and duties of his office. In my opinion, the board may legally provide the machine in question if they deem it reasonably necessary for the proper performance of the duties of his office.

CHARLES E. PHILLIPS,
Assistant Attorney General.

July 6, 1925.

86

COUNTIES—Register of Deeds—Recording acknowledgment of instruments by officers of corporation.

County Attorney.

You state that an instrument conveying or affecting the title of land is executed in the name of the corporation grantor by its president and its secretary (or cashier), corporate seal affixed, but that the acknowledgment on behalf of the corporation is by the president or secretary (or cashier) only.

Referring to sections 6970, 6971, G. S. 1923, you inquire if such an acknowledgment is in conformity therewith.

Interesting discussions of the purposes and effect, in law, of certificates of acknowledgments, will be found in Bennett vs. Knowles, 66 Minn. 4; Cone vs. Nimocks, 78 Minn. 249; Larson vs. Elsner, 93 Minn. 303; Park vs. Hudson, 154 Minn. 471, 477; and Brown vs. Reinke, 199 N. W. 235.

It has been held that an acknowledgment is not essential to the validity of a deed, mortgage, or contract to convey land. See Dunnell Dig., section 66, and cases cited.

In Cone vs. Nimocks, supra, it is held that the statutory forms of acknowledgment are permissive and not mandatory. "Any form of acknowledgment which would have been good previously (to the passage of Laws 1883, chapter 99) is still sufficient."

Whatever may be the effect, in law, of a defective acknowledgment, on the rights of interested parties, all that you are interested in officially is whether or not an instrument presented to you for filing or record is entitled to be filed or recorded.

In that connection you are advised that an instrument executed by a corporation as indicated by your inquiry, with a certificate of acknowledgment by one officer thereof, in the form substantially as authorized by sub. 3 of section 6970, G. S. 1923, if otherwise entitled to be filed or recorded in your office, is entitled to be filed or recorded, as the case may be. And this although the by-laws "state that the instrument must be executed by two officers."

ALBERT F. PRATT,

September 15, 1925. Assistant Attorney General.

87

COUNTIES—Register of Deeds—Recording assignment of interest under deed of trust without payment of current taxes.

A. D. Bornemann, County Attorney.

Referring to sections 2211, 2212, G. S. 1923, requiring the payment of taxes before "a deed or other instrument covering land" may be recorded, you inquire if an instrument whereby an insolvent corporate trustee under deed of trust, by the state commissioner of banks, pursuant to order of court, purports to "convey, revise, and release" unto a successor corporate

trustee, certain real property situate in your county, may be recorded without the payment of taxes and endorsement thereon of such payment by the auditor and treasurer.

You do not state what was the nature of the original "deed of trust," or how it was treated when originally recorded, whether as a deed or as a mortgage. I take it that it was probably a deed of trust given to secure the payment of an issue of bonds, and that it was treated as a mortgage and mortgage registry tax paid thereon as such. If so this instrument referred to amounts only to an assignment or partial assignment of a mortgage. It is made in trust nevertheless for the equal pro rata benefit of all and every the persons * * * who are or may become owners of any right, title or interest in the aforesaid property under the terms and provisions of said trust deed," and also mentions a bond held by the original trustee.

If it is an assignment of what amounts to a mortgage the payment of taxes under the statute aforesaid is not required. Otherwise such payment is required. So the answer depends on what the original deed was.

ALBERT F. PRATT,
Assistant Attorney General.

August 27, 1926.

88

COUNTIES—Register of Deeds—Liens upon motor vehicles.

County Attorney, Brown County.

As to chapter 352, Laws 1925, pertaining to liens upon motor vehicles, I have to advise that the statute does not require that the lien statement shall be recorded at length by the register. All that is required is that the statement shall be filed in the office of the register and properly indexed so that it can be found when necessity for its examination arises.

JAMES E. MARKHAM,
Deputy Attorney General.

November 27, 1925.

89

COUNTIES—Register of Deeds—Recording release of consent—Taxes must be paid.

A. W. Skog.

It appears that there is on record a contract for deed in usual form upon which the mortgage registration tax has been paid and that the vendor and vendee have tendered for record "an agreement releasing or annulling" the said contract, which they claim is entitled to record without the certification as to payment of taxes and assessments as required by section 2192, G. S. 1913, and chapter 295, Laws 1921, respectively. It appears from your letter that the instrument is not a quit claim deed, but otherwise it is not very definitely described. Presumably it is a contract in the form of a mutual agreement that the contract is cancelled and annulled.

You inquire if taxes must be paid before recording.

The question is whether or not the instrument is "a deed or other instrument conveying land," under section 2192, or a "conveyance" under chapter 295, Laws 1921, the latter applying only to special assessments in proceedings under chapter 35, Laws 1915. As that act applies only to villages and boroughs and to cities of less than 10,000 it probably has no application here and will not be considered.

The law now comprised in section 2192, G. S. 1913, so far as here pertinent, first appeared as section 106, chapter 11, G. S. 1878, which required payment of taxes before "any deeds, plats of any townsite, or instrument affecting the same, or any other conveyance of real estate" was entitled to record. By amendment in chapter 263, Laws 1887, Ramsey and Hennepin counties were taken out from under the act. In the tax code of 1902, chapter 2, section 70, Extra Session, Laws 1902, a certificate of taxes paid was required upon "any deed or other instrument conveying any real property or plat of any townsite or addition thereto," before being entitled to record, in all counties.

This section slightly changed to read "deed or other instrument conveying land," became section 985, Revised Laws 1905, which is now section 2192, G. S. 1913, save for certain excepting amendments not here material.

Formerly executory contracts were not "conveyances" within the recording acts and so not within the law requiring certificates of taxes paid upon all "conveyances." 15 Minn. 59, 39 Minn. 420, 70 Minn. 467, State vs. Weld, (1896) 66 Minn. 219, 225. They now are "conveyances" within the recording act, section 6813 G. S. 1913, having been stricken out of the exceptions by chapter 37, Laws 1901, and not again included therein.

Such contracts wherein the vendee is entitled to possession are "instruments conveying land" within the meaning of section 2211, G. S. 1923. See opinion 126, 1918 Report, and cases there cited.

Assignments of such contracts are within section 2211, G. S. 1923. See opinion 164, 1922 Report.

Numerous cases hold that the vendee becomes the owner of the equitable title, the vendor retaining the legal title as security.

Receivers' receipts were apparently considered by the legislature to be "instruments conveying land," as they were excepted by chapter 371, Laws 1913.

Note in the Weld case, supra, page 221, that under the then law covering "conveyances," the auditor should determine whether or not the instrument is one "conveying real estate" or "affecting the same." If it is, taxes must be paid.

This is significant in view of "conveyance" being changed to "instrument conveying real estate" in the later acts, indicating that the word "conveyance" and the phrase "instrument conveying land" are to be treated as substantially synonymous, in the act requiring payment of taxes before recording.

On page 222 of the Weld case the court refers to the reasons calling for a broad construction of the act: "The object of the statute is to enforce payment of taxes before the transfer of land or interests affecting the same from one party to another can be recorded. Those who are protected by and

receive benefits from our governmental institutions should promptly pay their taxes, and this statutory method of forbidding registration of instruments transferring lands or interests affecting the same proves to be a very efficient means of collecting such taxes. We do not wish to be understood as applying this rule to mortgage liens or other mere liens upon property."

Cases hold that the spouse must join in "releases" of contracts for deed before they affect the interests of such spouse.

Whatever the form of the release is, it seems clear that before its execution and delivery, the vendor holds the legal title and the vendee the equitable title, and that afterwards the vendor holds the fee title. Within the broad construction given to the statute by the courts, the instrument must therefore be one "conveying land" and so requiring payment of taxes before recording.

In view of the language and purposes of the act and the construction heretofore placed thereon I think that your inquiry properly is answered in the affirmative.

ALBERT F. PRATT,
Assistant Attorney General.

December 31, 1924.

90

COUNTIES—Sheriff—Fees on sale of real property on decree of specific performance of executory land contract.

M. A. Brattland, County Attorney.

You state:

> "The sheriff of our county asks me to submit to your office an inquiry as to the proper amount of fees to be charged for a sale under proceedings for specific performance of a contract for deed.
>
> "The statute governing mortgage foreclosure sales does not seem to apply to sales other than mortgage foreclosures. Section 6993, par. 17, G. S. 1923.
>
> "The form of the judgment entered requires a sale as on execution and the question is if fees as for execution sales are to be charged."

It would seem that this is a question in which the public, as such, is not concerned, and hence that the question is one properly to be determined between the parties themselves, being a matter of private controversy. I take it that under the statute the sheriff retains such fees as he may get for the services referred to, and that the public has no interest therein.

Perhaps a few suggestions may be proper. The facts stated are somewhat limited, but I take it that in an action by the vendor against the vendee to enforce specific performance of an executory contract for the sale and purchase of land, the court made and entered its order and decree finding the amount due from the vendee, directing specific performance, and in default of performance, that the land covered by the contract be sold by the sheriff at public auction in the manner provided by law for sale of land upon execution, the sale to be followed by a report to the court thereon, for further proceed-

ings in the case; that a certified copy of the decree was to the sheriff "directed and delivered," and that pursuant thereto he advertised the sale and sold.

Presumably the sheriff claims his principal fees under section 6993 (5) G. S. 1923, plus section 6993 (24), while the party in whose favor the decree was entered claims that the sheriff's principal fees in the premises are governed by section 6993 (17), plus section 6993 (24).

It repeatedly has been held that the sheriff's fees for selling land on foreclosure of mortgage, for all services required, are only $3.00, whether the foreclosure be by advertisement or on a decree of foreclosure entered in proceedings for foreclosure by action.

In this connection you might go into the history of the legislation now found in these subdivisions, particularly section 10 of chapter 70, G. S. 1866, section 11 of chapter 70, G. S. 1878, section 5550, G. S. 1894 and section 2697, R. L. 1905.

See also Thompson vs. First Division, 26 Minn. 353, where a fee of only $3.00 was allowed upon sale by the sheriff under decree of foreclosure, of personal property sold for $900,000. There the sheriff took the same position as your sheriff takes, to-wit, that the situation was more analogous to a sale on execution than to any other provision relating to fees. The court said that the services most resembled "selling land on decree of foreclosure * * * three dollars." Please note the decision in this case. Also please note from your investigation of the statutes above referred to that the sale of land on decree of foreclosure is now merged, along with sale on foreclosure by advertisement, in section 6993 (17).

Please note also that in a foreclosure of real estate mortgage by action a judgment is entered, and a sale ordered, and the sheriff is directed "to proceed to sell the same according to the provisions of law relating to the sale of real estate on execution, and to make report to the court." Section 9636, G. S. 1923. You will note the almost identical character of the proceedings relating to the sale in the instant case and those under the statute in foreclosure by action. Further, in neither case is a personal judgment entered until after report and confirmation.

Please note the wording of section 6993 (5): "collection on execution after levy * * *." Here there is no judgment on which a writ of execution may be issued; there is no "levy." The sale is not to satisfy a judgment; it is a sale on decree, by order of court.

The vendor, as repeatedly has been held, holds the legal title to the land as security for the payment of the balance of the purchase money; the seller in effect is foreclosing his security and looking to the securing of a deficiency personal judgment thereafter, if the sale does not pay out the purchase price. While the sale may be advertised and carried on as prescribed in case of sale on execution, it is not a sale on execution; there was no writ; there was no collection on a writ of execution. It is quite similar to a sale on decree on foreclosure of a mechanic's lien, but is on all fours with a sale on foreclosure of a mortgage by action.

In my best judgment the sheriff's fees for the sale are governed by section 6993 (17). He, of course, has some other fees coming under other subdivisions.

On the nature of the titles of the vendor and vendee respectively, in land sold on executory contract, please see Summers vs. Midland Co., (June 4, 1926) 209 N. W. 323, as follows:

> "What is the status of the parties to such contract for deed? The vendor holds the legal title merely as security for the payment of the purchase price. He has a lien thereon for his claim. * * * The relation is substantially that of mortgagor and mortgagee. Keith vs. Albrecht, 89 Minn. 247, 94 N. W. 677, 99 Am. St. Rep. 566. The only difference is a more efficient remedy in case of default."

ALBERT F. PRATT,
July 19, 1926. Assistant Attorney General.

91

COUNTIES—Sheriffs—Law enforcement fund—Control of county board over same.

Albert Johnson, County Attorney.

You state:

> Will you kindly advise me if the county board under section 696, subsection 7, G. S. 1913, has the power to exercise the authority vested in it by said section with reference to the law enforcement fund created by chapter 416, section 9, Laws 1923.

Perhaps the county board may recommend or make suggestions to the sheriff with respect to how the fund should be used by him within the statutory limitations, but the board has no real or legal authority in the premises. The fund is a special fund created by the legislature, to be used as stated in the act "and for no other purpose." The sheriff may or may not accept such recommendations or suggestions, but if he does, he takes his own risk that his expenditures may not be approved by the judge, in which case he would have to stand the expense himself. This fund may be used only for the statutory purposes, and in practice the sheriff usually acts under the general advice of the judge and the more specific advice of the county attorney in the expenditure thereof for such purposes. Section 696, G. S. 1913, has no application to the law enforcement fund created by section 9, chapter 416, Laws 1923.

ALBERT F. PRATT,
January 22, 1925. Assistant Attorney General.

92

COUNTIES—Sheriff's Aids—Liability for injury under workmen's compensation.

William M. Wood, County Attorney.

Referring to opinion 222, 1924 report, to section 7005, G. S. 1923, relating to the fees of "sheriffs' aids in criminal cases," and to section 907, G. S. 1923, relating to the posse commitatus, you state that after evidence has been secured and search warrants issued the sheriff sometimes employs men to assist him in executing the warrants and you inquire if the county should protect itself by insuring against liability for injury to or death of these men, under the workmen's compensation act.

There would seem to be no legal objection to carrying such liability insurance.

You inquire further if it is lawful for men so employed, who have no other appointment than a verbal request from the sheriff, and who hold no other public office, to accompany the sheriff and assist in executing these search warrants.

I see no legal objection to this procedure, in proper cases. Under section 907, G. S. 1923, "the sheriff shall keep and preserve the peace of his county, for which purpose he may call to his aid such persons or power of his county as he deems necessary." As I understand it that is the old posse commitatus law, and those "called to his aid" are the "sheriff's aids" under section 7005.

Nothing appears in your letter as to why the regular force of the office is not sufficient to handle these cases, and in passing it may be stated that "sheriff's aids" presumably are called upon only in emergency and when necessary to "keep and preserve the peace of his county." However, the county board will likely inquire into whether or not the assistance called upon was necessary, when the bills come in. The sheriff passes first on the question of necessity, under the facts of each case, but the board has the last say.

It may be added that in line with the old practice in connection with the posse commitatus it is good practice to swear in these aids before they start, using the general form of oath of a deputy sheriff, but putting "sheriff's aid in criminal cases" or the like, in the name of the appointment. This may be taken and administered orally, if necessary. Written appointments might also be made, but an oral appointment is good. Matter of proof is the principal question.

You inquire further whether a prosecution may be instituted under section 9995, G. S. 1923 or section 10098, G. S. 1923, for resisting an officer or assault, when the "officer" resisted or assaulted is one of these sheriff's aids.

If properly called upon to aid the sheriff, under section 907, and acting as a "sheriff's aid" by reason thereof, it seems quite clear that one is, in law, an "executive officer" pro tempore, within the meaning of the sections above referred to.

The sheriff or his deputy being present and in the execution of the process, the charge might be laid under section 9995 for resisting him by beating up his "aid," by appropriate pleading of the facts. And similarly under section 10098 (5).

The sheriff or deputy not being present reliance would be placed largely upon the fact that a "sheriff's aid" is an officer, or is engaged in making the "lawful apprehension or detention of himself (the alleged offender) or some other person."

ALBERT F. PRATT,
Assistant Attorney General.

November 30, 1925.

93

COUNTIES—Superintendent of schools—Traveling Expenses.

D. M. Cameron, County Attorney.

You call attention to section 11, chapter 91, Laws 1925, and inquire whether the superintendent of schools is entitled to be reimbursed for his actual traveling expenses where he does not use his own automobile but hires livery. The letter of the superintendent to you calls attention to section 1016, G. S. 1913, as amended by chapter 245, Laws 1919, and as amended by chapter 447, Laws 1921.

Chapter 91 repeals the last above mentioned statute as amended, so far as the same applies to those counties coming under chapter 91. The superintendent is entitled to a mileage fee of nine cents per mile for all traveling in the performance of his official work. This is not a way of reimbursing him for actual expenses, but is a flat mileage to which he is entitled under all circumstances. If he hires livery he is entitled to his mileage, but must settle for his livery hire.

CHARLES E. PHILLIPS,
Assistant Attorney General.

April 13, 1926.

94

COUNTIES—Supervisor of Assessments—Compensation and expenses—Office supplies—Expenses of outside trips.

Lucius A. Smith, County Attorney.

You state that the county board appointed a county supervisor of assessments under G. S. 1923, section 1989. They also appointed a number of assistant supervisors. The board directed the supervisor to make a valuation of every tract of land in the county with the view of equalization of tax assessments throughout the county. In order to perform the required service it was necessary for the supervisor and his assistants to travel from place to place in the county and to incur expense for such travel. This necessity was taken into consideration by the board, and they passed a resolution that the supervisor and each of his assistants would be allowed seven cents per-mile for the use of their own cars for such purposes.

You ask whether bills for traveling expenses of the supervisor and his assistants are legal charges against the county. Considering such bills strictly as claims for expenses, your question is answered in the negative. The statute in question makes no provision whatever for the payment of the traveling expenses or other expenses of the supervisor or his assistants. It simply authorizes the county board to fix their compensation, which is to be paid out of the general revenue fund of the county. In other cases where the legislature has intended to provide for the payment of expenses in addition to compensation for services it has done so in express language. It must therefore be concluded that in this case the legislature intended that the compensation to be fixed by the county board should cover expenses as well as compensation for services. The Supreme Court, in a case closely parallel to the present case, has held that a county has no authority to pay expenses where not expressly authorized by statute.

State vs. Smith, 84 Minn. 295.

However, the county board may, in fixing the compensation of the supervisor and his assistants, take into consideration the expenses which they will necessarily incur in the performance of their duties. The statute places no restrictions upon the board as to the amount of the compensation or the manner in which it shall be computed, though, of course, the provisions for compensation must be reasonable. If the provision for the allowance of traveling expenses was made in the resolution fixing the compensation and as a part of the compensation, we think a claim for such expenses would be valid.

You ask whether claims against the county for cards, card indexes, assessment plats, and filing cabinets for the use of the supervisor of assessments in compiling his records are legal charges against the county. In my opinion the county may furnish the supervisor of assessments with such stationery and other office supplies as may be necessary in carrying out his duties under the statute. The statute does not, however, contemplate that the supervisor shall compile and maintain a separate set of records in his office. The only records of the work of the supervisor which the statute prescribes are his reports in writing made to the county board, the entry of the same in the record books of the board, and the order of the board approving the report, to be filed with the county auditor. These records are records of the county board and the county auditor, not of the supervisor of assessments. Whether the supplies and equipment to which you refer are necessary in the making and filing of the supervisor's reports is a question of fact which will have to be determined by the county board or by the courts in case of an appeal.

In connection with both of the foregoing questions, your attention is called to an opinion rendered you by this office under date of March 12, 1926, in regard to the general scope of the duties of the supervisor of assessments. The county would have no authority to pay for services performed, expenses incurred, or supplies used in activities outside of the scope of the duties of the supervisor as defined by the statute. Just how far those duties extend is a question which neither this office nor any one else can undertake to state with certainty in view of the somewhat indefinite provisions of the statute, until the matter has been passed upon by the Supreme Court. Your attention is called to G. S. 1923, sections 646-648, with which you are doubtless familiar, prescribing the manner in which such a matter may be taken into court and an authoritative decision obtained.

You ask whether claims for the expenses of a trip made by the supervisor of assessments and a member of the county board to a place outside the state, where a like system is in use, to get information for use in starting the system in your county, are legal charges against the county. No, there is no statutory authority whatever for the payment by the county of the expenses of such a trip.

CHESTER S. WILSON,
Assistant Attorney General.

July 23, 1926.

95

COUNTIES—Treasurer—Deputy and other employes—Bonds.

To the County Attorneys.

As to the requirement found in chapter 293, Laws 1923, that every deputy county treasurer and every employe in his office shall give bond to the state in an amount to be determined by the board of county commissioners, conditioned for the faithful discharge of duty, and whether this relieves the treasurer from obligation in case of embezzlement or other defalcation on the part of his deputy or other employes.

The answer is that the bond relieves **pro tanto** only. The treasurer is responsible for all moneys of the county coming into his hands as treasurer, and he is not relieved from this obligation if his deputy or other employe embezzles it, notwithstanding the circumstance that the deputy and other employes are required to give bond to the state. The treasurer may also require his deputy and other employes to give bond to him for his protection over and above the statutory bond which they are required to give to the state for the benefit of the county.

The bond of the deputy treasurer and that of the other employes should be upon the standard form applicable to other county officers and should contain the standard condition indicated by section 9687, G. S. 1923. When executed, it should be approved by the county attorney and the county board and recorded in the office of the register of deeds, then forwarded to the secretary of state for filing, in accordance with the usual practice.

JAMES E. MARKHAM,
Deputy Attorney General.

December 31, 1926.

96

COUNTIES—Treasurer—Liability for default of deputy notwithstanding statute requiring deputy to give bond.

B. E. Grottum, County Attorney.

You call attention to chapter 293, Laws 1923, amending section 842, G. S. 1913, by requiring the deputy county treasurer and other employes in the treasurer's office to give bonds for the faithful discharge of their duties and the safe keeping of the money.

You inquire whether the giving of such bonds by the deputy treasurer and other employes in the treasurer's office relieves the treasurer from liability for a misappropriation of moneys by such deputy or employes.

Your inquiry is answered in the negative.

CHARLES E. PHILLIPS,
Assistant Attorney General.

November 12, 1926.

97

COUNTIES—Treasurer—Premium on bonds given by deputy and other employes.

The County Attorney, Rice County.

You are advised that there is no provision of law authorizing the county to pay the premium upon the bond required to be given by the treasurer as a condition precedent to receiving proceeds from the sale of school lands. While acting in this capacity, he is not, strictly speaking, acting as county treasurer, but rather as the agency of the state designated for the purpose of receiving the payments in question. His services are in no sense performed in behalf of the county.

Accordingly, I am of the opinion that the general statute authorizing and requiring the county to pay the premium on the treasurer's bond has no application.

CHARLES E. PHILLIPS,
Assistant Attorney General.

July 7, 1926.

99

COUNTIES—Tuberculosis Sanataria—Chapter 17, General Laws 1923.

Morris J. Owen, County Attorney.

You state that a patient residing in the city of Winona was admitted on application of the health officer of said city to the Buena Vista Sanatorium in Wabasha county. After admission this patient required an operation and extended hospital care. The Buena Vista Sanatorium is maintained jointly by three counties. You state that this patient came directly to Winona from Germany and had resided in Winona, Winona county, and in the state of Minnesota less than one year. You refer to chapter 17, Laws 1923, and assuming that the sanatorium district makes payment of the bill for the operation and medical attendance, you inquire whether the city of Winona, the county of Winona or the county of Wabasha is liable for repayment of the amount, or is the sanatorium district without recourse.

Chapter 17, General Laws 1923 imposes a liability for repayment of such expenses upon the relatives of the persons responsible therefor, and if there are no such relatives, then against the place of settlement of such patient as defined by chapter 128, Laws 1919. Referring to the last named chapter it appears that before a person shall acquire a settlement for the purposes of relief as a poor person, he must have resided at least one year in the state. Since the person referred to has not so resided there is no liability on the part of either the city or the counties named, and apparently the sanatorium district is without recourse.

WILLIAM H. GURNEE,
Assistant Attorney General.

March 9, 1925.

100

COUNTIES—Warrant—Lost—Bond for duplicate.

L. A. Wilson, County Attorney.

You state that certain warrants of your county were stolen from the Minnetonka State Bank at Excelsior on October 16, 1925, when such bank was robbed; that the bank has applied to your county auditor to have issued to it duplicate warrants to cover those so stolen, having furnished you with a list thereof giving date, names, etc.; that the bank has offered to furnish a surety bond for the face amount of the bonds.

You inquire whether the county may accept such bond and issue duplicates.

You state that you have been unable to find any provisions specifying the procedure in case of lost county warrants.

I have been unable to find any provision in the G. S. 1923. However, your attention is called to chapter 36, Laws 1915. I have examined the various Session Laws since the enactment of this statute, and can find no repealing statute. It would, therefore, seem that this statute is still in force.

If it is in force, then duplicate warrants may be issued only upon compliance with the provisions of that statute. You will note that it calls for a bond in double the amount of the lost warrants.

CHARLES E. PHILLIPS,
Assistant Attorney General.

December 11, 1925.

101

COUNTIES—Warrants—Payment of when sold on execution.

F. J. Jevne, County Attorney.

You state that the county auditor heretofore issued a warrant which was not accepted by the payee but remained in the auditor's office. Subsequently this warrant was levied upon under an execution against the payee named therein and sold by the sheriff. The purchaser has now presented this warrant together with the sheriff's certificate of sale to the treasurer for payment. The warrant has not been endorsed by the payee. You wish to know if the county treasurer may now pay this warrant to the holder thereof in the absence of the payee's endorsement.

The sheriff has authority to endorse this warrant in the name of the payee to the order of the purchaser at the sheriff's sale. When presented to the treasurer with such endorsement it can safely be paid.

WILLIAM H. GURNEE,
Assistant Attorney General.

August 13, 1925.

102

COURTS—Costs—Change of venue in criminal proceedings.

The County Attorney, Nicollet County.

You state that a criminal case was transferred from your county to * * * county for trial and there tried; that the latter county has now rendered a bill to your county for the costs of trial. You question the following items:

1. The fees of the clerk of court of * * * county who has presented a bill therefor.

2. Per diem or the court reporter who has presented a bill for compensation on a per diem basis.

I am of the opinion that these items are not proper charges. Section 10702, G. S. 1923, provides:

"Whenever the venue shall be changed to another county in a criminal case, * * * all the costs and expenses of the prosecution and trial of the case in such county to which the venue shall have been changed, including officers', witnesses' and jurors' fees, shall be paid by the county in which the offense was committed."

So far as I can find, there is no decision construing the statute as it now reads; In Board vs. Board, 84 Minn. 267, the court held that only those costs and disbursements for which judgment could be entered against the defendant were chargeable against the county in which the crime was committed. The items there under consideration were jurors' fees and fees of officer in attendance on the court, apparently a bailiff. The material part of the statute then reads:

"The costs accruing from a change of venue shall be paid by the county in which the offense was committed." Section 7314, G. S. 1894.

The legislature, apparently having the above mentioned decision in mind, amended the statute to read as it now reads. (Chap. 31 Ex. Sess. Laws 1902). The material change was the insertion of the words "including officers, witnesses and jurors fees. Thus it must be presumed that the legislature was satisfied with the construction so placed upon the statute by the court, except as it specifically amended the same. In my opinion the word "officers'," as so used, includes only such officers as receive compensation, for special compensation, for services rendered in connection with the case, as the bailiffs, etc. The clerk and the reporter, so far as services rendered in criminal cases are concerned, receive fixed annual salaries. The county would be obligated, therefor, whether they served in the particular case or not. I see no more reason for including a part of these salaries in the "costs" than a part of the salary of the judge, who presided at the trial.

CHARLES E. PHILLIPS,
Assistant Attorney General.

November 2, 1925.

103

COURT—Costs—Wardens—Constables—Sheriffs—Fees and mileage for arrests, with or without warrant—Mileage when two defendants are arrested on same trip.

The County Attorney, Waseca, County.

You state that a game warden who was present at a boat landing for the purpose of apprehending any violators of the game laws whom he might discover arrested without a warrant two men when they disembarked from their boat. The warden took them before the municipal court and charged them with illegal possession of certain fish. The complaint was made orally and no warrants were issued or served.

You ask:

1. Whether any fees may be taxed as costs against the defendants for their arrest by the game warden.

2. If such fees may be taxed, whether mileage may be charged from the place where the warden resides, which is at Owatonna, to the place of arrest and return, or whether mileage may be charged only for the actual distance traveled in bringing the defendants before the court.

3. Whether, if mileage may be charged, separate mileage may be taxed against each of the defendants.

You are advised:

1. Officer's fees and mileage in case of an arrest by a game warden may be taxed against the defendant upon conviction the same as in case of an arrest by a constable, as part of the disbursements of the prosecution, under G. S. 1923, section 9485. However, such fees and mileage do not go to the officer personally but into the state treasury, since the officer receives a salary from the state which covers all his services, in the same way as sheriff's fees which may be taxed in a criminal proceeding go into the county treasury. Strictly speaking, the game warden's fees and mileage should be paid to the county treasurer and transmitted by him, with the fine collected, to the commissioner of game and fish, to be paid into the state treasury. I am informed that the practice has grown up as a matter of convenience for the magistrate to pay the fees and mileage direct to the warden, who remits the same to the commissioner with his report of the case, but there is no legal authority for that practice. However, I do not suppose there is any more objection to it than to the quite general practice followed by magistrates of retaining their own fees when paid by a defendant, instead of remitting them to the county treasurer and then making a claim against the county in the regular way.

2. As you will note from the statute relating to fees of constables, G. S. 1923, section 6996, there is no provision for fees or mileage for making an arrest without a warrant. Hence no fees or mileage can be taxed against a defendant unless a warrant is obtained and served. When an officer arrests an offender without a warrant, it is the usual practice when complaint is made to the justice to issue a warrant and serve it on the accused person. When this practice is followed, fees and mileage, in case of conviction, may be taxed the same as if the warrant had been served at the place of arrest.

3. The statute provides that mileage shall be allowed only for necessary travel to and from the place of arrest. If the officer was called from his residence for the express purpose of making the arrest, mileage from his residence and return thereto may be taxed. In your case the warden did not come from his residence for the purpose of arresting these particular defendants, but for the purpose of watching for law violations in general. This was part of his general duty as a game warden, and his traveling expenses in that connection must be paid by the game and fish department. Mileage may be taxed against these defendants only for the travel which was necessarily incident to their arrest and production in court (assuming that a warrant had been obtained so as to authorize taxation of officer's fees and mileage). Such mileage should be measured from the place where the officer

was when he discovered the offenders and proceeded to arrest them. Return mileage should be allowed to the same place or to such other place as the officer may necessarily have to go to in order to resume the performance of his general duties after disposing of this case, but not allowing anything for distance which he would have traveled anyway if this case had not arisen. It is all a question of fact to be determined by the magistrate as to what travel necessarily incident to the case at hand was actually performed.

4. Where two or more persons are arrested by an officer on one trip, single mileage only may be taxed. This may be taxed against one defendant or divided among the several defendants, as the magistrate sees fit. If the full mileage has been taxed against one defendant, no further mileage can be taxed against any other defendant.

5. Of course, in a case of this kind where both the fine and the officer's fees and mileage go into the state treasury, it is not worth while to be very captious about the taxation of fees and mileage. If the defendants are disposed to be too particular about it the magistrate can simply raise the amount of the fine and let the fees go. However, for the sake of uniformity it is better practice to assess such a fine as the offense requires and tax costs separately as provided by statute. The magistrate's own costs should be taxed wherever possible. They do not go into the state treasury, but into the county treasury (unless retained by the magistrate under the informal practice above mentioned). If not taxed the county would have to pay them.

C. S. WILSON,
Assistant Attorney General.

August 25, 1926.

104

COURTS—Fines—Whether to county or village.

The Village Attorney, Sauk Rapids.

You state:

1. "Where a party is arrested while driving a car during the time he is intoxicated through the village streets where he is exceeding the limit set by village ordinance but under 25 miles per hour, and where the driving occurs on the pavement of a trunk highway, should this fine go to the village or to the county. Can the village claim any portion of the fine by virtue of violation of its ordinance and within its limits."

Answer: The fine goes to the county, whether the prosecution is for driving while intoxicated or exceeding the speed limit. There cannot be a lawful village ordinance regulating the use or speed of motor vehicles and accordingly no prosecution may lawfully be based thereon. See the statute which forbids municipalities from passing or enforcing any ordinance limiting or restricting the use or speed of motor vehicles. State vs. Mandehr 209 N. W. 750. See chapter 416, section 26, Laws 1925.

2. "When a party is found on the streets of the village in an intoxicated condition (not driving a car), does the fine go to the village treasury when he is properly arrested?"

Answer: Depends entirely on what law he is prosecuted under. If prosecuted for a violation of a village ordinance prohibiting drunkenness, the fine goes to the village. If prosecuted under the state law which prohibits drunkenness, the county gets the fine.

3. "Does it make any difference where a county official makes the arrest instead of a city marshal or officer?"

Answer: No. The sheriff and his deputies have authority to arrest for violation of municipal ordinances as well as for violation of the state law.

4. "Where other breaches of the village ordinance occur, such as disorderly conduct, disturbing the peace in village limits, fighting or swearing, or stealing, does the fine go to the village?"

Answer: If prosecuted under village ordinances, then the fine goes to the village, if prosecuted under the state law, then the fine goes to the county. Most of the offenses above mentioned ordinarily are covered by village ordinances, but, fighting or swearing under some conditions, and stealing, may also be violations of the state law.

5. "If a breach of peace occurs within the township and tried by a village justice of the village within said township, does fine go to township, county or village?"

Answer: The only breach of peace occurring within a township of which a village justice has jurisdiction is a prosecution therefor under the state law, and accordingly the fine goes to the county.

6. "What is the case if the case is tried by the township justice?"

Answer: The only prosecution for breach of the peace which a township justice has jurisdiction over is a prosecution therefor based on the state law, and accordingly the fine goes to the county. See section 9707, G. S. 1923.

All of the above is based upon proceedings in justice court. There are municipal courts wherein some of the above rules do not apply. (Note—But see C. 412, Laws 1927.)

ALBERT F. PRATT,
Assistant Attorney General.

March 16, 1925.

105

COURTS—Justice—Appeals from conviction, after plea of guilty.

The Village Attorney, Marble.

You state:

"A person enters a plea of guilty before a justice of the peace to an offense which is made a misdemeanor by statute. After conviction by the justice and after sentence is imposed, can the person convicted appeal to the district court by complying with section 9129, G. S. 1923?"

A categorical answer is not possible, on the facts presented.

The general rule probably is that when a judgment is properly entered on a voluntary plea of guilty, it cannot be reviewed either by appeal or by writ of error, since such judgment is in effect a judgment by confession. See cases cited in 17 C. J. p. 33.

When, however, the court did not proceed properly in receiving and accepting the plea of guilty, a judgment entered on a plea of guilty in such

case may be reviewed, since "properly entered" does not refer merely to the form of the judgment, but rather to the substance. See cases cited, id.

It is also stated that defendant may appeal from a judgment based on his plea of guilty, or nolo contendere, on the ground that the indictment does not state facts constituting a crime, as such plea does not admit the validity or sufficiency of the indictment. See cases cited, id.

My impression would be that if the plea was "voluntary" and the judgment was "properly entered," the defendant is through, so far as an appeal on the merits is concerned, as by his voluntary plea the defendant admitted the truth of the facts alleged. But if it is claimed that the complaint failed to state a criminal offense, I think that the defendant may raise that question, either by appeal on questions of law or by writ of habeas corpus, or both.

The proper place to settle the question is in the appellate court, by motion to dismiss, or other appropriate motion, when the matter comes up.

ALBERT F. PRATT,
Assistant Attorney General.

May 25, 1925.

106

COURTS—Justice—Authority to take acknowledgments outside of county.
The County Attorney, Washington County.

You inquire whether a justice of the peace has power to administer oaths or take acknowledgments within the state of Minnesota outside of his own county.

Section 6973, G. S. 1923, names the officers who shall have power to take and certify acknowledgments "within the state." Subdivision 4 of the section limits the authority of the officers named in that subdivision to their respective counties. There is no such limitation as to the authority of justices of the peace or the other officers who are named in subdivision 3 of that section. I am, therefore, constrained to the view that a justice of the peace has authority to take an acknowledgment or administer an oath anywhere in the state.

WILLIAM H. GURNEE,
Assistant Attorney General.

April 2, 1925.

107

COURTS—Justice—Hours for sittings.
The Commissioner of Forestry.

Please be advised that a justice of the peace may hold court after 5:00 o'clock or 6:00 o'clock, P. M., if he sees fit to do so, in any criminal action or proceeding before him.

It is true that section 9004, G. S. 1923, requires civil process in the court of a justice of the peace to be returnable not earlier than 9:00 o'clock A. M., nor later than 5:00 o'clock P. M., and that section 9013, G. S. 1923, provides that the parties shall have one hour after the return time within which to appear. These sections, however, are not applicable to criminal prosecutions.

As to holding court on Sunday, you are referred to section 160, G. S. 1923, which reads as follows:

> "No court shall be opened on Sunday for any purpose other than to receive a verdict, give additional instructions or to discharge a jury; but this provision shall not prevent a judge of such court from exercising jurisdiction in any case where it is necessary for the preservation of the peace, the sanctity of the day or the arrest and commitment of an offender."

Under this section the legality of a trial on Sunday for an offense under the forestry laws would be doubtful. If sustained at all, it would have to be sustained upon the theory that the justice of the peace had properly determined that such trial was necessary for one of the purposes named in the above quoted statute.

Section 10237, G. S. 1923, provides as follows:

> "Every service of legal process upon the Sabbath day, except in case of a breach or apprehended breach of the peace, or when sued out for the apprehension of a person charged with crime, or where such service is expressly authorized by statute, is hereby prohibited."

Section 10567, G. S. 1923, reads as follows:

> "If the offense charged be a felony, arrest may be made on any day and at any time of the day or night; if it be a misdemeanor, arrest shall not be made on Sunday or at night, unless upon the direction of the magistrate indorsed upon the warrant."

From the above you will see that the legislature intended to prohibit generally the arrest and trial of persons charged with a mere misdemeanor on Sundays. Necessity in a particular case is the only permissible exception to the statutory rule.

As to holidays, section 10933, subdivision 6, G. S. 1923, designates the legal holidays in this state and provides that "no public business shall be transacted on those days; except in cases of necessity, nor shall any civil process be served thereon."

It is advised that as far as possible your cases be prosecuted by the service of process during the ordinary hours of the usual business day and by trials held during such hours in the courts of the justices of the peace. In case exceptions are made as to Sundays and holidays, the record made by the justice of the peace should show the reason therefor in conformity with the statutes above quoted. A justice of the peace may hold criminal court during the evenings if he sees fit to do so; but the court should not ordinarily make its hours suit the convenience of the defendant in that respect. If the offender is both inconvenienced and fined, he is less likely to repeat the offense.

ERNEST C. CARMAN,
Assistant Attorney General.

December 7, 1925.

108

COURTS—Juvenile—Appeals from.

The City Attorney.

You inquire as to the method of appeal from orders of the probate court acting as juvenile court.

Section 6 of chapter 397, Laws 1917 (now section 8641, G. S. 1923) provides that

> "any parent or the attorney for any child may appeal from the final disposition of the guardianship matter by complying with the law regulating appeals in probate courts."

Further than this, I can find no provision of law regulating appeals from juvenile court. This provision covers only guardianship matters. In other cases the appeal would have to be by a writ of certiorari as was done in the case of State vs. Juvenile Court of Ramsey county, 147 Minn. 222, 179 N. W. 1006, and State ex rel vs. Probate Court of Mohnomen county, 150 Minn. 16, 184 N. W. 27. In each of the above cases the state appealed and sued out a writ of certiorari in the supreme court.

WILLIAM H. GURNEE,
Assistant Attorney General.

March 18, 1925.

109

COURTS—Juvenile—Appeals—Mother's pensions.

County Attorney.

You inquire:

1. Whether the Mother's Pension law is compulsory and whether the county must allow the pension upon the proper application and upon a proper showing of facts. Yes.

Under section 8671, G. S. 1923, as amended by chapter 355, Laws 1925, whenever the court finds any child under the age of 16 years who is regularly attending school, if physically able and of school age, or who is under school age, or who through physical or mental disability is unable to be employed, to be dependent, then it becomes the duty of the court to investigate and make findings of fact as further specified. If such further findings of fact are such as to warrant the allowance of a compensation, it is clearly the duty of the court to make an order allowing the same. It seems clear to me that if these findings of fact are favorable, there is no discretion left in the court. The widow is then entitled to the compensation as the law provides.

2. Whether there is any appeal in case the judge refuses to grant an application after evidence has been submitted, establishing the statutory requirements.

I have been unable to find any statutory authority for an appeal. It is well settled in this state that an appeal will lie only in those cases where it is authorized by statute. It occurs to me that the proceedings and order may be reviewed through a writ of certiorari. It would seem to be an appropriate use of such writ.

It is doubtful whether a writ of mandamus would avail. If the court made and filed findings of fact which, under the law, clearly entitled the applicant to compensation, it is possible that mandamus would lie to compel him to make an order allowing the same. The findings, however, would have to determine the right of the applicant to the compensation so clearly as to leave merely a ministerial duty to be performed.

We are unable to give you any citation of direct authorities. However, see Re Koopman, 146 Minn. 36.

CHARLES E. PHILLIPS,
Assistant Attorney General.

December 31, 1925.

110

COURT—Juvenile—Court commissioner may not act as judge.

The County Attorney, Carleton County.

Replying to your inquiry, you are advised that the court commissioner may not act as judge of the juvenile court in the absence of the probate judge from the county. The statute makes no provision for this.

CHARLES E. PHILLIPS,
Assistant Attorney General.

December 22, 1925.

111

COURTS—Juvenile—Delinquent children—Duties of county attorney to appear in district court on appeal.

The County Attorney, Itasca County.

You state that a child is found to be delinquent under the provisions of section 8646, G. S. 1923, and by the probate court, acting as a juvenile court, is committed to the care of an accredited association as its guardian, as provided by law. The parents have appealed from the order appointing the guardian.

You submit the following inquiry:

> "Is the county attorney, when the cases come up in district court on appeal, required to appear in support of the order of the probate court committing the child to such association?"

We are of the opinion that it is not the duty of the county attorney to handle these cases as attorney for the guardian upon the appeal.

The same situation has arisen a number of times and we are informed that in some instances county attorneys have seen fit to handle the appeals and have been reimbursed therefor either by the guardians or by the county board. It would seem that the county attorney is the logical person to handle such a case, but we do not think that he can be required to do so if he is unwilling.

Inasmuch as an appeal in such cases stays the order of the probate court very often an extremely dangerous situation arises and it is desirable that there be some attorney to adequately protect the interests of society

at large. As stated before, the county attorney would seem to be the proper person to so protect the public interests but there is no statutory requirement that he do so.

WILLIAM H. GURNEE,
Assistant Attorney General.

July 2, 1925.

112

COURTS—Municipal—Blanks for.

The City Attorney, Luverne.

You state that the judge of the municipal court of Luverne has in the past caused blank forms for use in civil actions to be printed at the expense of the city.

You inquire if the city is obliged to pay for the printing of such blanks. No. See Opinion No. 515, 1910 Report, relating to blanks used in the justice court.

I see no reason why the same ruling should not apply to municipal courts.

WILLIAM H. GURNEE,
Assistant Attorney General.

September 30, 1925.

113

COURTS—Municipal—City attorney to represent state in ordinance prosecutions.

The City Attorney, South St. Paul.

You report a prosecution in the municipal court under an ordinance making it an offense to maintain a nuisance created by the keeping of a place for the sale of intoxicating liquor contrary to law. The prosecution was in the name of the state. You, as city attorney, appeared in the municipal court as prosecuting officer.

You inquire whether it is your duty also to appear for and represent the state on the trial in the district court, after an appeal has been taken.

Yes. I assume that your charter contains no provision abrogating the right of appeal to the district court in these cases.

Nibbe vs. Red Wing, 199 N. W. 918.

Where prosecutions for the violation of municipal ordinances are in the name of the state, the city and not the state is the interested party, and there is no reason why the city should not attend to such cases on appeal.

State vs. Sexton, 42 Minn. 154.

The county attorney, if he should see fit to do so, might prosecute these intoxicating liquor cases under the state law, instead of leaving it to the city attorney to institute proceedings under the ordinance. Then, it would be the duty of the county attorney to follow the case into the district court in case of an appeal. No duty rests upon him to conduct a criminal prosecution under a city ordinance.

JAMES E. MARKHAM,
Deputy Attorney General.

August 5, 1925.

114

COURTS—Municipal—Clerk—Appointment of.

Judge of Municipal Court, Columbia Heights.

As to whether a judge of a municipal court organized under the general statutes may appoint a clerk who is not a resident of the city or village in which such court is located:

Section 223, General Statutes 1923, authorizes the judge to appoint and remove at pleasure a clerk and his deputies. There appears to be no residence restriction anywhere in the statute. It will be observed that the statute specifically requires the judge and special judge to be residents of the city or village in which the court is located. In view of this express provision in reference to the judge and special judge, and the absence of law in reference to the clerk, I am inclined to the view that it was the legislative intent to permit the judge to appoint as clerk a person who is not a resident of the city or village.

CHARLES E. PHILLIPS,
Assistant Attorney General.

July 13, 1925.

115

COURTS—Municipal—Transcript of judgment.

Lewis C. Shepley, City Attorney, South St. Paul.

You call attention to section 235, G. S. 1923, and inquire: 1. Whether a transcript of judgment can be issued by your clerk and filed in the district court before an execution has been issued and returned unsatisfied out of the municipal court.

Yes.

2. Whether the clerk of your court may issue execution after a transcript of judgment has been filed in the district court.

Yes.

CHARLES E. PHILLIPS,
Assistant Attorney General.

February 5, 1926.

116

COURTS—Probate—Administrators—Minors.

The County Attorney, Kanabec County.

You state:

> "The judge of probate and myself are having some difficulty in determining who should sign a petition for the probating of an estate under the following circumstances:
>
> A boy about nineteen is the sole heir of his father's estate, his mother being dead. Is the proper procedure to have a guardian appointed and have the guardian petition for the probating of the estate, or can the boy himself, before a guardian is appointed, sign the petition for the probating of the estate?"

One way is to wait until expiration of the statutory time within which the next of kin may apply, and then have a creditor or some one else interested apply. A claim for funeral expenses constitutes one a creditor. See 120 Minn. 122.

The minor is "incompetent" to act as administrator. McGooch vs. McGooch, 4 Mass. 348. Whether or not his petition would confer jurisdiction is a more difficult question to answer.

It has been held that a minor wife may nominate an administrator although she could not herself act.

In re Stuart's Estate, 18 Mont. 595, 46 Pac. 806.

It has been held that the guardian of a minor next of kin cannot nominate an administrator.

In re Wood's Estate, 97 Cal. 428, 32 Pac. 516.

Proceedings for administration of intestate estates in Minnesota are in rem and not in personam. See Dunnell, Probate Law, page 533. Jurisdiction attaches from the facts of death and residence in the state. And while a proper petition is required, the minority of the signer would seem to be less likely to invalidate the proceedings than it would in case the proceedings were in personam, by action.

It was stated in Dixon vs. Merritt, 21 Minn. 196, 200, that an infant's mortgage is not void, but voidable at his election. With reference to conveyances and mortgages by infants a similar rule is laid down in many cases.

A power of sale given in a mortgage by an infant has been held to be voidable only.

Askey vs. Williams, 74, Tex. 294, 11 S. W. 1101, 5 L. R. A. 176.

"While a person is in legal phraseology an infant until the age of 21, his actual capacity to do acts involving legal consequences and the practical necessity of his doing such acts increases from babyhood to the age of majority; and the law necessarily recognizes such progressive capacity."

14 R. C. L. p. 220.

A minor over fourteen may nominate his own guardian.

After all the search that time at present permits, I have not been able to find any authority squarely on the point.

My best judgment is that a final decree in probate proceedings instituted by petition for administration, properly signed and verified by the son who is sole heir at law and is 19 years of age, will not be held invalid by reason of his minority.

ALBERT F. PRATT,
Assistant Attorney General.

April 9, 1925.

117

COURTS—Probate—Descent and distribution—Property inherited by minors from parents.

The Judge of Probate, Martin County.

It appears that one A, of the age of three years, died intestate, leaving certain estate which was received under the intestate law from her deceased

father, and also leaving other property received from other sources, not under the intestate laws or by will.

She left her surviving a mother and a brother. The petition for probate recites that the mother is her sole heir at law. It is assumed that the present law was the law in force at the time of A's decease.

You inquire: 1. To whom should the property received from the father, as above, be distributed? 2. To whom should the property received from other sources, as above, be distributed?

Please note the assumption above that A received the property from her father under the intestate laws and not by will. In the latter case another situation arises which has been the subject of considerable controversy.

Please note also that your inquiry does not cover the question of whether the property inherited was personal property or real property. That may make a difference, as there is a mix-up in section 8726, G. S. 1923, in connection with some amendments to the prior law, said section relating to the distribution of personal property. The legislative history of the latter is outlined in opinion to Judge William M. Erickson, February 27, 1924.

Assuming that your inquiry as to inherited property relates only to real property, then it is apparently answered by the decision in St. Paul vs. Kenney, 97 Minn. 150.

Subdivision 7 of section 4471, G. S. 1894, under consideration in that case is the same as subdivision 6 of section 8720, G. S. 1923.

And under the statute and that decision the real property received by A from her father under the intestate laws would go to A's brother, and to the issue of any other children of A's father who have died, by right of representation. If there were no such issue, then the brother gets it all.

The real property which A received, otherwise than by inheritance or by will, will go to the mother, under subdivision 3 of section 8720.

It is probable that personal property goes the same way, respectively, reading "section 3648, R. L. 1905, subdivision 1-6 (or 7)" into subdivision 6 of section 8726, G. S. 1923, in place of "section 9235, subdivision 1-6" as it now reads. Section 9235, G. S. 1913, relates to service on juries.

Of course the real procedure is for the parties to present their claims and authorities, and the court decides as he believes the law to be, and if either party does not like it he may appeal.

ALBERT F. PRATT,
Assistant Attorney General.

March 22, 1926.

118

COURTS—Probate—Judge—Term and time of commencement of one elected to fill vacancy.

The County Attorney, Morrison County.

A was appointed on May 26, 1926, to fill a vacancy in the office of judge of probate; B was duly elected to the office at the general November election. You ask:

1. When does B assume the duties of the office, as soon as he qualifies or on the first Monday in January, 1927?

2. Does he hold for a term of four years or for the unexpired term.

Answering your second inquiry first, you are advised that B holds for a full four year term. Cromwell vs. Lambert, 9 Minn. 283 (267).

The first inquiry presents a more difficult question. So far as I have been able to ascertain, this question has not been passed upon by our supreme court.

Section 7, article VII, of the constitution, fixes the term of the judge of probate at four years. It does not specify when such term shall begin. B has been elected for a new constitutional term, and not in any sense for the completion of the unexpired term. Section 9, article VIII, of the constitution, provides that the official terms of state officers shall commence on the first Monday in January. The judge of probate is a state officer. Section 257, G. S. 1923, also specifies that "the term of office of every state and county officer shall begin on the first Monday in January next succeeding his election, unless otherwise provided by law." It would seem clear from these two provisions that it is contemplated that the terms of judges of probate shall commence on the first Monday in January next following election. Such has been the general custom and practice in respect to regular terms.

Section 10, article VII, provides that any vacancy in the office of judge

> "shall be filled by appointment by the governor, until a successor is elected and qualified. And such successor shall be elected at the first annual election that occurs more than thirty days after the vacancy shall have happened."

Again, it will be observed that the constitution does not specify when the one elected to succeed the appointee shall qualify, but merely provides that the appointee shall hold until he does qualify. It is suggested that he may qualify as soon as he receives his certificate of election. In view, however, of the fact that he qualifies for a new term, and not for the unexpired term, and the constitutional (section 9, article VIII) and statutory (section 257, G. S. 1923) provisions that terms of state officers shall commence on the first Monday in January, I am of the opinion that it is contemplated that the newly elect shall qualify at such time. I can see nothing in section 10 indicating that he should qualify at any other time. If he may legally qualify and assume office at any time, we have the anomalous situation of a definite constitutional term of four years commencing at no specified time but at the mere pleasure and whim of such person. Query: If he should elect to qualify in November, would not a new vacancy result in November four years later when his constitutional term expires? A construction permitting such a situation should not be adopted in the absence of language clearly requiring such construction.

CHARLES E. PHILLIPS,
Assistant Attorney General.

November 29, 1926.

119

COURTS—Probate—Jurisdiction to hear petition filed under section 7365, G. S. 1913.

The Judge of Probate, Waseca County.

You ask:

1. Has the probate court jurisdiction to hear, try and determine a petition filed under G. S. 1913, sections 7365-6-7 (G. S. 1923, sections 8853-4-5) without notice?

2. If so, what are the duties of the court as set out in G. S. 1913, section 7368 (G. S. 1923, section 8856)?

The legislature has clearly provided for action by the court without notice. If the court has acquired jurisdiction of the estate by the filing of a proper initial petition and the taking of proceedings thereon required by law, it is my opinion that the legislature may authorize him to act without further notice upon an agreement and petition signed by the representative and presented to the court for approval. No constitutional rights are invaded by such a proceeding. Your first question is therefore answered in the affirmative.

G. S. 1923, section 8856, prescribes the proceedings to be had after a representative has made a "sale." You will observe that the preceding sections do not provide for a sale, but merely for an adjustment of the damages done by the taking of lands for a public purpose, which includes the full value of the land taken and the damages to the remainder. These three sections were originally enacted in Laws 1899, chapter 196. Prior to that time G. S. 1894, sections 4590-91-92, provided for the settlement of damages by the representative with a railroad company which had located the line of its road upon lands belonging to the decedent or ward. Those provisions, together with the provisions of chapter 196, were included in R. L. 1905, sections 3770-1-2. In the 1894 General Statutes the sections relating to sales of real estate in part preceded and in part followed the sections relating to settlement of damages just mentioned. The section requiring the report of sale (now G. S. 1923, section 8856) was section 4609 in G. S. 1894, and several sections removed from sections relating to settlement of damages and had no connection whatsoever with them. No mention of such report is made in chapter 196. In the 1905 revision the sections relating to damages for taking of the lands of an estate for public use were inserted just before the section requiring a report of sale. It is clear, however, that the section last mentioned has no application to G. S. 1923, sections 8853-4-5, relating to damages for taking for public use. This answers your second inquiry.

G. A. YOUNGQUIST,
Assistant Attorney General.

April 1, 1925.

120

COURTS—Probate—Notices—Names of attorneys on.

The Judge of Probate, Kandiyohi County.

You inquire why the name of the attorney for the representative should not appear on the published order for hearing on claims.

I know of no law which requires the attorney's name to appear on any probate citation or notice. In some places they rarely appear.

I know of no law which prohibits the attorney's name being on the notice of hearing on claims. In most places, by request to the judge or otherwise, attorneys see that their names appear on all notices and citations. This for legitimate advertising purposes. But it is wholly optional all along the line. The blank publishing people, or some of them, have left the line for the attorney's name off of printed blanks for notice of hearing on claims, for some years, but there is no legal reason therefor. If the court does not object and the lawyers desire it, their names may go on.

ALBERT F. PRATT,
Assistant Attorney General.

March 28, 1925.

121

COURTS—Witness—Testimony of at former trial when witness is dead.

The County Attorney, Murray County.

You state a case where a witness died after giving testimony at the trial of a criminal case wherein the jury disagreed. You also state that the court reporter who took the testimony has died.

You inquire whether upon a trial the notes of the deceased court reporter as to the testimony given by the deceased witness may be read to the jury.

The general rule in this state will be found in the following cases:

State vs. George, 60 Minn. 503; Mill Co. vs. Ry. Co. 51 Minn. 304; Slingerland vs. Slingerland, 46 Minn. 100; Finnes vs. Selover, 114 Minn. 339. See Dunnell's Digest, section 3308.

The death of the court reporter who took the testimony adds a new feature to the case on which I find no authority. I am of the opinion, however, that if it is shown that the deceased witness was duly sworn and testified, that the deceased reporter took the notes of the testimony, and there is someone who can read these notes to the jury, that such proof should be received. It might be safer, however, to have the notes transcribed and testimony given by some person—say the clerk—who was present at the trial and heard the deceased witness testify. The transcribed notes might be referred to for the purpose of refreshing the recollection of the witness.

In the case of Palon vs. Great Northern, 135 Minn. 154, our supreme court has even gone so far as to hold that neither the parties nor the issues in the two actions need be the same, the question being whether the parties and issues are nearly enough the same to make the testimony admissible.

WILLIAM H. GURNEE,
Assistant Attorney General.

April 9, 1925.

122

CRIMINAL LAW—Adultery—Necessity of joining both parties in prosecution for.

Leonard Erickson, County Attorney.

Referring to prosecutions for adultery under section 8702, G. S. 1913, you inquire if both the parties alleged to have committed the offense must be proceeded against in order to sustain the prosecution.

On general questions involving procedure for instituting the prosecution, see State vs. Marshall, 140 Minn. 383, and cases cited. Also State vs. Dlugi, 123 Minn. 392 and cases cited.

Your point was not directly involved or decided in either case, but in the latter case the record shows that only Dlugi was prosecuted—and he alone was named as defendant in the indictment.

The husband is also named as one of the witnesses who testified before the grand jury on the finding of the indictment. So it seems that an indictment has been returned and prosecuted against one and not against the other.

The complaint in justice court was against both of them, and prayed that they both be arrested, etc. See also State vs. Brecht, 41 Minn. 50, where it appears that only the man was prosecuted, and the indictment seems to have been against him only. See also State vs. Vollander, 57 Minn. 225, wherein, on page 227, it appears that the charge was against the man alone, and as against him, the testimony of the injured husband was held to be competent.

There would seem to be no question that either one or both may be named in the complaint or indictment. The principal difference is that in one case the evidence of the injured spouse is competent, while it is not competent against the spouse, when she or he is defendant.

ALBERT F. PRATT,
Assistant Attorney General.

January 26, 1925.

123

CRIMINAL LAW—Extradition after conviction.

Frank E. Morse, County Attorney.

You inquire:

> "1. Where a person has been convicted on each of two separate charges of unlawfully selling intoxicating liquor, sentenced upon one conviction and a stay of execution of sentence granted, and while the stay is in effect, the defendant leaves the state and becomes a fugitive, will extradition be granted?"

Answer: There is no legal objection to the granting of a request for rendition in the case stated, when properly presented. In the first case I take it that the request would be based upon the judgment of conviction. To make up the record, exemplified copies of complaint (information or indictment), warrant, return, verdict, judgment, minutes relating to stay, default,

commitment, if any, bench warrant on commitment, if any, etc., must be presented, together with affidavits showing all material facts not so shown. The stay may of course be vacated and commitment and bench warrant issued on the judgment.

ALBERT F. PRATT,
Assistant Attorney General.

December 16, 1925.

124

CRIMINAL LAW—Extradition—Desertion and non-support—Children.

John W. Lovell, County Attorney, Martin County.

I acknowledge your communication in which you state that in 1922 the wife of one A, a resident of your county, took their three children and left for Montana, where she remained until the summer of 1925, working and supporting herself and the children; that in 1922, shortly after the departure of his wife and children, A obtained a divorce from his wife, with custody of the children, but made no effort to get the children back; that something over a year later A went to Indiana, where he is now living; that thereafter, in July, 1925, his former wife returned to Martin county, Minn., bringing the three children with her, and that they are now living in that county practically destitute; that you have made demands upon A to support the children, but that he pays no attention thereto. You inquire whether A is guilty of desertion, also whether the crime has been committed in Martin county, bearing in mind that they were not in that county at the time A left.

Two questions arise: (1) What offense, if any, has A committed in the state of Minnesota? (2) If he has committed an offense, can he be brought back to Minnesota for trial by extradition proceedings?

(1) Defendant might be guilty of two offenses, simple non-support, a misdemeanor, under G. S. 1923, section 10136, or desertion and failure to care for and support his children with intent wholly to abandon them, a felony, under section 10135. In my opinion the defendant is clearly guilty of non-support in Martin county. He probably was not guilty of non-support when his wife left and took the children with her to Montana. If she had been obliged to leave on account of his misconduct, the situation would be different, but since he got a divorce on account of her misconduct, and was awarded custody of the children, it must be assumed that when she took the children she did so upon her own initiative and without her husband's consent. This would give him lawful excuse for not supporting the children, under the statute, as long as she kept them away from him. However, if he has been given reasonable notice that the children are back in Minnesota and are in need of support, and has failed to furnish such support after reasonable opportunity, he is guilty of non-support in Minnesota even though he has not been in this state since the children returned. The venue of the offense would be in Martin county, where the children now reside, as that is where the defendant owes the obligation to care for them until he makes provision for them elsewhere. His constructive presence there will be assumed for the purposes of this offense.

Note to State vs. Gillmore, 47 L. R. A. (N. S.) 218.

Re Fowler, 89 Kan. 430, 131 Pac. 598, 47 L. R. A. (N. S.) 227.

State vs. Wellman, (Kan.), 170 Pac. 1052, L. R. A. 1918, D 949.

See also: State vs. Justus, 85 Minn. 114; State vs. Ford, 151 Minn. 382.

Whether A is guilty of the more serious offense of desertion, there is some doubt. There are no Minnesota cases on this point. From the authorities above cited it appears that there may be constructive desertion of wife or children in the state of their residence, though the accused is not in another state. However, these decisions seem to be based on statutes setting forth the different elements of the offense disjunctively, so that either desertion or mere failure to support is sufficient to complete the offense. Under our statute there must be both desertion and failure to support, accompanied by intent wholly to abandon. Perhaps constructive desertion would be sufficient, especially in view of the last clause of the statute, which provides that desertion and failure to support for three months shall be presumptive evidence of intent wholly to abandon. On the other hand, it might be argued that since we have a separate statute, providing for the offense of simple non-support, there must be an overt act of desertion committed within the state in order to make out a case of felonious desertion. However, until the question is decided otherwise by the supreme court, this department is disposed to advise that constructive desertion by a man who is absent from the state is sufficient, provided the circumstances are such as to show an intent wholly to abandon.

(2) Assuming that A has not been in the state since the return of the family from Montana, the case is an example of the class of constructive offenses which are not extraditable under the federal statute. In order to extradite an accused person, he must have been personally present in the state at the time the offense was committed, or at least at some time during the course of its commission, must have fled from the state, and must now be a fugitive from justice. If A has been in Minnesota at any time during the period in which he has been guilty of non-support, or if he should come into the state while the present situation exists and then go away again, he would be a fugitive from justice and could be extradited. It is possible that the desertion or non-support began when A permitted his wife to take the children away without making provision for their support, or when he later left the state without making such provision.

25 C. J. 257, Sec. 12.

Ex parte Roberson, (Nev.) 149 Pac. 182.

State vs. Wellman (Kan.) 170 Pac. 1052.

Taft vs. Lord, 92 Conn. 539, 103 Atl. 644.

8 R. C. L., 306.

Op. 550, Attorney General Report 1920.

CHESTER S. WILSON,
Assistant Attorney General.

February 2, 1926.

125

CRIMINAL LAW—Extradition—For selling mortgaged property.

Chester S. Wilson, County Attorney.

You inquire if the offense of unlawfully selling or disposing of chattel mortgaged property as defined by section 10395, G. S. 1923, is an extraditable offense. The offense constitutes a felony. Such an offense is an extraditable offense.

Whether or not the extradition warrant will issue or be honored of course depends largely upon the facts. The application is usually scrutinized quite carefully, to see if it is merely a collection case.

In proper cases—usually for wife desertion or offenses involving women and children—extraditions are issued even in misdemeanor cases, although under the rules extradition for misdemeanors are not favored. However, they are not prohibited.

The value of the property is not material, except as it might influence the demanding or rendering chief executive to decide that the case is not worth the expense and trouble of rendition, if the amount is of little consequence.

ALBERT F. PRATT,
Assistant Attorney General.

April 9, 1925.

126

CRIMINAL LAW—Extradition—Interstate rendition—Misdemeanors—Abandonment of wife.

The County Attorney, Steele County.

You inquire whether resort may be had to extradition proceedings upon a charge pending against the accused that he has abandoned his wife.

There was a ruling by this department some twenty years ago that resort could be had to extradition proceedings only in cases in which the accused is charged in the demanding state with the commission of a felony. There is no authority in law for the distinction between felonies and misdemeanors as applied to these proceedings.

It is said in Scott on Interstate Rendition, section 19, that:

> "The authorities are practically unanimous and unquestioned in holding that it (the federal statute) applies to all persons charged with the commission of any crime whatever in the state or territory from which he may have fled. No state, by its governor or legislature, can place any limitation on the character of the crime charged against the fugitive from the justice of another state. If the offense charged in the demanding state, however frivolous, is a crime according to the statutes of that state, that establishes its legality beyond question in the asylum state, and is sufficient justification for the arrest and surrender of the accused person under rendition procedure."

The suggested distinction between the two classes of crimes, felonies and misdemeanors, as applied to extradition proceedings, was brought to the attention of the highest court many years ago. The court, in its decision, quoted the language of the federal statute: "A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

The court said:

> "Looking to the language of the clause, it is difficult to comprehend how any doubt could have arisen as to its meaning and construction. The words 'treason, felony or other crime,' in their plain and obvious import, as well as in their legal and technical sense, embrace every act forbidden and made punishable by a law of the state. The word 'crime' by itself includes every offense from the highest to the lowest in the grade of offenses, and includes what are called misdemeanors, as well as treason and felony."
>
> Kentucky vs. Dennison, 24 How. 66.

It does not necessarily follow that the governor of the state of asylum would allow the application and return the fugitive. Some of the governors exercise what they are pleased to term "discretion" in the allowance or disallowance of applications for the return of a fugitive, and there is no way of reviewing the exercise of this so-called discretion. The governor cannot be coerced by mandamus or otherwise to allow the application, even when a case is presented in which it is his plain duty under the law to allow it.

There is quite a unanimity of opinion among the governors of the several states in regard to the offense of child desertion; while, unfortunately, a different view sometimes obtains with reference to a charge of wife desertion.

If you have an aggravated case, one that clearly calls for a criminal prosecution, I think you may look for success in your undertaking to secure a return of the accused.

In most of the states, as in our own, there is a provision applicable to child desertion and wife desertion both, allowing the court in case of conviction to accept proper security from the accused for the discharge of his obligation in the future, meaning the furnishing of proper care and support for the abandoned wife or the abandoned child, and, upon such assurance, to suspend or annul the sentence of conviction. In some instances the governor of the asylum state accepts such assurances to obviate the return of the accused and the expense of a trial, when it is apparent that the accused will be released after conviction upon giving such assurance in the courts of the demanding state. The practice, though unauthorized, is a convenient one. It has been employed on more than one occasion by the governor of this state, with no discouragement of such action on the part of this department.

JAMES E. MARKHAM,
Deputy Attorney General.

August 31, 1925.

127

CRIMINAL LAW—Felony—Complaint for compounding.

M. A. Brattland, County Attorney.

You state that certain cream, value about $5.00, was stolen in the night time from a building, and that the owner "compounded" with the thieves for about $25.00 each. You request form of indictment under section 10034, G. S. 1923 for compounding a felony.

The only case that I know of under this section which has reached our supreme court is State vs. Quinlan, 40 Minn. 55. The indictment in that case is set out in full. Apparently no question was raised on the indictment, but the case was reversed for variance between the pleading and the proof, in connection with the description of the original offense alleged to have been committed by the payor. So please look carefully into the facts of the original defense and plead accordingly.

You will also note that there are several distinct offenses defined in section 10034; the taking may be under an agreement (1) to compound a crime; (2) to conceal a crime; (3) to compound a violation of a statute; (4) to conceal a violation of a statute; (5) to abstain from a prosecution therefor; (6) to discontinue a prosecution therefor; (7) to delay a prosecution therefor; (8) to withhold any evidence thereof; all in cases where compromise is not allowed by law.

Apparently, under the common law, the charge of "compounding a felony" could be sustained by proving an agreement not to prosecute. State vs. Hodge, 55 S. E. 626, 627, 142 N. C. 665, 7 L. R. A. (n. s.) 709, 9 Ann. Cas. 563; Blackstone 4 Comm. 134, Russell Crimes, 194; Bishop Crim. Law, 648; Black Law Dict. 240; 8 CYC 492.

Our statute makes "compounding a crime" one subdivision, and if in doubt as to just which subdivision should be pleaded under or if the evidence shows a "settlement," charge an agreement to "compound the crime," and rely upon the general definitions as to what constitutes "compounding" a crime, or "concealing" a crime.

The statute, in the last paragraph, apparently treats the offense generally as that of "compounding a crime," but in fact, as above stated, there are apparently several offenses defined in the statute.

It is possible that if the "settlement" were all made at one time with all the alleged thieves, the agreement might be charged as made with all of them and each of them, in one indictment. Otherwise it would seem that the taking of each payment and the making of each agreement constitutes a separate offense.

ALBERT F. PRATT,
Assistant Attorney General.

January 21, 1926.

128

CRIMINAL LAW—Fornication—Absconding to avoid paternity proceedings. County Attorneys.

As to the proper venue of a criminal action based on subdivision "A," section 10185, General Statutes 1923, which defines and provides for the punishment of the crime of absconding with intent to evade paternity proceedings.

The attorney general and his staff have given this careful consideration, and you are advised that the proper venue of such a prosecution is in the county from which the accused man actually absconds, regardless of whether or not it is the county in which he resides or in which the woman resides, or in which the original fornication was committed. This opinion is based on the general statutory rule that the venue of a criminal prosecution in the absence of any specific statutory provision to the contrary, is in the county where the crime was committed, that is, where the crime was completed. G. S. 1923, section 10701; 16 C. J. 187, section 262.

Of course it might be argued that a prosecution for this offense might be commenced in any county which would have jurisdiction of the paternity proceedings on the theory that the intent of the accused in absconding to evade such proceedings must be had with reference to some county in which such proceedings could be instituted. However, it has been held that paternity proceedings, though criminal in form, are essentially civil in nature, and it would hardly be proper to resort to the special statute providing for the venue of such proceedings (G. S. 1923, section 3261) for the purpose of fixing the venue of a criminal prosecution contrary to the general rule as stated. Until there is some more authoritative rule to the contrary, this department will hold that the venue for the prosecution of the crime in question is in the county from which the accused actually absconds. The courts might hold to the contrary. When this happens we will change the rule. The indictment should include an allegation of the original fornication as well as the other elements of the offense. It is not necessary that there should be stated or proved a prior conviction of fornication. If in fact there has been a prior conviction for fornication, the original evidence on that feature of the case must be submitted to the jury in the prosecution for absconding, for the obvious reason that in a prosecution for fornication the conception of a child is not an elemental circumstance, whereas in the prosecution for absconding it is a very essential element, and the evidence must be submitted to the jury so that it may be determined whether or not the fornication with which the accused is charged was the cause of the conception. Evidence of the prior conviction of fornication might be admitted as part of the proof, but it would not be sufficient of itself to establish the offense. It must be shown, of course, that the conception resulted from the fornication.

JAMES E. MARKHAM,
Deputy Attorney General.

October 22, 1925.

129

CRIMINAL LAW—Gambling—Lottery—Game of "beano."

Wm. R. Mitchell, City Attorney.

You inquire if the game commonly called "beano" where players paying a certain amount, usually ten cents each, for a card, placing corn or beans upon certain letters on the card as the letters turn up on a wheel, the holder of the card which first spells out the word getting a piece of merchandise, cost something like 79 cents wholesale, for which the players in the aggregate have put up from $4.00 to $7.20, the others getting nothing, is a lottery or a gambling game.

This is one variation of the ancient game of "keno" and is a lottery or gambling device, or both, under Minnesota laws.

You inquire if "blanket wheels" and "candy lotteries" are lotteries or gambling devices and if their operation constitutes operating lotteries or gambling devices. Yes.

You inquire if the lottery or gambling statutes are applicable where some article or merchandise is given with each ticket or card or chance sold. Yes.

ALBERT F. PRATT,
Assistant Attorney General.

June 9, 1925.

130

CRIMINAL LAW—Gift enterprises—Lotteries.

J. L. Lobben, County Attorney.

You state that some of the merchants give out "trading stamps," others use a ticket or coupon, where purchasers are given china ware or other merchandise as a gift or inducement to purchasers to trade at their stores.

You inquire if the use of the "cash coupon," (the coupon reads: "Cash Coupon, 10 cents. This coupon represents cash purchase to the amount stated above and, with other of these coupons, is redemable in 'Good Luck' china ware according to our profit-sharing list. Cash value one-tenth mill. [Signature of seller].") is in violation of the gift enterprise law.

Please take the statute and the decision in the case of State ex rel. vs. Sperry & Hutchinson Co., 110 Minn. 378, and cases there cited, and cases cited in 2 L. R. A. (n. s.) 588, and test the facts by the statute and decisions and you will have your answer.

If there is any element of chance involved, by drawing or otherwise, that, of course, ends it, and the practice is illegal.

It does not appear how the buyers go about it to get their china, whether it is put up by a third party, or by the seller. This may be a case where the merchant has on exhibition the premiums, duly labelled, one to be given for $5.00 in coupons, another for $10.00 and so on. I have not heard of any legal objection to that practice. See on that question page 393 of the above case.

It may be a case of selection from a catalog furnished to the purchaser by the merchant, wherein the premiums are described or pictured, one to be given for so many stamps, another for so many, a definite number, and

so on. See on that question bottom of page 393, top of page 394, of the above case. On the whole question of "trading stamps" see last paragraph of the decision, page 397.

It is probable that the coupon is issued under one of the two arrangements mentioned above and on page 393, in either of which cases the procedure seems to be unobjectionable from a legal standpoint.

ALBERT F. PRATT,
Assistant Attorney General.

December 29, 1925.

131

CRIMINAL LAW—Lotteries—Gift enterprises—Voting contests as.

The County Attorney, Waseca County.

You direct attention to a newspaper advertisement inserted by a dealer. It is headed "Cast your votes in the big gift election." Following this are "Rules," not any too clear in contents or meaning, wherein it is declared that "with every 25-cent purchase or over you will receive 25 votes free. The first one bringing in the required number of votes will have the choice of the following gifts—Cast your vote for your favorite gifts." It then lists gifts for boys, girls, women and men. Apparently the boy first bringing in 300 votes will receive a baseball bat, the two boys first bringing in 250 votes each will receive a baseball bat of another variety, and so down to "Everybody: 700 votes for a pencil. Pick your winner and vote early and often at (name of dealer)."

Presumably the votes are transferable. There is no time limit as in most "voting contests," where there are first, second, third, etc., prizes based on number of "votes" received, but the boy first in line with the 300 votes gets the first baseball bat, and so on down the line until the "gifts," of which there are 9, are gone. But the distribution of the "gifts" is not by "chance" save only the chance of being the first to get and present the required number of votes, which the decisions apparently do not recognize as a "chance" under the anti-lottery law, section 10209, et seq. G. S. 1923.

It does not appear who puts up the "gifts," but presumably it is the trader. One element in a "gift enterprise" under section 10492, et seq. is that there shall be a third party giving gifts, premiums, or prizes. On that assumption the scheme does not appear to be within the prohibition of the gift enterprise law, section 10492, et seq.

For an extended discussion of the gift enterprise statute see State vs. Sperry-Hutchinson Co., 110 Minn. 378, and the numerous cases there cited. On voting contests see National Sales Company vs. Manciet (Oregon, 1917) 162 Pac. 1055, L. R. A. 1917 D, 485, and cases there cited, and annotations, pages 489, 490.

On the facts stated and assumed as above, it is my conclusion while the scheme is close to the line, under the decisions it is not in violation of law.

ALBERT F. PRATT,
Assistant Attorney General.

June 11, 1926.

132

CRIMINAL LAW—Lottery—Guessing contest.

Floyd B. Olson, County Attorney.

You inquire whether or not the following described enterprise comes within the "lottery" or "gift enterprise" laws of this state, viz:

> "A weekly newspaper offering money prizes to persons guessing the score results of major league baseball contests as compared with the score results in 1924; no consideration being required from the entrant except that his entry must be written upon a coupon clipped from the pages of the newspaper offering the prizes."

From your statement of facts, I am unable to determine just what bearing upon the contest the score results of 1924 have. If it is purely a guessing contest without any appreciable degree of skill or judgment involved, I would say that the scheme outlined would be a violation of section 10209, G. S. 1923.

Our supreme court has construed this statute in the following cases:

State vs. Moren, 48 Minn. 555.
State vs. U. S. Express Co., 95 Minn. 442.
State vs. Wolford, 151 Minn. 59.

The subject of what constitutes a lottery and the necessary ingredients of the offense are considered in 25 Cyc. 1633, et seq., 25 Cyc. 1638, wherein it is stated that guessing contests have been held lotteries in which prizes were to be awarded to the persons who, having paid a certain entrance fee or purchased a certain amount of merchandise, should guess with the nearest approach to accuracy the number of beans in a glass bowl, the number of cigars on which taxes would be paid during a certain month, the number of votes to be cast for a certain officer at the next election, or the missing word in a paragraph otherwise complete.

All of the above may be said to involve some degree of skill or judgment, but the courts hold that where the winner is to be determined by what is essentially guess-work, the scheme, whatever it may be, constitutes a lottery.

While it is true that a consideration must be paid, or agreed to be paid, for the chance, before the scheme can be termed a lottery, I think that the fact that a coupon must be clipped from the pages of a certain newspaper furnishes such consideration.

WILLIAM H. GURNEE,
Assistant Attorney General.

April 25, 1925.

133

CRIMINAL LAW—Prohibition—Allowance of mileage to county attorneys for investigation of violations thereof.

George A. Barnes, County Attorney.

You inquire if the county board has authority to allow mileage to the county attorney in connection with the investigation of violations of the prohibition or other criminal law.

I think not.

The statute fixes the compensation of county attorneys. (Section 974, G. S. 1913, section 935, G. S. 1923.)

The statute provides how the county attorney may be reimbursed out of the county attorney's contingent fund for necessary expenses not especially provided for by law, in preparing and trying criminal cases, conducting investigations by the grand jury and paying the necessary expenses of the county attorney incurred in the business of the county. (Section 975, G. S. 1913, section 934, G. S. 1923.)

This statute covers all classes of criminal cases. Section 25-A, chapter 416, Laws 1923 (section 3226, G. S. 1923) creates the law enforcement fund, which "may be used by the county sheriff for the purpose of conducting investigations and securing evidence of the violation of any such law (relating to intoxicating liquor) and for no other purpose," to be disbursed upon written request of the sheriff by auditor's warrant countersigned by a judge of the district court.

The sheriff's office is, of course, the investigating office. Which is not to say that the county attorney does not do a lot of it, and necessarily so.

It looks as though the legislature had intentionally limited the payment out of the county treasury of expenses of investigation, etc., by the county attorney and sheriff, to payment, respectively, out of the two contingent funds, and made the same subject to the control of the judge. Except, of course, as the sheriff is allowed certain expenses in connection with the performance of his official duties, upon allowance of the county board, under statutes not here pertinent.

ALBERT F. PRATT,
Assistant Attorney General.

March 16, 1925.

134

CRIMINAL LAW—Prohibition—Evidence of liquor found as evidence of possessing for sale.

Theodor S. Slen, County Attorney.

You refer to section 3214, G. S. 1923, relating to evidence in abatement proceedings under the prohibition law, to the effect that "the finding of any liquor or any bar * * * shall be prima facie evidence in any civil or criminal proceedings under this act that such premises or place is a nuisance." Stating that you have brought certain charges of nuisance under the prohibition law, liquor being found on the premises, and that in each case you have also charged possession for sale, as a separate offense, under section 2, you inquire if the rule of evidence above referred to is applicable to such cases, and also if proof of the finding of liquor is evidence tending to prove the charge of possession for sale.

I doubt if the rule of prima facie evidence applies on a charge of possession for sale. It is applicable by its terms only to all civil or criminal proceedings under the act, relating to nuisance.

However, the finding of the liquor and all the surrounding facts and circumstances—place where kept, amount, kind of containers, etc., etc.,—are

all competent evidence, and in many cases the only available evidence, tending to prove possession for sale, and properly to be submitted to the jury on that issue.

State vs. Upson, 201 N. W. 913, is the latest case involving evidence along that line. That was a case of sale, but the legal principles are the same.

State vs. Bolnick, 156 Minn. 498, 194 N. W. 318, was a case of possession for sale—evidence warranting conviction was that the defendant was caught filling pints out of a jug.

See State vs. Clark, 155 Minn. 117, 192 N. W. 737. Evidence of corks and bottles admissible.

See State vs. Hess, 154 Minn. 89. Possession for sale case, where liquor taken on search warrant was held admissible in evidence.

See State vs. Nordstrom, 146 Minn. 136, 139, for some of the circumstances which are admissible.

One reason for the apparent lack of cases involving the admissibility of such evidence, as mentioned in your letter, is that the rule is so well established that there is no use of raising it.

The "possession of liquor under such circumstances that it must have been the intention of the possessor to sell" (quoting from your letter) is clearly "sufficient to support a case, unless the jury accepts some explanation" on behalf of the accused.

ALBERT F. PRATT,
Assistant Attorney General.

April 1, 1925.

135

CRIMINAL LAW—Prohibition—Law enforcement fund—Forfeited bail money not in.

Theodor S. Slen, County Attorney.

You inquire if bail money forfeited for non-appearance on charges of violation of the prohibition law goes into the county law enforcement fund, created by section 9 of chapter 416, Laws 1923.

No. That fund is composed of one-half the fines imposed and paid into the county treasury for violation of the laws of this state relating to intoxicating liquor. Forfeited bail moneys are not "fines" within the meaning of that term, and do not constitute or pay the penalty for violation of law. The defaulting defendant may be apprehended and convicted, notwithstanding his bail money is forfeited, and then one-half of the fine imposed and paid will go into the law enforcement fund.

ALBERT F. PRATT,
Assistant Attorney General.

December 21, 1925.

136

DANCES—Designation of officer to attend.

The County Attorney, Cook County.

You state and inquire:

> "It is provided by section 10, chapter 139, Laws 1923, regulating public dances, that in case of a public dance given in a municipality, the officer for the dance shall be designated by the chief peace officer of the municipality. The village marshal is the chief peace officer of this village. Is he required to appoint another person to act as such officer, or may be designate himself to act in that capacity and collect a fee?
>
> "And may the village council fix the fees to be charged by dance officers?"

Is the village marshal the "chief peace officer"? How about the mayor or president, the trustees, and the village constables, elected under section 1134, G. S. 1923?

The president and the trustees are ex-officio peace officers. Section 1180, G. S. 1923. Burkee vs. Matson, 114 Minn. 233, 236.

Constables are subject to the lawful orders of the council or president. Section 1179; Burkee vs. Matson, supra. The marshal is appointed by authority of the council. Section 1186 (4), G. S. 1923. His compensation is fixed by the council, and he doubtless is subject to the lawful orders of the council or president.

My best judgment is that the mayor or president is the "chief peace officer," within the meaning of the public dance law, of a village organized under either of the general laws.

If there are village constables, as the law requires, which one ranks the other as between the two; and if there are constables and a marshal, or one constable and a marshal, which one ranks the others?

Assuming, however, that in your case the village marshal is the "chief peace officer," there would seem to be no legal reason why he should not designate himself as the "officer of the law present at the public dance." This, of course, in the event that the marshal is not putting on the dance or interested therein.

If the marshal is designated as the "officer of the law," whether by the president or mayor or by himself, the way it is usually worked is for the council to fix the fees for his services, and require them to be paid by the permit holder to the village, at least where the marshal is on a salary basis. This is easily done by requiring such payment as one of the conditions of issuing the permit.

Or, if the marshal is on some sort of a fee basis, the council may fix or allow him to fix it by agreement with the permit holder, and authorize it to be paid to and retained by the marshal as a part of his official compensation.

So, whether or not the marshal is the "chief peace officer," and however or by whom he may be designated as the "officer of the law" to be

present at the public dance, the council has full control of the matter, by imposing conditions in connection with the issuance of the permit. (Note—See C. 321, Laws 1927.)

ALBERT F. PRATT,
Assistant Attorney General.

February 8, 1926.

137

DANCES—Licenses—Authority of town board.

R. J. Stromme, County Attorney.

You inquire as to whether or not the supreme court of this state has had occasion to construe chapter 139, G. L. 1923. You further inquire as to whether or not in acting upon petitions for dance hall licenses the town boards may exercise judicial discretion or whether their duties are purely ministerial.

In the case of State vs. Hoffman, 199 N. W. 175, the supreme court sustained the constitutionality of the so-called dance hall law.

In Town of Linden vs. Fischer, 154 Minn. 354, the supreme court sustained chapter 478, G. L. 1921, which in part covered the same subject matter. You will find citations in these cases which may be valuable.

I also call to your attention the following cases which, while not involved with the proposition of dance halls, deal with the discretionary powers of the governing body of a municipality:

Bainbridge vs. Minneapolis, 131 Minn. 195;
State vs. Rosenstein, 148 Minn. 127;

and the cases therein cited.

I have no doubt that the granting or refusal of a license for a dance hall rests within the sound discretion of the town board and that the exercise of such discretion will not be interfered with by the court in the absence of a showing that the board acted capriciously or arbitrarily. (See last two cases above cited.)

ALBERT F. PRATT,
Assistant Attorney General.

July 3, 1925.

138

DANCES—Permits for—By whom may be issued.

The County Attorney, Ramsey County.

It appears from your communication that a certain dance hall is situated in an organized town in your county; that the annual town meeting voted against the granting of a permit to operate such dance hall; that the town board has refused to issue a permit therefor; and that the proprietor of the place has now made application to the county board for a permit to hold public dances therein.

Calling attention to section 4 of chapter 139, Laws 1923, as amended by chapter 302, Laws 1925, being section 10164, G. S. 1923, which provides that "any person or persons desiring a permit to hold, give or conduct a public dance shall make such application therefor, by filing with the city clerk,

village recorder, or county auditor," you inquire if the county auditor has authority to receive the application and the county board authority to consider it.

Both inquiries are answered in the negative. The action of the town meeting was, of course, only advisory, but the action of the town board was final.

The reference in the section quoted above to presenting the application to the county auditor is applicable only to unorganized territory, as specified in the last paragraph of section 3 of the act.

The county board, on appeal under section 13, may revoke a permit granted by a town board, but may not grant such a permit, save for unorganized territory.

ALBERT F. PRATT,
Assistant Attorney General.

July 1, 1926.

139

DEPOSITORIES—Cities and Villages.

A. W. Spellacy, Village Attorney.

You direct attention to section 1841, G. S. 1923, and chapter 173, Laws 1925, and ask to be advised as to the amount of bond that should be furnished by the depositories of village funds.

You are advised that if the depository furnishes a bond and no security, the bond must be in the sum specified by section 1841. On the other hand, if the depository furnishes collateral security as authorized by chapter 173, the treasurer is authorized to deposit funds of the village only to the extent of 90 per cent of the market value of the securities so deposited. Chapter 173 does not amend or supersede section 1841, but merely authorizes the depository to assign collateral security in lieu of a bond if it so desires.

CHARLES E. PHILLIPS,
Assistant Attorney General.

March 5, 1926.

140

DEPOSITORIES—Cities and Villages—Deposits outside of city under charter.

James Spillane, City Attorney.

You state that your city treasurer will receive at least $50,000.00 more money than your charter allows him to deposit in local banks, and you inquire whether the city may deposit the excess in some bank or banks outside of the city, provided the bank furnishes proper bond.

As I understand, your city is operating under a home rule charter. Section 47 thereof provides that the city treasurer shall receive and safely keep all money belonging to the city, including license money and fines. Section 48 directs that the city treasurer shall, immediately upon receipt of money, credit the same to the proper fund and deposit it in the name of the city "in a depository, if any, which shall have been designated by the city council." Section 49 provides that the city council may by resolution designate "any state or national bank or trust company, having its principal place of business in the city of Rochester," a depository for city moneys.

When the city council has designated each state and national bank and trust company having its principal place of business in the city of Rochester, it has exhausted its power to designate depositories. In my opinion, under the terms of your charter, the council has no authority to designate any institution not having its principal place of business in your city as a depository for city funds.

As hereinbefore indicated, it is the duty of the city treasurer to deposit all city moneys as received in the depositories designated by the city council, if any. He is limited, however, in the amounts which he may deposit in any particular depository in the following manner:

1. He is prohibited from depositing an amount in excess of one-half of the penalty of the bond furnished by such depository. See section 48; and

2. He is prohibited from depositing in any depository an amount in excess of the assessed capital stock of such depository as shown by the public tax list. See section 49.

Under section 51 the treasurer and his official bond are relieved from liability as to moneys legally deposited in any duly designated city depository.

When the city council has designated each state and national bank and trust company, having its principal place of business in the city of Rochester, and the city treasurer has deposited in each of said depositories the maximum amount which he may legally deposit therein under the above limitations, he becomes liable for the safe-keeping of any excess moneys of the city. I am of the opinion, however, that he may deposit such excess in banks outside of the city of Rochester, but he and his official bond continue to be liable for the safe-keeping of such deposits. I am further of the opinion that the treasurer may take from said banks a proper common law bond to secure the safe-keeping and payment of such moneys. Such bond, however, would not be an official bond of a depository, but rather a common law bond for the protection of the treasurer under his absolute liability for the safe-keeping of such moneys.

CHARLES E. PHILLIPS,
Assistant Attorney General.

June 27, 1925.

141

DEPOSITORIES—Collateral.

Secretary of Executive Council.

Section 4, chapter 265, G. L. 1925, authorizes the executive council to accept from state depositories as security in lieu of surety bonds such bonds and certificates of indebtedness, except bonds secured by real estate, as are legally authorized investments for savings banks under the laws of this state.

Chapter 421, General Laws 1923, now section 7714, G. S. 1923, contains a list of authorized securities for savings banks. Among other securities, such banks are permitted by paragraph 3 of section 7714 to invest in the bonds of any city of the state

"provided that the net indebtedness of any such municipality, as net indebtedness is defined, by Revised Laws of 1905, section 777, and its amendments, shall not exceed 10 per cent of its assessed valuation."

Certain street improvement certificates of various cities and villages issued under chapter 65, General Laws 1919, have been tendered as collateral by state depositories. At the end of section 9 of said chapter 65, appears the following:

"The amount of any such certificates at any time outstanding shall not be included in determining such municipality's net indebtedness under the provisions of any applicable law."

Your question is whether certificates issued under said chapter 65 must be included or excluded in determining the net indebtedness of a village or city of the fourth class, in ascertaining the eligibility of such certificates as collateral. In other words, is section 777, Revised Laws 1905, now section 1935, G. S. 1923, amended by the above quoted provision of chapter 65, General Laws 1919.

The determination of this question involves a consideration of repeal or amendment of existing statutes by implication. Neither is favored in the law. (Dunnell's Digest, section 8927, and cases therein cited. Vol. 1, Lewis' Sutherland on Statutory Construction, second edition, section 247.)

Section 777, Revised Laws 1905, has been directly amended only once, by chapter 145, General Laws 1913. Chapter 65, General Laws 1919, does not purport to amend it, the same being an act entitled "An act relating to street improvements in cities of the fourth class and in villages, and to the payment of the cost thereof." The chapter in no way relates to the general subject of net indebtedness. In my opinion, the effect of the quoted words is merely to permit municipalities or villages to issue certificates of indebtedness without being hampered by the general provisions of law limiting the amount of the indebtedness of such municipality.

Section 777 of the 1905 code is the standard fixed by the legislature in section 7714, G. S. 1923. The legislature specifically refers to section 777 as containing the definition of net indebtedness adopted by it in section 7714. A municipality may lawfully issue certificates of indebtedness under chapter 65, General Laws 1919, although by so doing its net indebtedness, as defined by section 777, will then exceed 10 per cent of its assessed valuation. Such certificates of indebtedness are lawful and enforceable obligations of the municipality. This does not, however, make them authorized investments for savings banks because savings banks are governed by section 777 and amendments thereto. I do not consider chapter 65, General Laws 1919 an amendment thereto, applying the well known rules as to amendment or repeal by implication.

I am, therefore, constrained to hold that such certificates of indebtedness must be included as debts of the municipality in arriving at the net indebtedness of such municipality.

WILLIAM H. GURNEE,
Assistant Attorney General.

September 18, 1925.

142

DEPOSITORIES—Collateral—Bonds of joint stock land bank as.

Graham M. Torrance, County Attorney.

You inquire whether bonds issued by a joint stock land bank may be accepted as collateral security from a duly designated county depository.

Chapter 173, Laws 1925, authorizes acceptance, among other securities, of "such bonds, certificates of indebtedness or warrants, except bonds secured by real estate as are legally authorized investments for savings banks under the laws of the state."

Chapter 421, Laws 1923, designates the securities in which savings banks may legally invest. You will observe that sections 4 and 5 thereof, authorize investment in notes or bonds secured by mortgages or trust deeds on real estate. Section 8 further authorizes investment in farm loan bonds issued by a joint stock land bank of the district.

A bond issued by a joint stock land bank, as I understand, is a direct obligation of the bank issuing the same and is secured by either first real estate mortgages or government bonds delivered to and assigned in trust to the registrar of the district. I further understand that all such bonds are further secured under the law by a statutory obligation of all other joint stock land banks of the district which have outstanding bonds. The stockholders of the bank are also under a double liability.

I am of the opinion that such bonds are not "bonds secured by real estate" within chapter 173, and hence may be accepted as collateral by the county. In the first place, it will be observed that technically they are not secured by any mortgage upon real estate, but are secured by the deposit of certain collateral, to-wit, real estate mortgages or United States government bonds, both of which are personal property. While this fact may not be of great importance, yet it removes such bonds from the technical language of the statute. I think the legislature had in mind bonds which were directly secured by mortgages or trust deeds upon real estate, such, for instance, as a savings bank might invest in under section 4 of chapter 421.

CHARLES E. PHILLIPS,
Assistant Attorney General.

December 16, 1925.

143

DEPOSITORIES—Collateral—City, county and other public "bonds of any state or its agency" construed. (Chapter 173, Laws 1925.)

The County Attorney, St. Paul.

You ask for a construction of the term "bonds of any state or its agency," as used in chapter 173, Laws of 1925.

That act provides that a depository may, in lieu of a surety bond, furnish collateral to secure the funds deposited. The classes of securities enumerated by the statute as eligible for this purpose include:

1. The bonds, certificates of indebtedness or warrants, except bonds secured by real estate, as are legally authorized investments for savings banks under the laws of the state.

2. The bonds of any of the insular possessions of the United States.

3. **The bonds of any state or its agency,** the payment of the principal and interest of which, or either, is provided for otherwise than by direct taxation.

It is to be noted that among the securities authorized for investment by savings banks are:

> "Bonds of any state which has not defaulted in the payment of any bonded debt within ten years prior to the making of such investment;" and "bonds of any county, city, town, village, school, drainage or other district created pursuant to law for public purposes in Minnesota * * * provided that the net indebtedness of any such municipality or district * * * shall not exceed 10 per cent of its assessed valuation; or any bonds of any county, city, town, village, school, drainage or other district created pursuant to law for public purposes in Iowa, Wisconsin, and North and South Dakota; or any bonds of any city, county, town, village, school district, drainage, or other district created pursuant to law for public purposes in the United States, containing at least 3,500 inhabitants, provided that the total bonded indebtedness of any such municipality or district shall not exceed 10 per cent of its assessed valuation." (Chapter 421, Laws of 1923.)

It hardly seems reasonable to hold that the legislature, by the use of the expression "bonds of any state or its agency," intended to render eligible as security for a depository of public funds the bonds of any political subdivision in any state in the United States without qualification or limitation. By providing that bonds authorized for investment by savings banks might be hypothecated for this purpose, the legislature has rendered eligible the municipal bonds specified by chapter 421, cited above. But the municipal bonds mentioned in that chapter must possess certain qualifications; they are not acceptable without limitation. It seems to me that the legislature intended to qualify for this purpose bonds issued by some instrumentality or agency of the state, not including any political subdivision. An instance of a bond of this character would be those issued by the commission of the port of New Orleans. As I recall it, the legislature of that state created the commission. It authorized it to issue and negotiate bonds, and provided that such bonds should be paid off and retired out of revenues received from the operation of the port, and not by direct taxation. It is quite likely that the legislature had securities of this character in mind when it employed the phrase under consideration.

ROLLIN L. SMITH,
Assistant Attorney General.

May 9, 1925.

144

DEPOSITORIES—Collateral—Must be approved by the County Board of auditors.

Public Examiner.

You call attention to sections 847 and 849, G. S. 1913, and chapter 173, Laws 1925. You then inquire whether collateral deposited in lieu of a

depository bond should be approved by the county board of auditors or by the county board.

In my opinion such collateral must be approved by the county board of auditors. Section 847 empowers the county board of auditors to advertise for proposals from banks desiring deposits of county money, and to designate county depositories. Section 849 provides that surety bonds filed by county depositories shall be approved by the county board. Chapter 173 which, among other things, provides that

> "Before any collateral is deposited with the treasurer it shall first be approved by the same authority that designated the depository."

In the case of county depositories only the county board of auditors has authority to designate such depository.

No reason suggests itself to the writer why the approval of surety bonds given by depositories should be approved by one authority and collateral given for the same purpose should be approved by another authority. This chapter relates generally to depositories of county, city, village, borough, town and school funds. It is quite probable that the legislature did not have in mind the fact that in the case of counties only is the bond approved by a different board from that which designates the depository.

However, the language is clear and unambiguous, and it must be assumed that the legislature intended to require the designation by the particular authority named.

CHARLES E. PHILLIPS,
Assistant Attorney General.

June 26, 1925.

145

DEPOSITORIES—Collateral—Real estate first mortgages not authorized.

Harold S. Nelson, County Attorney.

You inquire whether the county may, under chapter 173, Laws 1925, accept first mortgage real estate security from a bank designated as a county depository in place of a corporate or surety bond.

No. Such security cannot be accepted.

CHARLES E. PHILLIPS,
Assistant Attorney General.

August 20, 1925.

146

DEPOSITORIES—Counties—Interest on daily balances.

J. H. Mark, County Attorney.

You state that the proposals submitted by banks to be designated as depositories for county funds all contain a provision reading as follows:

> "The interest due on the balance for the preceding month on the lowest balance for said preceding month on all funds payable on demand at the rate of one and one-half per annum."

You further state that it is the understanding between the board and such bank that this means that the depositories will pay interest at the rate specified on the lowest daily balance of the preceding month.

You inquire whether these proposals comply with the statute. Section 846, G. S. 1923 requires the proposals to state, among other things, "what interest allowed on monthly balances."

I have been unable to find any judicial construction of this provision. It has been practically construed to mean that the banks shall specify the rate of interest on such sum as results from taking the daily balances for the entire month and dividing the same by the number of days. In my opinion this is the meaning of the language used. Such a construction seems most equitable from the standpoint of the county as it allows interest on the mean balance of the month. It may and does frequently happen that the balance on some particular day during the month is very low while substantial balances are carried throughout most of the month.

In view of this practical construction that has been placed on this provision by county officials and the banks generally, I am inclined to think it should be followed in the absence of judicial interpretation to the contrary.

CHARLES E. PHILLIPS,
Assistant Attorney General.

June 26, 1925.

147

DEPOSITORIES—School district—Authorized collateral—Chapter 173, General Laws 1925.

Albin Nelson.

You inquire if a school district treasurer has a legal right to accept warrants of his own district, as security from a depository of school district funds.

Chapter 173, General Laws 1925, authorizes the acceptance as collateral of such bonds, certificates of indebtedness or warrants, except bonds secured by real estate, as are legally authorized investments for savings banks, under the laws of this state. The securities in which a savings bank may invest are specified in section 7714, G. S. 1923. Paragraph 3 thereof authorizes an investment in the "bonds of any county, city, town, village, school, drainage, or other district created pursuant to law for public purposes in Minnesota, or in any warrant, order or interest bearing obligation issued by the state or by any city, city board, town or county therein, provided that the net indebtedness of any such municipality or district, as the net indebtedness is defined by Revised Laws of 1905, section 777, and its amendments, shall not exceed 10 per cent of its assessed valuation."

The statute does not authorize investment in warrants of a school district, hence such warrants may not be accepted as collateral by the treasurer of your school district.

The same is true in relation to the county.

WILLIAM H. GURNEE,
Assistant Attorney General.

September 19, 1925.

148

DEPOSITORIES—School district—Designation of.

Commissioner of Education.

You submit the following inquiries:

"1. The board designated a certain bank as depository for school funds, but did not require said bank to furnish a bond. Under this circumstance, are the treasurer's bondsmen relieved from liability in case of bank failure?"

"2. In designating a depository, and failing to require a bank to give bond, do the trustees become personally liable for loss in case of bank failure?"

No. In so answering, I assume that the bank so designated as a depository did not furnish any securities in lieu of a bond, as it might now do under the statute.

CHARLES E. PHILLIPS,
Assistant Attorney General.

December 12, 1925.

149

DRAINAGE—Petition—Bond—Delay in proceeding to contract.

The County Attorney, Kittson County.

I acknowledge your communication from which it appears that there was filed in the office of the county auditor of Stevens county a petition addressed to the board of county commissioners asking for the establishment and construction of a public ditch for the purpose of draining certain lands therein described, some of which were owned by the petitioners.

The county auditor prepared and published a notice to the effect that a hearing would be had on this petition before the county board on November 13, 1915. The hearing was had and an order made appointing an engineer to make a survey of the route of the proposed ditch and viewers to ascertain and report damages and benefits to property affected, in accordance with the requirements of the statute in force at that time.

The engineer made the survey and filed his report thereon. The viewers reported benefits to affected lands in excess of the estimated cost of the proposed improvement. The county auditor, by direction of the board, gave notice of a hearing on the petition, the engineer's report and the viewers' report, to be held on June 21, 1917. You report that there was a meeting of the board at the indicated time and some of the interested parties were heard for and against the project. Action was deferred. The country was at war. Construction costs were excessive. Furthermore, the suit brought by North Dakota to enjoin Minnesota from collecting and discharging drainage into boundary waters was pending and undetermined. By appropriate direction entered in the minutes of the board, the proceedings were adjourned from time to time until July, 1924. On the last adjourned day no action was taken so far as disclosed by the minutes. The petitioners now ask that the board proceed to a final hearing and determination. You ask to be advised whether this may be done, and if so, what notice is required.

Also, you submit a copy of the bond given by the petitioners at the time the petition was filed in the year 1915. You advise that the parties to this bond have asked the board to proceed now to a final order. You report that the preliminary expenses, which have been met by the county, amount to as much or more than the penalty of this bond, which is $1,500.00. You inquire whether this bond is good in form and whether the sureties, assuming they are financially responsible, may be required to reimburse the county for the expense incurred.

You are advised of these conclusions:

1. We advise against proceeding to a final order establishing this ditch except upon a new petition. Your attention is directed to section 111 of chapter 415, Laws 1925, which provides that in all cases where proceedings have been instituted under existing laws and are pending at the time of the passage of this act, such proceedings may be completed under the provisions of the existing law or under the provisions of this act; and in case the parties to such proceedings desire to complete them under the provisions of this act, a petition signed therefor by the petitioners in the original proceeding, or two or more of them, shall be presented to the county board, and thereupon the board shall fix a time and place for hearing and give notice thereof in accordance with the requirements of the statute.

If a new petition be filed in compliance with this provision, it should be accompanied by a bond in at least the amount of $2,000.00, in accordance with the requirements of section 3 of the act of 1925. The petition for further proceedings also should be signed by the two original petitioners who are upon the bond.

2. The bond signed by Steinfort and Grove in connection with the original petition, while somewhat informal and not strictly in accordance with the requirements of the statute, is a good bond and may be enforced, assuming that the makers are financially responsible.

3. If the proceedings are revived by the filing of the suggested petition and accompanying bond, the same engineer appointed previously might be reappointed, and thus a substantial part of the cost of survey might be avoided. Perhaps viewers' expenses also might be reduced by the appointment of the same viewers. These are details which may be worked out by the board acting upon your advice.

I have prepared and send herewith a rough draft of petition reciting that the proceeding upon the original petition is pending and undetermined. My view is that the auditor in giving notice of hearing upon this petition should include in the notice a statement that at the indicated time and place the board will proceed to a hearing upon the petition and will then and there hear all persons interested for or against the proposed continuance of said drainage proceedings under and pursuant to the provisions of chapter 415, Laws 1925, and the establishment of said proposed ditch in accordance with the report of the engineer and the viewers heretofore made and filed herein. I think this notice should be mailed in accordance with the requirement of section 111; and also that it should be published and posted in accordance with the requirement of section 26 of the act.

I think it would be reasonably safe to proceed as here outlined. The proceeding, of course, would not be free from attack by injunction at the suit of any person whose property was likely to be assessed; but in the absence of such injunction proceeding the action of the board in granting a petition and establishing the ditch could not thereafter be attacked collaterally.

JAMES E. MARKHAM,
Deputy Attorney General.

January 25, 1926.

150

DRAINAGE—Repairs—Plans, etc., in repair jobs to be forwarded to Commissioner.

Commissioner of Drainage and Waters.

You inquire if the engineer's reports, including plans, specifications, maps and profiles, made and filed in connection with proposed repairs upon drainage systems pursuant to sections 53-60 of chapter 415, Laws 1925, should be forwarded to the commissioner of drainage and waters for examination and approval or recommendation for modifications, in the manner prescribed in section 12 of said chapter.

Section 12, relating to proceedings in connection with new or original drainage systems, prescribes the duties of the engineer and provides that: "He (the engineer) shall make a complete set of plans and specifications covering all the work and construction ordered by the board or court, and make a full, detailed and complete report of his work and recommendations to the board or court, and shall include all maps, profiles, specifications and matters herein provided for, and file the same with the auditor or clerk of the district court where the proceedings are pending. All plans, specifications, maps and profiles herein required shall be made in triplicate and shall be filed with the auditor or clerk where the proceedings are pending, and within 5 days of the filing of such report and before further proceedings are had thereon, one of the copies of said report shall be forwarded by said auditor or clerk to the commissioner of drainage and waters who, within the next 15 days shall examine and approve the same as presented and shall file with the auditor or clerk his approval thereof, or if he does not approve he shall file instead his recommendation for such modifications thereon as he may deem necessary * * *."

Section 55 of said chapter prescribes the duties of the engineer in connection with proceedings for repair of drainage systems, and provides that "so far as applicable and necessary said engineer shall, in the performance of his duties, comply with the requirements of sections 10 and 12 of this act * * *."

Section 80 of said chapter also provides that "In all cases where reference is made in this act to * * * any other sections of this act * * * all such

* * * sections and provisions thereof shall, so far as applicable for all purposes of this act, be treated and construed as having the same force and effect as though herein in full set forth."

Which, in my opinion, answers your inquiry generally in the affirmative.

ALBERT F. PRATT,
Assistant Attorney General.

March 25, 1926.

151

EDUCATION—Aid—Supplemental—Teachers to keep separate register of pupils.

Commissioner of Education.

You call attention to sections 2822 and 3030, G. S. 1923, and inquire whether in determining the **supplemental aid** provided for by the latter section pupils transported from one district to another under section 2822 should be counted in the district where they actually attend school, or in the district which has closed its school.

They should be counted as pupils of the district which has closed its schools and not be counted in the district where they actually attend. A literal reading of section 3030 would seem to require that they be counted in the latter district. However, such statute must be construed together with the provisions of section 2822. It will be observed that the latter section requires the teachers to keep a separate register of pupils from the district discontinuing its schools, which shall be returned to the clerk of such district and to the county superintendent. It also expressly provides that the district sending the children shall retain its organization and shall be entitled to public money, including the special state aid to ungraded elementary schools, under such rules as may be fixed by the Commissioner of Education, except that state apportionment for non-resident pupils enrolled in the high school department shall go to the districts in which the high school is located. It seems quite clear, therefore, that all financial aids given by the state shall be paid to the school sending the children, except the high school aid expressly mentioned.

CHARLES E. PHILLIPS,
Assistant Attorney General.

October 16, 1926.

152

EDUCATION—Board—Unorganized territory—Chairman of county board is ex officio chairman of county board of education.

Commissioner of Education.

You submit the following inquiry:

"If a change is made in the office of chairman of the board of county commissioners in January at their annual meeting, will such change also affect the office of chairman in a school board of an unor-

ganized school district, or can the chairman of such school district put in at the July annual meeting, hold such office until the end of the school year."

Under section 2, chapter 328, Laws 1921, the chairman of the board of county commissioners is made ex officio chairman of the county board of education, which constitutes the governing body for unorganized territory. It follows, therefore, that when a particular individual ceases to be chairman of the board of county commissioners, he then ceases to be chairman of the county board of education. His successor to the office of chairman of the county board succeeds him as chairman of the county board of education.

CHARLES E. PHILLIPS,
Assistant Attorney General.

January 24, 1926.

153

EDUCATION—Claims—Compromise of.

Messrs. Johnston & Carman, Attorneys for School Board.

By virtue of section 3097, G. S. 1923, a school board may prosecute actions in the name of the district on a contract made with the district.

The supreme court in Oakman vs. City of Eveleth, 203 N. W. 514, held (page 515):

"The power to compromise grows out of and is incident to the power to sue and be sued,"

and also said:

"Pending litigation is a proper subject of compromise by a municipality. It may be compromised at any time before final judgment has been entered."

Later on in the opinion the rules under which a municipality may compromise are laid down. Where the claim is reduced to final judgment and the debtor has sufficient assets the municipal officers have no power to accept less than the full amount due. Where the debtor is not able to pay the full amount and the municipality is unable to enforce full payment a compromise may be effected even after the entry of final judgment.

The court says (p. 516):

"We see no reason that should preclude a municipality from having authority to compromise its litigation either before or after judgment under the limitations stated."

This is as far as the decision goes. It refers entirely to matters in litigation. Whether the supreme court would take the view that the officers of a school district have authority to compromise a claim without litigation, we cannot say. As you state, no good reason appears for requiring an action to be commenced as a condition precedent to a compromise.

Opinion 113, 1924 Report, to which you direct attention, we believe to be sound under the facts stated in the opinion. If a school district has a depository bond by means of which it can enforce full payment of deposits in an insolvent bank, of course, no one has the power to give away the tax payers' money in a so-called compromise. If, however, collection on the

bond is doubtful, or there is no bond, a different situation arises and a compromise may lawfully be made within the limitations laid down in the Oakman case.

My own view is that it would be the safe thing for the school district to commence action, and then compromise, if the case is a proper one for compromise.

WILLIAM H. GURNEE,
Assistant Attorney General.

November 12, 1925.

154

EDUCATION—Contracts—Meaning of "responsible bidder."

Mason M. Forbes, County Attorney.

You state that the school board of district No. 31 has advertised for bids for construction of a new school house; that bids are to be opened and a contract let on August 3; that the board desires a definition of the word "responsible" as used in section 2847, G. S. 1923, which provides that "every said contract shall be awarded to the lowest responsible bidder," etc.

I do not know that any definition may be given of the term "responsible bidder." I will say, however, that it is not limited to a consideration of the ability of such bidder to furnish the bond. The board has a right to consider the financial ability of the bidder in reference to his probable ability to perform and complete his contract. They may also consider his past reputation and performances and determine therefrom whether he is likely to in fact perform his contract expeditiously and in a workmanlike manner. If they are of opinion from past experiences of themselves or others that he is not likely to perform the work in good workmanlike manner, and as provided in and by the plans and specifications, I am of the opinion that his bid may be rejected as not being the bid of a responsible person. In other words, I think the word is broad enough to justify the board in rejecting a bid from a person whose financial ability or habits of performance are such that in the opinion of the board the contract is not likely to be performed promptly in a workmanlike manner and according to the terms and conditions of the contract.

CHARLES E. PHILLIPS,
Assistant Attorney General.

August 1, 1925.

155

EDUCATION—Election—Date for filing.

Commissioner of Education.

You call attention to chapter 111, Laws 1915, as amended by chapter 433, Laws 1923, and inquire whether candidates are required to file their application twelve days before the day of the election or twelve days before the day of the annual meeting.

It is the opinion of this department that such application must be filed twelve days before the day of the election. In other words, it must be filed twelve days before the Saturday preceding the annual meeting.

CHARLES E. PHILLIPS,
Assistant Attorney General.

July 18, 1925.

156

EDUCATION—Funds—Authority of board to expend as reward for evidence of liquor furnished pupils.

Frank E. Morse, County Attorney.

You inquire as to the authority of a school board to offer a reward for evidence as to the furnishing of liquor to students of the school.

You are advised that the board has no power to offer such reward. School funds may only be expended for school purposes as authorized by the statute. I have been unable to find any statute which would authorize an expenditure of such funds for the purpose mentioned.

CHARLES E. PHILLIPS,
Assistant Attorney General.

November 2, 1925.

157

EDUCATION—Funds on hand may be appropriated at a meeting of the district without notice that such action will be taken thereat.

Commissioner of Education.

You state that a common school district has on hand money in the amount of $1,500.00 which has been gradually accumulated from year to year; that at a meeting legally called on May 12, the district voted that $800.00 of this money be used, together with a bond issue, for the purpose of erecting a school house.

You further state that while this meeting was legally called, the notice thereof did not specify that the matter of transferring this money from the general fund to the building fund would be considered thereat.

You inquire whether the district has a legal right to use $800.00 of this money for the building of the schools.

Yes. While section 2710 provides that money may not be "raised" for the building of a school house except at a meeting called pursuant to notice specifying that such matter will come before it, I am inclined to the opinion that this does not apply to the mere transferring of moneys already on hand. It occurs to me that such section applies to raising money by taxation or otherwise, where a new obligation of the district is created. The action of the district at the May meeting did not create any new liability on the part of the district, but merely authorized the use of money already on hand.

CHARLES E. PHILLIPS,
Assistant Attorney General.

May 29, 1925.

158

EDUCATION—Officers—Compensation in districts of ten townships.
Commissioner of Education.

You inquire whether the compensation of board members in a common school district composed of ten or more townships, not having a five-member board, as provided in chapter 143, Laws 1923, remains the same where the number of schools drops below 31, provided there were 31 or more schools in the district when the law governing compensation of board members was passed.

No. The compensation is fixed by section 2719, G. S. 1913, and depends upon the actual number of schools in the district at the time the compensation is claimed. Upon the decreasing of the number of schools below 31 the compensation automatically decreases, as provided in such section.

CHARLES E. PHILLIPS,
Assistant Attorney General.

February 26, 1925.

159

EDUCATION—Officers—Traveling expenses in ten township districts.
Commissioner of Education.

You call attention to section 2720, G. S. 1913, which in speaking of the members of the school board, reads in part as follows:

> "shall be paid their actual and necessary traveling expenses, incurred and paid by each of them in the conduct of his official duties, including the visitation of schools."

You ask:

> (a) "Does the board have authority to pass on what are actual and necessary traveling expenses incurred?"

This inquiry is answered in the affirmative as it stands. It will be observed that the statute requires such expenses to be duly itemized and verified and approved by the board before they may be paid by the district. In giving their approval the board must necessarily determine whether they have been actually and necessarily incurred.

> (b) "If they do have this authority, can they, on motion properly carried and believing it to be for the best interests of the district, send any members to any conventions and include the expenses so incurred up to the limit of $150.00 allowed by law?"

As this inquiry stands it must be answered in the negative. It will be observed that this particular statute refers to expenses incurred in the performance of "official duties." In my opinion the words "official duties" refer to the ordinary and regular affairs of the district. Attending conventions is not in the performance of any function of the school district, although it may result in indirect benefits to the district.

There is, however, authority granted by other statutes to pay the expense of one or more members of the board to certain specified conventions or conferences.

See opinions 426, 427, 428 and 429, 1920 report.

CHARLES E. PHILLIPS,
Assistant Attorney General.

March 30, 1926.

160

EDUCATION—Officers—Resignation—Effective without acceptance.

Commissioner of Education.

You submit the inquiry as to whether the board has the privilege of accepting or rejecting a resignation filed with it by the president.

I am inclined to the view that the resignation is effective without acceptance. Under the common law of England a public office was deemed a burden or duty of citizenship and hence one elected or appointed to a public office was under a legal obligation to accept the same and was not permitted to surrender the office without the consent and approval of the appropriate authority. Such rule, however, has not generally prevailed in this country, and a great majority of the opinions hold that a public officer may surrender the same at his pleasure. These opinions, however, recognize the right of the state to impose the duty to serve. This renders a consideration of section 2902, G. S. 1913, appearing as section 157 of the Compilation of School Laws. You will note therefrom that any person accepting an election or appointment upon a school board is subject to a penalty if he thereafter fails or refuses to qualify and to serve. I am inclined, however, to the view that this does not impose a duty upon a board member to retain the office for the full term. I think the purpose of the enactment is to require one who has accepted to complete his qualification and while he retains the office to perform the duties thereof. In the absence of a more specific imposition of a duty to serve, I think the general rule giving a public officer the right to resign at pleasure prevails. If I am correct in this, it follows that upon the filing of the resignation he surrendered the office and a vacancy resulted.

You also inquire as to the proper procedure for filling a vacancy. It does not appear whether he resigned the office of president or whether he resigned as a member of the school board. If the latter, your attention is called to sections 71 and 72 of the School Compilation. You will note that section 71 gives the school board power to fill the vacancy by appointment within ten days after the vacancy occurs. If the board fails to make an appointment within such time, a special meeting of the electors may be called by ten days posted notice signed by three voters, freeholders or householders in the district, to elect a person to fill such vacancy.

CHARLES E. PHILLIPS,
Assistant Attorney General.

November 6, 1926.

161

EDUCATION—Officers—Superintendent and teachers—Method of electing.

J. F. Muench, Superintendent of Schools.

You inquire whether it is necessary that the vote of each member of the school board be reported separately in action taken by the board to elect a superintendent and teachers, or whether such election may be effected by a motion duly seconded and voted upon.

You are advised that the statute vesting power in the board to elect superintendents and employ teachers does not specify the procedure or method to be followed. It is, therefore, competent for the board to elect a superintendent or to employ teachers by a proper motion duly seconded and carried. It is not necessary that the vote of the several members of the board be recorded. Such a procedure, however, would be proper.

CHARLES E. PHILLIPS,
Assistant Attorney General.

March 30, 1925.

162

EDUCATION—Officers—Superintendent in independent district—Time and term of election.

Commissioner of Education.

General Statutes 1923, section 2807, as amended by Laws 1925, chapter 124, limits the term of the superintendent to a maximum of one year.

It is our opinion that a contract is valid for one year and that the attempt of the board to make it for a longer period is ineffective.

As to whether the superintendent must be elected at the organization meeting held on the first Saturday in August, or whether he may be elected prior to that time by the old board: Provision for the election of the superintendent is contained in the statute cited. That statute refers principally to the organization of the board. The contention may well be made that it contemplates the election of the superintendent at that time and at no other. But the language is not mandatory, but permissive. It has been the general practice for many years among boards of education to elect a superintendent in advance of the organization meeting. The necessities of the situation practically require such action, for the advice and co-operation of the incoming superintendent in the selection and employment of teachers for the ensuing year, and advance preparation for the opening of the school, are virtually indispensable.

We reach the conclusion that the board of education has power to elect the superintendent prior to the organization meeting. Such power must of course be exercised at a reasonable time and in a reasonable manner.

G. A. YOUNGQUIST,
Assistant Attorney General.

August 17, 1926.

163

EDUCATION—Pupils—Absence of for religious instruction and training.

D. M. Cameron, County Attorney.

You call attention to the proviso to section 3 and the proviso to section 4 of chapter 78, Laws 1923, and inquire for our construction of the same.

It is our interpretation that section 3 was designed to permit parents to have children excused from school attendance for the purpose of receiving general religious instruction conducted by some church or Sunday School organization. The proviso to section 4 was designed to give the parents of pupils a right to have such children absent themselves for the purpose of receiving special instruction, which is required by the ordinances of many churches as a condition of being received into full membership in the church. This proviso relates to the entire act, and parents have an absolute right to absent their children from school on such days as they attend upon instruction according to the ordinances of the church. The school authorities have no right to question or restrict the parents in the exercise of this right. It is probable that the school authorities could require such children to present proof that they are in fact absenting themselves for such purpose.

As above indicated, the purpose of section 3 was to permit parents to keep their children out of school, within the limitations of that section for the purpose of receiving general religious education and training. I am frank to say I do not see the force of the proviso to this section, unless it was intended to make clear that the time which a child may be absent for the purpose of receiving special instruction as provided by the last proviso should not be deducted from the three hours which he is entitled to absent himself for general religious instruction. I may say that we have also held that it is mandatory under section 3 for the school authorities to grant excuses to pupils desiring to receive general religious instruction as therein provided, subject, however, to such reasonable rules and regulations as to time, etc., as the school authorities may adopt.

CHARLES E. PHILLIPS,
Assistant Attorney General.

October 21, 1925.

164

EDUCATION—Pupils—Right of orphanage children to attend school.

Commissioner of Education.

It appears that the Lutheran Colony of Mercy is located within school district No. 20, Ramsey county; that children are received by this institution from the various parts of the state and are cared for therein until other disposition is made of them; that there are about thirty children of school age now therein; that the district has a two-room school, with a seating capacity of about sixty children; that there will be enrolled about forty-two pupils; that the institution desires to send its children to a public school; that the electors at the last annual meeting passed a resolution prohibiting such children from attending the school of the district.

You inquire whether the district may legally exclude such children.

I assume that this institution was established and is maintained as a place for receiving destitute or homeless children and caring for them until a permanent home can be found. If such be the case, I am of the opinion that a child of school age while living therein has a legal right to attend the school of the district in which such institution is located.

Section 2741, G. S. 1923, provides:

> "All schools supported in whole or in part by the state school funds shall be styled public schools and admission to and tuition therein shall be free to all persons between the ages of five and twenty-one years, in the district in which such pupil resides."

The school in question is a public school, and all children residing in the district have a legal right to attend the same. Do the children in the institution reside in the district? I am of the opinion that they do. It is their home; they have no other. The object of the institution is to provide a place where homeless children may receive shelter, food and care until a permanent home can be found. In individual cases this period may be short or it may be comparatively long. Every child permanently in the state is entitled to public school privileges somewhere. It cannot be seriously maintained that a child received into the institution continues to reside in the district from which he came. Such residence has been completely, fully and permanently abandoned.

The right of a child taken into a home of a relative, friend or charitably inclined person for the purpose of receiving care, support and maintenance therein, to attend the school of the district in which such relative, friend or person lives has long been recognized. The legal right of institutions of the character of this one to provide and maintain homes for orphan children is clear.

Attention is called to the case of Logsdson vs. Jones 143 N. E. 56, which sustains the legal right of such children to attend the public school of the district in which the orphanage is located under laws very similar to ours.

CHARLES E. PHILLIPS,
Assistant Attorney General.

September 11, 1925.

165

EDUCATION—School—Method of compelling district to maintain for minimum period.

Commissioner of Education.

You call attention to section 2796, G. S. 1913, as amended by chapter 321, Laws 1923, which reads in part as follows:

> "The school shall be maintained not less than seven nor more than ten months," etc.

You further state that in Rice county a certain school district voted at the annual meeting to maintain its school for but six months. You inquire what may be done in the premises.

You will note that the statute fixes seven months as the minimum school year and ten months as the maximum school year. The district has no power to vary these limitations. They may prescribe the school year only within such limitations. Therefore, the vote of the district to conduct and maintain the schools for but six months is void and of no effect. It is the duty of the school board to proceed and maintain the schools for the minimum period. This duty is enjoined upon them by law. Such being the case, I call your attention to section 9970, G. S. 1923, which reads in part as follows:

> "Whenever any duty is enjoined by law upon any public officer or person holding public interest or employment, from willful neglect to perform such duty * * * shall be a gross misdemeanor."

I further call your attention to the fact that a school district maintaining its schools for less than seven months, is not entitled to school aid. This fact might well be called to the attention of the officers of the district and to the electors.

I am further of the opinion that any parent of children of school age upon the completion of the six months of school may maintain, if there are funds sufficient for that purpose, mandamus proceedings against the school board to compel them to take action to provide and maintain school for an additional month.

CHARLES E. PHILLIPS,
Assistant Attorney General.

August 5, 1925.

166

EDUCATION—Sites—Chapter 48, Laws 1925, does not validate authority heretofore given by voters to the board to select designated sites.

Commissioner of Education.

You state that at the last annual meeting of a ten or more township district, the board was authorized to select sites and provide buildings. You call attention to chapter 48, Laws 1925, and inquire whether the school district may now proceed to select a site and move a building thereon under the authority of such resolution.

Your inquiry is answered in the negative.

Prior to the enactment of chapter 48, a school district could not delegate authority to the school board to finally select and acquire a school house site. The specific site must have been approved by the electors before the board had authority to acquire the same.

Chapter 48 now empowers the electors at the annual, or at a special election to authorize the school board to select specific or general school house sites and acquire the same, subject to the right to have the matter referred to the electors as therein provided.

The action taken at the annual meeting was invalid at the time taken, and in my opinion cannot constitute an authorization under chapter 48. The

law is not retroactive, and the authority given to the board to select and designate a site must be given after such statute became law.

CHARLES E. PHILLIPS,
Assistant Attorney General.

July 15, 1925.

167

EDUCATION—Taxes—Maximum per capita levy unaffected by balance on hand.

Thomas S. Silliman, School Attorney.

You inquire whether a school district may proceed to levy taxes in the maximum amount allowed by section 2, chapter 417, Laws 1921, notwithstanding such district may have a balance of moneys on hand at the end of the year.

Yes. The statute in question imposes merely a maximum upon the amount of taxes which a school district may levy in any particular year, and such maximum is not affected by moneys or other funds which the district may have.

CHARLES E. PHILLIPS,
Assistant Attorney General.

January 30, 1926.

168

EDUCATION—Tuition—Right of non-resident to apply taxes on lands in district does not apply to special district.

Commissioner of Education.

You call attention to those paragraphs of section 2747, G. S. 1913, which relate to the right of a non-resident person to apply taxes paid to the district on lands therein on tuition, and inquire whether they apply to a special school district.

The inquiry is answered in the negative. These provisions originated as chapter 445, Laws 1907. It reads therein as follows:

> "Provided, in case a person has real property in and pays taxes thereon, in a common or an independent school district," etc.

Hence the law, as originally enacted, applied only to common and independent school districts, and I have been unable to find any legislation act extending the same to special districts.

CHARLES E. PHILLIPS,
Assistant Attorney General.

October 26, 1925.

169

EDUCATION—Workmen's compensation—Right of district to carry indemnity insurance.

Commissioner of Education.

You are advised that the so-called Workmen's Compensation Act applies to school districts, and renders the district liable for injuries received by employes which result from an accident occuring in the course of their duties.

I am of the opinion that the district may legally carry insurance to protect them against this liability and pay the premium thereon out of school funds.

CHARLES E. PHILLIPS,
Assistant Attorney General.

August 19, 1925.

170

ELECTIONS—Ballots—Heading without party designation.

County Attorney, Hennepin County.

You are advised that the provisions of Session Laws 1919, chapter 230, section 1, (now G. S. 1923, section 352) are still in full force and effect, and modify the provisions of G. S. 1913, section 336, as amended by Session Laws 1923, chapter 127, section 2 (now G. S. 1923, section 294) so as to require the ballots for non-partisan offices to be headed "ballot of candidates to be nominated without party designation."

CHESTER S. WILSON,
Assistant Attorney General.

April 15, 1926.

171

ELECTIONS—Ballots—Name of candidate.

Mason M. Forbes, County Attorney.

The county auditor states that a candidate for the office of sheriff of your county has signed his affidavit of candidacy, "L. W. Pal Brown." The candidate's true name is Lawrence W. Brown, but he is best known by the name of Pal Brown, and is anxious to have the word "Pal" printed on the election ballot.

In my opinion Mr. Brown has a right to have his name printed on the ballot in the same way that he signed his affidavit, "L. W. Pal Brown," if he desires to adopt that as his name and be so known. The rule is well settled that a man may adopt any name by which he desires to be known without any legal proceedings. The Minnesota statute, G. S. 1923, sections 8633-8635, merely provides a definite method whereby a person may adopt a new name and have it recorded, but it does not abrogate the settled common law rule whereby a man may change his name without proceedings.

19 R. C. L. 1332-1333. Ann. Cas. 1917 A, 437, Note.

Of course it would hardly be proper for a candidate on the eve of election to assume a new name for the purpose of furthering his candidacy. However, in Mr. Brown's case it seems that he is simply adopting a combination of his real name and the name by which he is most commonly known, for the purpose of enabling the voters to identify him. This is entirely consistent with the principal purpose of every name, which is to identify the person designated.

This office has previously ruled that a descriptive title, such as "doctor," may not be added to a candidate's name on the ballot. However, that rul-

ing would not apply to the present case, where the desired designation is really a part of the candidate's name by which he is commonly known and which he wishes to adopt.

CHESTER S. WILSON,
Assistant Attorney General.

March 15, 1926.

172

ELECTIONS—Ballots—Right of village canvassing board to inspect.

L. R. Simons, Village Attorney.

You ask whether the village council, acting as a canvassing board under G. S. 1923, section 1170, has a right to inspect the ballots cast at the village election for the purpose of verifying the returns of the election as recorded by the judges and clerk.

You are advised that the canvassing board has no authority to inspect the ballots. Their duty, as stated by the statute, is to declare the results appearing from the returns. The returns consist of the record of the election made by the judges and clerk in the book provided for that purpose, as prescribed by the statute.

The fact that the statute provides that the ballots cast shall be returned to the clerk does not make the ballots a part of the official returns. A recount of the ballots may be had only in case of a contest, and it must be conducted in the manner prescribed by the statutes relating to election contests.

If there is any obvious mistake or discrepancy on the face of the returns, the canvassing board may send the record book back to the judges and clerk for correction, but neither the canvassing board nor the judges and clerk have any authority to recount or check over the ballots after they have once been counted and the results recorded and returned by the judges and clerk.

CLIFFORD L. HILTON,
Attorney General.

December 16, 1926.

173

ELECTIONS—Ballots—Taking to home of invalid.

To Election Officers:

1. There is no method provided by law whereby a person quarantined in his home may vote.

2. It is not permissible for one of the judges of election on election day to take a ballot from the polling place to the home of a sick voter, permit him to mark it, then return it to the polling place and cast it in the name of the sick voter.

3. If such person can go to the polls he can of course, ask for a ballot to be brought to him at the door of the polls. (Section 428, G. S. 1923). He cannot use the absent voter's law for the reason that he is not absent from the district in which he resides.

CLIFFORD L. HILTON,
Attorney General.

October 18, 1926.

174

ELECTIONS—Ballots—Returns—Compensation for carrying.

The Public Examiner.

As to the payment of compensation of persons carrying election ballots from and returns to county auditor's offices, prescribed by subdivision 3 of section 493, G. S. 1923 (1926 Election Laws, section 534), you are advised as follows:

(1) The compensation of persons carrying ballots from the office of the county auditor, that is, $1.00 for each trip and 10 cents per mile of travel, is to be paid by the respective towns, villages, or cities where the elections are held, under the provisions of G. S. 1923, section 494, as amended by Session Laws 1925, chapter 216 (1926 Election Laws, section 535). Before this amendment section 494 specifically provided that the compensation prescribed by subdivision 3 of section 493, above mentioned, should be paid by the county. Section 494 also made specific provision for the payment of the expenses prescribed in subdivisions 1, 2 and 4 of section 493, and went on to provide that the expenses prescribed in the remaining subdivisions thereof, as well as all necessary expenses of the clerks of municipal corporations on account of elections, should be paid by the respective towns, villages or cities where the elections were held. The amendment above mentioned simply cut out from section 494 the reference to subdivision 3 of section 493, thus leaving the compensation prescribed in that subdivision to be covered by the general clause providing that the expenses prescribed in the remaining subdivisions should be paid by the towns, villages, or cities concerned.

(2) The same rule applies to the compensation of persons going to the express office or postoffice for ballots, in case the same are sent by mail or express. However, this office has previously ruled that a clerk or other election official is not entitled to compensation for obtaining ballots if the same are delivered at his home or postoffice box by the express company or mail carrier.

(3) The compensation for delivering election returns, ballots, and other things required to be delivered to the county auditor after election is to be paid by the respective towns, villages or cities in which the elections are held, under the same statutory provisions above mentioned, except in election districts where the polling places are more than ten miles from the county seat, which are governed by a specific statute, G. S. 1923, section 469-471 (Election Laws 1926, sections 507-509), providing that in such districts the returns and other papers shall be sent by registered mail and that the compensation and mileage of the persons mailing the same shall be paid out of the county treasury. This office has previously ruled that the statute last mentioned is mandatory and exclusive as far as districts having polling places more than ten miles from the county seat are concerned, and that if the returns, ballots, etc., from such a district are delivered by one of the judges or other messenger to the county auditor's office in person, the person delivering the same is not entitled to the fees and mileage for the

trip, since the statute authorizes the county to pay only the return postage and the fees and mileage for taking the returns, ballots, etc., to the post-office nearest the polling place.

(4) The expenses of obtaining and delivering ballots, returns, etc., and other election expenses of election districts in unorganized towns are to be paid by the county. In the absence of any specific provision for the payment of the election expenses of such districts, it must be implied that they are to be paid by the county, as such districts are created by the county board and there are no means whereby the funds for the payment of expenses of such districts may be appropriated by any other authority than the county board.

CLIFFORD L. HILTON,
Attorney General.

June 25, 1926.

175

ELECTION—Candidate—Certificate being issued when expense account has not been filed.

John Lovell, County Attorney.

You submit the following inquiry:

"May the county auditor lawfully issue to a successful candidate for a county office a certificate of election when such candidate has duly filed a final statement of receipts and disbursements in proper form but failed to file one or more intermediate statements?"

Yes. Unless it appears that such intermediate statements were withheld for some fraudulent purpose.

CHARLES E. PHILLIPS,
Assistant Attorney General.

November 9, 1926.

176

ELECTIONS—Candidate—Certificate—Issuance of in case of contest.

Frank E. Morse, County Attorney.

You state that at the last biennial election as canvassed by the county canvassing board a county commissioner was declared elected by a majority of four votes over his opponent; that thereafter the county auditor made out his certificate of election but did not deliver the same; that an election contest has been duly instituted.

You inquire whether it is proper for the county auditor to now deliver such certificate, allowing the candidate to qualify pending the outcome of the contest. Your inquiry is answered in the affirmative. I have been unable to find any statute which qualifies section 477, G. S. 1923, directing the county auditor to issue a certificate of election. Section 486, G. S. 1923 expressly provides that

"Whenever a contest is instituted under this act, the county auditor * * * shall refrain from issuing a certificate of election until the final determination of the question as to which of the parties is entitled to the certificate of election."

This section, however, is a part of chapter 162, Laws 1919, which relates exclusively to contests in legislative elections.

I am further of the opinion that the candidate declared elected by the county canvassing board upon receiving such certificate is entitled to qualify for the office notwithstanding the pendency of the contest. If this is correct, there is no occasion for the consideration of the further question as to whether the old commissioner holds over until his successor qualifies.

CHARLES E. PHILLIPS,
Assistant Attorney General.

December 27, 1926.

177

ELECTIONS—Candidates at primary—Residence required.

The County Attorney, Houston County.

It appears that one A, a legal voter of Minnesota, changed his legal residence from another county therein to your county on May 13, 1926. He desires to file as a candidate for nomination to a county office in your county, at the primary election to be held June 21, 1926. The last day for filing as such candidate will be June 1. He will not then have acquired a voting residence in your county but will have acquired such voting residence by June 21. Assuming that the foregoing facts with respect to voting residence appear upon the affidavit tendered for filing, you ask whether his affidavit may be accepted for filing on or prior to June 1, 1926, and his name placed on the primary ballot.

The statute (section 297, G. S. 1923) says that any party eligible and desirous of having his name placed upon the primary ballot shall file his affidavit stating his residence, that he is a qualified voter in the subdivision where he seeks a nomination, etc.

In Ekburg vs. Jensen, 205 N. W. 702, having under consideration the sufficiency of a general election contest notice which did not state that the contestant was a voter, but did state that he had been a successful candidate for the nomination at the preceding primary, the court held the notice to be sufficient. Referring to section 297, G. S. 1923, the court said:

> "That law provides that any party eligible desiring to have his name placed upon the primary ballot shall file his affidavit stating his residence and that he is a qualified voter in the subdivision where he seeks a nomination, etc. In this notice (of contest) the direct allegation that he was a voter is not made, but it states facts from which there arises, by reasonable and necessary implication, the assertion that he was a voter. To say that he was a candidate at the regular election, in view of the necessary affidavit incident to the primary, includes the assertion that he was a voter. The fact that he was a candidate surviving the primary election under the statute implies that he was a voter."

Under the statute as it reads, and in view of the language used in the above decision, it would seem that your inquiry might properly be answered in the negative, without further consideration. But the proper answer may depend upon legal principles of a broader application.

Section 306, G. S. 1923 (as amended by chapter 420, page 693, Laws 1925), provides that:

> "Every person qualified as a voter may register therein and vote at such primary election."

This disposes of any question of the right of your applicant to vote at the primary, under the facts presented, but still leaves open the matter of his eligibility to become a candidate for the nomination.

Section 7 of article 7 of the constitution provides that:

> "Every person who by the provisions of this article shall be entitled to vote at any election shall be eligible to any office which now is, or hereafter shall be elective by the people in the district wherein he shall have resided thirty days previous to such election, except as otherwise provided in this constitution, or the constitution and laws of the United States."

This disposes of any question as to the right of your applicant to be elected to the office for the nomination to which he now seeks to become a primary candidate, assuming that his voting status and eligibility otherwise existing on June 21 continue the same until the general election.

But his eligibility to become a candidate for the nomination by primary on or prior to June 1, 1926, still remains in question.

It will be conceded that statutes may be made reasonably regulating political machinery in regard to nominations for public office, as to both voters and candidates. State vs. Scott, 99 Minn. 145; State vs. Moore, 87 Minn. 308; State vs. Erickson, 119 Minn. 152; State vs. Jensen, 86 Minn. 19; State vs. Johnson, 87 Minn. 221; State vs. Scott, 110 Minn. 461.

In State vs. Moore, supra, the claim was made that "every person who is eligible thereto has a right to be a candidate for an office * * *."

The court said: (pp. 310, 311)

> "The guaranty of the organic law refers to essential qualifications, and dispenses with any other test to hold office (as birth, education and the like) than the right to vote. It is not attempted therein to provide regulation for voting, nor the details of the candidacy of the aspirant. The right to vote and the right to hold office are declared to be co-ordinate. The methods by which these rights shall be protected and enforced are, of necessity, left to legislative action; but we shall readily assume that it is an inherent right of citizenship that only such a system of regulation be provided for as will be just and reasonable, and operate in its application to all voters and to candidates equally. That any system will accomplish absolute equality in all things cannot be expected."

It was held that the provisions in the primary election law which prohibit an unsuccessful candidate for nomination at the primary thereafter to obtain a place on the ballot at the general election by petition are valid and enforceable.

In State vs. Johnson, supra, referring to the constitutional provision quoted above, it is said:

"It is very clear that the election of nominees provided for in the primary law is not the election referred to in the constitution."

See also cases cited in 22 L. R. A. (n. s.) 1142, 1143, 1144. See also State vs. Flaherty (N. D. 1912) 136 N. W. 76, 41 L. R. A. (n. s.) 132, and cases cited in note, pp. 136, 137, 138, 139, 140.

In State vs. Erickson, supra, it was said that:

"Statutory regulations applicable only to a primary election, which might be repugnant to the constitution if extended to elections, are not necessarily invalid unless they are so onerous, unfair or oppressive as practically to defeat the fair right of an elector to vote or to be elected to office."

In State vs. Scott, supra, one issue squarely raised was with respect to the statements required by section 297 to appear in the affidavit, and the provisions of that section were held to be valid and constitutional.

A provision requiring a candidate to file an affidavit containing matters in substance as required by the Minnesota statute, was held to be valid in Winston vs. Moore, 244 Pa. 447.

See State ex rel. Olson vs. Erickson, 125 Minn. 238, 146 N. W. 364.

There seems to be nothing unjust or unreasonable in the statutory provision requiring the person desirous of having his name placed upon the primary ballot to state in his affidavit that he is a qualified voter in the subdivision where he seeks a nomination. Presumably the legislature meant what it said. It is also to be presumed that if the legislature had intended to base eligibility to become a primary candidate upon the status of the applicant as it may exist in the future on the day of the primary election, it would have done so by the use of apt language.

I see no good legal reason for holding that the legislature meant any more or less than is to be understood from the language used.

Your inquiry is accordingly answered in the negative.

You will, however, please note that the inquiry so answered contains the proviso that the situation presented appears from the affidavit. It is quite doubtful if the filing officer may refuse to accept a filing which is valid and complete on its face and duly tendered, on the ground that he has information tending to show that material statements made therein are false.

ALBERT F. PRATT,
Assistant Attorney General.

May 27, 1926.

178

ELECTIONS—Candidates—Withdrawal of.

The City Attorney.

You state that South St. Paul is a city of the fourth class operating under a home rule charter, and you ask whether persons who have heretofore filed as candidates for members of the council may now withdraw as such, in the absence of charter provision authorizing such action.

The rule with regard to general elections is that a person may withdraw his filing of candidacy at any time before the officer charged by law with the preparation of the ballots makes up the form of ballots to be used at the election. See opinion 269, 1918 Report. This opinion was not based upon any particular statutory provision, but upon the general proposition that a candidate for public office may withdraw at his pleasure, subject to the limitation that he cannot require the election officials to hold up their forms or to take steps which would obstruct the holding of the election in any way.

I see no reason why our interpretation of the law with reference to general elections should not be applicable to city elections in South St. Paul. Your charter being silent on the subject, you are advised that a candidate who has filed for member of the council may withdraw as such at some time prior to the making up of the ballots by filing an affidavit to that effect or by notifying the filing officer in writing of his intention so to do.

ROLLIN L. SMITH,
Assistant Attorney General.

March 24, 1925.

179

ELECTIONS—Cities and villages—Australian ballot system—Repeal of ordinance adopting.

Swanson & Swanson, Village Attorneys, Pillager, Minn.

You are advised that the council in a village which has adopted the Australian ballot system pursuant to chapter 315, Laws 1915, may rescind its former action, and thereby go back to its caucus method of nominating candidates and of voting, by adopting a resolution repealing the ordinance putting the Australian ballot system into effect. Such repealing resolution must be adopted at least thirty days before the election.

ROLLIN L. SMITH,
Assistant Attorney General.

February 27, 1925.

180

ELECTIONS—Corrupt Practices act—Fee office, limitation of expenditures.

To County Attorneys.

Under the Corrupt Practices Act, G. S. 1923, section 542, a candidate for the office of * * * court commissioner, which is not a salaried office but a fee office, may expend in his campaign for nomination and election not to exceed one-third of the compensation received by the predecessor of such candidate, if elected, during the first year of such predecessor's incumbency. Referring to the present time this amount would be one-third of the total fees received by the holder of the office during the first year of the current term.

CLIFFORD L. HILTON,
Attorney General.

May 20, 1926.

181

ELECTION—Primary—Submission of proposed city charter at.

The City Attorney, Minneapolis.

You call attention to section 36, article 4 of the state constitution, to section 1348, G. S. 1913, and to section 1349, G. S. 1913, and submit the following questions.

1. Does the term "election" as used in the above mentioned section of the constitution in the phrase "The next election thereafter," and in these statutes above referred to in the phrases: "At the next general election thereafter," and "No general city or village election," and "At the same time with the general election," mean and include a primary election, that is, does the term "primary election" mean an election as that term is used in the cases referred to?

You are advised that the term "election" as used in the various places referred to in the foregoing question does not mean or include a state primary election, and conversely, the term "primary election" does not mean an election as that term is used in the places referred to.

2. If the proposed charter is returned to the mayor within the six months period immediately preceding the primary election must the city council then cause the same to be submitted at such primary election; or must the council in such case cause the proposed charter to be submitted at a special election to be held within ninety days after the delivery thereof?

This question is answered in part by the answer to question 1. Since the term "election" as used in the various places referred to in question 1, does not include a primary election, the fact that the proposed charter was returned to the mayor within six months immediately preceding the primary, if such should be the case, would have no bearing on the obligation of the council under the statute to submit the proposed charter at a special election to be held within ninety days after the delivery of the draft of the charter. In such case, in order to comply with the statute the council must cause the proposed charter to be submitted at a special election to be held within ninety days after the delivery of the draft, notwithstanding the fact that there may be a state primary election within the next six months.

3. May the council submit the proposed charter at a special election to be held at the same time as the state primary election?

This question is answered in the affirmative.

4. If the proposed charter is submitted so as to be voted upon at the time of the state primary election, must it then be submitted only at a special election held at that time or may it be submitted at or as a part of the primary election?

If the proposed charter is submitted so as to be voted upon at the time of the state primary election, such submission must be in the form of a separate special election held at that time. The provisions of law in reference to the calling and holding of a special election to vote on the proposed charter should be carefully observed. Separate ballots and ballot boxes should be used. The election officials, though they may be the same for both elections, should treat the charter election as separate and distinct from the primary elections.

5. If the proposed charter be submitted at a special election held at the same time as the state primary election, would an affirmative vote of four-sevenths of those lawfully voting on the question of adoption be sufficient for ratification?

This question is answered in effect, by the answers to the preceding questions. Obviously, if the charter election is a special election, legally separate and distinct from the primary election, though held at the same time, the vote cast at the primary election would have no effect whatever on the charter election. The provision of the statute requiring a four-sevenths vote of those lawfully voting "at such election" would refer only to the special charter election. Hence the affirmative vote of four-sevenths of those lawfully voting on the question of adoption of the charter at such an election would be sufficient for ratification.

CHESTER S. WILSON,
Assistant Attorney General.

December 4, 1925.

182

ELECTIONS—Registration.

The City Clerk, Minneapolis.

You are advised that there is no law requiring a registered female voter who marries subsequent to her registration, and assumes the surname of her husband to re-register under such surname as a prerequisite to voting. Social custom and usage have resulted in a married woman assuming as her name the name of her husband with prefix "Mrs." There is no law preventing her from retaining her maiden name and voting under it if she so desires.

In order that the registration act may be effectively administered it might be well to secure an amendment thereof providing that a person may vote only under the name under which such person is registered, and that a female registered voter who subsequently marries shall again register under her husband's name with the prefix "Mrs." before voting. However, it is not within our province to recommend legislation in this respect. As matters stand, if a voter can demonstrate to the election board that he is registered, he is entitled to vote regardless of the name he happens to be known by at the time.

ROLLIN L. SMITH,
Assistant Attorney General.

December 31, 1925.

183

ELECTIONS—Registration—Permanent—Cities of first class.

The Corporation Counsel, St. Paul.

You call attention to the fact that under section 6 of chapter 305, Laws 1923, which is an act relating to registration in cities of the first class, the commissioner is required to prepare registration cards containing information concerning each applicant for registry, and also containing a record of voting. A duplicate registration list is provided for to be known as the

election register. This consists of copies of the original registration card. The record of voting contains a space in which the registrant may be recorded as having voted or not voted. It has the date of the election, and a column for remarks.

You further call attention to the fact that under the general election law, section 474, G. S. 1913, every clerk of election is required to keep a poll list containing one column headed "Number," one headed "Residence," one headed "Names of Voters" and one column headed "Remarks." That each voter is given a number and under the column headed "Remarks," opposite the name of each person not registered is entered words "Not registered." The information required to be stated on the poll list is also required to be stated on the record of voting contained on the duplicate registration card.

You ask in view of this whether it is necessary to prepare and use poll lists at general elections in cities of the first class.

In my opinion, your inquiry is properly answered in the negative. As we construe the Permanent Registration Act the legislature intended to provide a complete scheme for the registration of voters in such cities, and as a part of that comprehensive plan it provided for a record of voting. I do not see what useful purposes the keeping of the poll list separate and apart from the record of voting on the registration card would serve. It strikes me as a duplication of work. I do not think the legislature intended this. You are, therefore advised that it is not necessary to keep poll lists referred to in section 474, G. S. 1913, at general elections in cities of the first class.

ROLLIN L. SMITH,
Assistant Attorney General.

February 21, 1925.

184

ELECTIONS—Registration days—Under chapter 375, Laws 1925.

James T. Spillane, City Attorney.

You state that section 9 of the charter provides that—

> "All general laws of the state of Minnesota relating to elections and the preliminaries thereto, shall, so far as applicable, except as herein otherwise provided, apply to and govern all elections hereunder."

You then call attention to section 6 of chapter 13, Laws 1921, which provides that the primary election shall constitute the first registration date and that the second registration date shall be held one week after the primary election. You then inquire whether chapter 375, Laws 1925, voids section 6 of said chapter 13.

As I construe chapter 375, it was the purpose of the legislature to provide for permanent registration in cities having more than 10,000 inhabitants and less than 50,000 inhabitants, as provided in and by chapter 305, Laws 1923. It would, therefore, seem that under the last mentioned chapter as amended by chapter 375, permanent registration is provided in the city of Rochester for all elections specified in said chapter 305. This being so, it is my opinion that the effect of section 9 of your charter is to make such statutes appli-

cable to your charter elections. Therefore, there would be no occasion for holding registration days as provided under chapter 13. It follows that your inquiry must be answered in the affirmative.

CHARLES E. PHILLIPS,
Assistant Attorney General.

July 18, 1925.

185

ELECTIONS—Returns—Sewing and sealing of envelopes.

Secretary of State.

You request a construction of the provisions of G. S. 1923, section 466, as amended by chapter 126, Laws 1925, relating to the sewing and sealing of envelopes containing election returns. The provision in question reads as follows:

> "Before separating, the judges shall include one set of such returns in each of two envelopes, one of which envelopes shall then be sewed by drawing twice through it and the return therein a substantial twine, tying the ends thereof together and then sealing said envelopes in three places with wax and stamp, furnished by the county auditor, one of which places shall be over the knot in said twine, then indorse said envelope in the following form: 'Election returns of the election district of . . . in the county of . . .' and direct one of such envelopes to the auditor and the other to the proper town, village, or city clerk."

You ask whether, under this provision, it is the duty of the judges to sew and seal both envelopes, or only one of them. If only one envelope is to be sealed, which one is it, the one to be delivered to the county auditor, or the one to be delivered to the clerk of the municipality?

It is the duty of the judges to sew and seal both envelopes in the same manner. The statute should be construed as if read "each of which envelopes shall then be sewed," etc., instead of, "one of which envelopes shall then be sewed." Unquestionably such was the intention of the legislature when this provision was adopted. The word "one" must have been used instead of "each" through inadvertence. Unless the statute be so construed it would be impossible for the judges to tell which envelope was to be sewed and sealed. Both sets of returns are official, and it is important that the same precautions should be taken with both of them to secure them against tampering. Such was undoubtedly the intention of the legislature, and the statute should, therefore, be construed as above stated.

CHESTER S. WILSON,
Assistant Attorney General.

April 1, 1926.

186

ELECTION—Voter who takes oath must be permitted to vote.

C. G. Anderson, Village Attorney.

You inquire whether the judges may refuse to permit a person to vote after challenge when he has answered under oath in such manner as to show him to be a qualified elector, the judges being of the opinion that he has answered falsely, and in fact, is not a legal voter.

No. The judges are not triers of any issues of fact. If a person appearing for the purpose of voting takes the oath and answers questions submitted thereunder in such manner as to show him to be a qualified voter, the judges may not go further in the matter but must permit him to vote. The only remedy is to prosecute him for perjury if he answers falsely.

CHARLES E. PHILLIPS,
Assistant Attorney General.

December 4, 1926.

187

GAME AND FISH—Fur farms—Fencing of unmeandered lake.

Wm. M. Wood, Esq., County Attorney, Long Prairie.

It appears that one S owns three forties partly in an unmeandered lake, which lake also covers some adjoining land which he does not own or control. He wants to go into the muskrat farming business and inquires if he may lawfully fence his land so as to keep his rats from getting away.

This seems to be mostly a private inquiry, but if his lawyer will consult the following cases:

L. Realty Co. vs. Johnson, 92 Minn. 363; 100 N. W. 94, 104 Am. St. Rep. 677, 66 L. R. A. 439;

Lamprey vs. Danz, 86 Minn. 317, 90 N. W. 578;

Whittacre vs. Stangvick, 100 Minn. 386; and cases cited therein, he should find that if the lake is not meandered he may lawfully fence on the lines of the land which he owns.

ALBERT F. PRATT,
Assistant Attorney General.

April 19, 1926.

188

GAME AND FISH—Licenses—Hunting—Trapping unprotected fur bearing animals.

Commissioner of Game and Fish.

You state:

"Section 5515, G. S. 1923, as amended by chapter 380, reads as follows:

" 'No person shall hunt, pursue, or kill any wild quadruped, fowl or bird for which a closed season is provided by this chapter, or take with traps or other devices, any fur bearing animals, except wolves, or engage in hunting or trapping or fishing except as herein provided, without first having procured a license so to do, and then only during the respective periods of the year when it shall be lawful, * * * .'

"Fur bearing animals such as bear, snowshoe rabbits, cottontail rabbits and jack rabbits are also unprotected as well as mink.

"Question: Is it necessary to have a license to take any or all of these unprotected fur bearing animals and if so, please advise the kind of license, i. e., small game, big game or trapping."

Prior to the 1925 amendments varying hare or snowshoe rabbits were protected, and their taking then required a license to take fur bearing animals. Letter of date November 30, 1923.

Under date of November 10, 1924, you were advised that as the law then stood a big game license was probably required for the taking of bear. Bear were then protected. So were mink.

Now varying hare or snowshoe rabbit and mink may be taken either in the day time or at night and in any manner except that poison may not be used. Section 5546, G. S. 1923, as amended by chapter 380 (p. 498) Laws 1925.

Mink may also be taken, bought, sold and possessed at any time. Section 5542, G. S. 1923, as amended by chapter 380 (p. 496) Laws 1925.

Steel traps may be used for the purpose of taking or catching bear only upon permission of the game and fish commissioner to do so. Rules and regulations for the safe use thereof shall be prescribed by the commissioner and any one setting them so as to become a danger to persons walking in the woods shall be guilty of a gross misdemeanor. Section 5541, G. S. 1923, as amended by chapter 380 (p. 496) Laws 1925.

Wild animals, whether protected by law or not, may when destroying or interfering with the breeding or propagation of protected wild animals, or when injuring or damaging private or public property be destroyed or killed under such rules and regulations as the commissioner may prescribe. Section 5639, G. S. 1923, as amended by chapter 380 (p. 510) Laws 1925.

Bear may be taken and possessed at any time. Section 5541, G. S. 1923, as amended by chapter 380 (p. 496), Laws 1925.

Section 5514, G. S. 1923, as amended by chapter 380 (p. 492), Laws 1923, covers hunting and trapping on lands owned or leased and occupied by the hunter or trapper as a permanent abode. In what is said hereinafter this will be understood as an exception. Likewise the exception in section 5639 supra.

Section 5498, G. S. 1923, as amended by chapter 380 (p. 489) Laws 1925, provides that "traps for the purpose of taking fur bearing animals protected by law may be used as herein provided."

Under the last paragraph of section 5515, G. S. 1923, as amended by chapter 380 (p. 493) Laws 1925, no person may take any protected or unprotected wild quadruped, without a license, unless he is a bona fide resident of the state.

What is said hereinafter will be understood to apply only to bona fide residents of the state.

Section 5522, G. S. 1923, as amended by chapter 380 (p. 493) Laws 1925, specified a license fee of $1.00 for "taking fur bearing animals" and a license fee of $1.00 for "hunting small game" and a license fee of $1.00 for "hunting big game."

What effect, if any, the legislature really intended to be given, in connection with license requirements, to the amendments of 1925, removing the prior existing protection on varying hare, bear and mink, is difficult to determine.

But it is possible to construe the various contradictory and indefinite provisions of the act so as to reconcile and give effect to all of them, to some extent at least.

Section 5515, G. S. 1923, as amended supra, and so far as pertinent to your inquiry may be divided into three parts, and may be read as follows:

1. No person shall hunt, pursue or kill any wild quadruped for which a closed season is provided by this chapter, without first having procured a license so to do.

2. No person shall take with traps or other (like) devices, any fur bearing animals (protected or unprotected) except wolves, without first having procured a license so to do.

3. No person shall engage in hunting or trapping except as herein provided, without first having procured a license so to do.

Section 5497, G. S. 1923, which remains unamended, provides that no person shall pursue, take, wound or kill in any manner, number, or quantity, any wild animals protected by law, except as permitted in this act.

Section 5498, G. S. 1923, as amended by chapter 380 (p. 489) Laws 1925, provides that "birds and quadrupeds protected by law shall be taken only in the daytime with a gun * * *."

Reading the whole together, and subject to the exceptions above noted, my conclusions are:

1. No license is required to hunt, pursue or kill bear, varying hare or snowshoe rabbits, cottontail rabbits, jack rabbits, or mink, otherwise than by traps or other devices.

2. A license for "taking fur bearing animals" (trapping license) is required for taking varying hare or snowshoe rabbits, cottontail rabbits, jack rabbits, mink, bear, or any other unprotected fur bearing animals, except wolves, with traps or other devices.

The distinction is between "any wild quadruped for which a closed season is provided," which limits the application of (1) above, and "take with traps or other devices, any fur bearing animals, except wolves," in (2) above.

And there may be a practical reason for the distinction. The person hunting with a gun is presumed to know what he shoots at. But if he sets a trap for mink, he may catch a muskrat, which is protected; or for rabbits, he may catch a skunk, which is protected.

That the legislature was apparently attempting to make some such distinction seems quite clear from the legislative history of section 5515.

As originally section 21 of chapter 400, Laws 1919, that section, so far as pertinent, read as follows:

"No person shall hunt, pursue or kill with a gun, any wild quadruped * * * for which a closed season is provided by this chapter, or take with traps or other devices, any fur bearing animals, for which a closed season is provided by this chapter, or engage in hunting or trapping, except as herein provided, without first having procured a license so to do."

By chapter 426, Laws 1923, the section was amended by striking out "with a gun," by striking out "for which a closed season is provided by this chapter," and by inserting "except wolves," after "any fur bearing animals."

The 1925 act did not change that portion of the section.

It will be noted that under the 1919 act a license was required to take with a gun any protected wild quadruped, and to take with traps or other devices, any protected fur bearing animals.

It seems quite clear that when the 1923 legislature struck out "with a gun" from the first provision, and struck out "for which a closed season is provided by this chapter" from the second provision, it intended to make a class distinction, and to provide that a license should be required to take protected wild quadrupeds, howsoever to be taken, but that a license should not be required to take unprotected fur bearing animals, unless taken with traps or other like devices. And wolves were excepted altogether from the provision which required licenses.

It is true that section 28 of chapter 400, Laws 1919, provided for a license fee "for hunting game birds," another for "hunting quadrupeds," and another for "trapping fur bearing animals," which was amended by chapter 347, Laws 1921, and chapter 426, Laws 1923, to provide a license fee for "hunting small game" and another for "hunting big game" and another for "taking fur bearing animals." So that there is now, in terms, no such thing as a "trapping" license, but the word "taking" covers taking "by trapping or in any other manner."

Section 28, however, relates only to kinds of licenses and the amounts of the respective fees when licenses are required, while section 21 (5515) is general and states when licenses are required and when not, which, of course, governs.

The license required for taking the unprotected fur bearing animals, except wolves, above referred to, by traps or other devices, is the license for "taking fur bearing animals," and is the same as the license required for taking protected fur bearing animals (except beaver) by trapping or otherwise. (Note—See 1927 Amendments.)

ALBERT F. PRATT,
Assistant Attorney General.

August 25, 1925.

189

GAME AND FISH—Licenses—Small game—Issuance within one year after conviction of violation of federal migratory bird law.

Commissioner of Game and Fish.

You state that certain parties (holding Minnesota 1924 small game licenses) were prosecuted and convicted in federal court in May, 1925, of violations of the federal migratory bird act, committed in Minnesota during the open season of 1924.

Referring to section 32, chapter 400, Laws 1919, being section 5530, G. S. 1923, you inquire if such persons are eligible to receive Minnesota small game licenses for the open season of 1925.

Section 5530, G. S. 1923, so far as pertinent, reads as follows:

> "Upon conviction of any person for any violation under any license issued to such person, such license shall immediately become null and void and no license shall be issued to any such person for a period of one year thereafter."

The principal question is whether or not the convictions were for "violations under any (Minnesota) license issued to such persons."

Licenses contain the implied conditions that the holder shall hunt, take, pursue and kill only in accordance with the provisions of the state law. Presumably the legislature referred to those conditions in using the word "under."

Generally speaking, under most laws, a conviction which will bar the subsequent issuance of a state license within the time limited by state law must be a conviction in a state court upon a charge of violation of a state law conditioned upon obedience to which the license is issued. The duty of enforcing the "Migratory Bird Treaty Act" is imposed upon federal authorities and the federal courts. Act, July 3, 1918, chapter 128, section 5; section 8837e, U. S. Comp. Stat. 1919, Supp. Vol. 2. Concurrent power in the states to enforce the act does not appear to exist.

Section 5539, G. S. 1923, like the state prohibition law, might well have specifically authorized revocation of licenses upon conviction for violation of federal laws or regulations, but it did not.

The only reference in the state law to the federal law, so far as I can determine, is in section 5534, G. S. 1923, which provides that "migratory game birds may be taken each day only during the hours permitted by federal law."

That provision is doubtless one of the conditions "under" which the license was issued, and if the convictions referred to were upon charges of violations of the federal law relating to the hours for taking, such convictions would seem to be convictions "under the license," that is, for a violation of the conditions under which the licenses were issued, calling for their revocation and non-issuance for a year thereafter. If such is the situation the inquiry is answered in the negative.

ALBERT F. PRATT,
Assistant Attorney General.

July 10, 1925.

190

GAME AND FISH—Search of aeroplane.

The Superintendent, Superior State Game Refuge, Winton.

You inquire if a game warden has authority to search an aeroplane without a search warrant.

Answer, that depends upon the specific facts of each case.

Section 125, chapter 400, Laws 1919, now section 5631, G. S. 1923, as amended by chapter 380 (p. 508), Laws 1925, provides that:

> "The state game and fish commissioner, game refuge patrolmen and game wardens are hereby authorized and empowered * * * with or without a warrant, to open, enter and examine all buildings, camps, vessels, boats, wagons, automobiles, or other vehicles, cars, stages, tents, suitcases, valises, packages, crates, boxes, and other receptacles and places where they have reason to believe the (that) wild animals, taken or held in violation of this chapter, are to be found. Wilful hindering, obstructing, interferring or refusing such inspection shall constitute a misdemeanor."

An aeroplane is either a "vehicle" or a "place" or both, within the meaning of this law. The courts have so held under similar phraseology in other laws.

Whether or not there exists the right to "open, enter and examine" an aeroplane depends on whether or not the investigating commissioner, game refuge patrolman or game warden (as the case may be) has reason to believe that wild animals ("all living creatures not human, wild by nature, endowed with sensation and the power of voluntary motion, and includes quadrupeds or mammals, birds and fish," section 5640 [19] G. S. 1923 taken or held in violation of the game and fish laws are to be found therein.

ALBERT F. PRATT,
Assistant Attorney General.

July 6, 1926.

191

HEALTH—Power of chairman of town board to quarantine without services of physician.

J. H. Mark, County Attorney.

You state that an epidemic of scarlet fever exists in some of the rural sections of your county, and inquire whether the chairman of the town board may quarantine without the services of a physician, or must an inspection or diagnosis be made by a physician first.

See rules adopted by the State Board of Health relating to the control of communicable diseases, and section 2 thereof.

Under the law and these rules, all known or suspected cases of communicable diseases are required to be reported to the chairman of the board of health. The chairman of a board of supervisors is chairman of the town board of health. The duty is imposed upon the chairman of the town board of health to enforce proper quarantine mesures. If the chairman is sure that a communicable disease exists upon the premises, it is his duty to forthwith quarantine. If in doubt, he should call upon the town health officer to make an investigation, if there exists a town health officer. Unless the chairman of the town board of health is sure of the nature and character of the disease, it is advisable to call the health officer.

CHARLES E. PHILLIPS,
Assistant Attorney General.

October 7, 1926.

192

HIGHWAYS—Appropriations for town roads and bridges—May be used for graveling.

W. O. Wiederhoeft, Chairman, Town Board.

You state:

"If the township votes for money at the annual election, say one-half mill for town fund and 3½ mills for road and bridge fund, then vote to do some road graveling but vote no money for this purpose, could they use the 3½ mills road and bridge fund for road graveling purposes or must they have a graveling fund and vote money for that purpose?"

The town board is not bound by the vote at the annual meeting "to do some road graveling." Such a vote is simply advisory.

The annual meeting (and the town board later for that matter, and within the maximum limit fixed by law) votes the money for the "road and bridge fund." The town board determines how the money shall be spent, and may use some of it for graveling or may not, as the board deems advisable.

If the board decides to do some graveling on roads of which it has charge, the money therefor comes out of the road and bridge fund. There is no such thing as a "graveling fund."

You will note that under section 6 of chapter 439, Laws 1923, the town board may appropriate money from the town road and bridge fund to aid in the construction or improvement within the town of any county road or any road which has been designated as a state aid road, the money so appropriated being paid into the county road and bridge fund and used only for the purpose designated by the town board at the time it makes the appropriation. This in addition to its powers to construct and improve town roads. That law likely was passed so town money, county money and state aid money might be combined and handled in larger contracts.

ALBERT F. PRATT,
Assistant Attorney General.

March 18, 1925.

193

HIGHWAYS—Bids—Necessity of advertising for by counties and town.

Minnesota Highway Department.

You call attention to opinion given the Public Examiner on June 25, 1921, relating to the question of the necessity of a county's advertising for bids on road work which is to be performed by day labor.

As the opinion is written, it may be construed in either of two ways: (1) That counties and towns must advertise for bids on every job costing more than $500.00, whether it is to be done by contract or by day labor; or (2) That the statement made in the opinion has reference to a contract described in it involving more than $500.00, and that the application of the statement should be limited to cases of contract. The Public Examiner adopted the former construction, and he has not since been advised by this department to the contrary. In order to clear up the situation it is well at this time to restate our views on the statutes relating to the calling for bids on county and town road work.

It may first be mentioned that G. S. 1923, section 991, (G. S. 1913, section 1091) merely provides, so far as pertinent here, that no contract for the construction or repair of roads or bridges the estimated cost of which exceeds $500.00 shall be made by any county of the class therein mentioned without first advertising for bids. It contains a proviso that contracts for repairs may be made in emergencies without advertising for bids. This section does not seem to conflict with those to be mentioned hereafter; but if it does, the latter, being subsequently enacted, will control.

G. S. 1923, section 2563, (G. S. 1913, section 2508, as amended) relates to state aid roads. It first provides that if the estimated cost of the work

does not exceed $500.00 the county board shall when necessary cause surveys to be made

> "and shall thereupon receive bids for all or part of said work and let the contract to the lowest responsible bidder, or may cause the same to be done by labor employed therefor."

It further provides that if the estimated cost exceeds $500.00 the county shall cause surveys, plans and specifications to be made, shall submit them to the commissioner of highways for approval, and when they are approved shall proceed to do the work by contract or by labor employed therefor as the county board and the commissioner of highways may direct. The provisions of this section are peculiar and somewhat contradictory. The meaning to be extracted from it is: On work the estimated cost of which does not exceed $500.00, the county board may cause a survey to be made when it deems a survey necessary, and may, whether a survey is made or not, call for bids for the doing of the work and let a contract, or it may without calling for bids cause the work to be done by day labor. On work the estimated cost of which exceeds $500.00, the county board must prepare plans and have them approved by the commissioner of highways and may then, with the approval of the commissioner, do the work either by contract or by day labor; and if it be done by contract must, in view of the provisions of the section to be next mentioned, call for bids. The only distinction here made between work the estimated cost of which is less than $500.00, and work, the estimated cost of which is more than $500.00, is that in the former case the county board may or may not prepare plans as it chooses, while in the latter case it must prepare plans and have them approved by the commissioner. The reason for the distinction is to be discerned in the propriety of permitting counties to make small improvements without the necessity of securing the approval of the commissioner of highways, while in the making of the larger improvements it is proper, the roads being state aid roads and state moneys being appropriated thereto, that the commissioner of highways should have control of the plan and the execution of the improvement. It is also true that as to state aid roads the county board must, if it chooses to let a contract, advertise for bids whatever the estimated cost of the work.

G. S. 1923, section 2595, subdivision 2, (G. S. 1913, section 2494, subdivision 2, as amended) relates only to contracts let by counties and towns for the improvement of any road. This subdivision provides that no county or town shall contract for the construction or improvement of any road when the contract price exceeds $500.00 unless plans and specifications have been prepared and filed as required in subdivision 1 of the same section, nor until bids have been called for as therein provided. The provisions of subdivision 1 of the same section relating to bridges are, as to counties and towns, really covered by subdivision 2, for the reason that by G. S. 1923, section 2543, the word "road" is defined to include all bridges which form a part of the same.

It seems clear that section 2595 relates only to work which is done by contract and has no application to work done by day labor.

As corollaries to the conclusions set forth above, it may be said that contracts for construction in excess of $500.00 may not be made under the guise of day labor work and without calling for bids. If, for instance, a road outfit is hired at $100.00 a day for any period longer than five days, or for

the completion of the work where the completion will require more than five days (so that the compensation to be paid exceeds $500.00), such an arrangement would constitute a contract under which more than $500.00 is to be paid. It should also be borne in mind that if in the doing of work by day labor it becomes necessary to purchase materials, any purchase involving a consideration of more than $500.00 must be made upon bids. It is my view that the provision of section 2595, subdivision 2, applies not only to general construction contracts but also to any purchase of material and any employment of service in road construction, whether done by day labor or otherwise. Such contracts are as to counties also covered by section 991. But as to towns, they are controlled exclusively by section 2595, for, while section 1096 requires that bids shall be called for on all contracts made by towns within the class to which that section applies, it excepts from that provision contracts which are to be paid for out of road taxes.

There is no specific provision authorizing the doing of road work by towns by day labor as there is authorizing counties to do state aid road work in that manner. It is nevertheless my opinion that the town board has such authority. Section 2571 gives the town board general care and supervision of all town roads, and such care and supervision of county roads as is prescribed by statute. It requires that the town board shall procure machinery, implements, tools, stone, gravel, and other material required for the construction and repair of such roads. Towns in counties having a population of 150,000 or more are excepted from this statute. Section 2575 provides for the appointment of road overseers, whose duty it is to supervise the construction of all town roads and the maintenance of all town and county roads. This general grant of power indicates a legislative intention that the town board may purchase all materials and equipment, and may employ labor and equipment necessary to the discharge of the duty imposed upon it by statute to construct and improve these roads. This would necessarily include the power to employ labor.

G. A. YOUNGQUIST,
Assistant Attorney General.

April 7, 1925.

194

HIGHWAYS—Bridge—Authority of town board to construct.

Joseph L. Hilgers, County Attorney.

You state that the town board of Spring Lake township is contemplating the erection of a bridge over a platted portion of the main land of a meandered lake to an island therein; that the island is also platted under the provisions of section 8236, G. S. 1923; that such bridge will be several hundred feet long and will extend from a road on the main land to a road upon the island as shown by such platting; that the island contains about fifteen acres of land, and that the lake is about three miles long and two miles wide, and is used for boating, etc.

You inquire as to the authority of the town board to construct such bridge.

You are advised that it is the opinion of this department that the county board has no authority to construct the same. See Commissioner of Highways vs. Ludwig, 151 Mich. 498; 115 N. W. 419.

You also inquire whether the owners of land along said lake may construct such bridge, and after the completion thereof may dedicate the bridge to the public and be thereby relieved from responsibility for accidents on said bridge.

The only statute covering the general situation that we have been able to find is subdivision 2 of section 2584, G. S. 1923. This, however, is not applicable to the particular premises in view of the fact that the island does not contain forty or more acres of land. In the absence of a statute covering the matter, I am inclined to the opinion that your second inquiry must be answered in the negative.

CHARLES E. PHILLIPS,
Assistant Attorney General.

September 23, 1926.

195

HIGHWAYS—Completing a road in an adjacent township.

The County Attorney, Clearwater County.

You state that it is planned to expend some of the money of an unorganized township in completing a road in an adjacent, organized township, which will benefit the inhabitants of the unorganized town. The organized township is out of funds and unable to pay for the work. The work is being done on an established county road. You inquire whether or not this would be a legal expenditure of the funds of the unorganized township.

Your attention is called to section 2578, G. S. 1923, which provides:

> "The council of any village, borough or of any city of the fourth class or the town board of any town, may appropriate and expend such reasonable sums as it may deem proper to assist in the improvement and maintenance of roads lying beyond its boundaries and leading into it, and of ferries and bridges thereon whether they are within or without the county in which it is situated. * * *"

The only limitation this department has placed upon this provision is that expenditure of money for such purposes may not be made on roads outside of the state nor in a foreign country. Your inquiry is answered in the affirmative.

VICTOR E. ANDERSON,
Assistant Attorney General.

October 8, 1925.

196

HIGHWAYS—Construction by county of a paved roadway along trunk highway in cities.

Lucius A. Smith, County Attorney.

You inquire whether, under the provisions of G. S. 1923, section 2557, a county can "enter into an agreement with the commissioner of highways

for the construction of a paved roadway of greater width than would be necessary to accommodate the normal trunk highway traffic on a trunk highway, within a city of either the third or the fourth class?"

As to cities of the third class the county has no such power. The words, "upon any trunk highway within its boundaries," may perhaps be said to indicate an intent on the part of the legislature to authorize a county to thus give financial aid to the construction of the extra width on a street in a city upon which a trunk highway has been located. This language must, however, be considered in connection with other statutes relating to the powers and duties of counties with reference to the improvement of highways. It has been the rule for many years past that the county has neither power nor authority to expend its money in the improvement of the streets of cities of this class. I have found no statute which empowers a county to expend moneys on the streets of any city of the third class under any circumstances, nor any statute which authorizes such improvement of a street in a city of the fourth class that has not been designated as a state aid road. The fact that the expenditure has some relation to a trunk highway has no bearing, for under the constitution and the statute the burden of constructing and maintaining trunk highways is laid upon the state; and the authority to municipal subdivisions to co-operate with the commissioner of highways, as indicated in the section cited, was apparently given them that they might, when they so desired, secure for their own convenience and their own needs improvements beyond those found necessary for trunk highway purposes. It is more likely that what the legislature intended by this section was to extend to the various political subdivisions mentioned the right to expend moneys in that manner only where the street or highway involved was one which, prior to the location of the trunk highway and independently of the presence of the trunk highway, the municipality (including counties and towns within that term) was obliged to construct and maintain.

The subsequent provisions of the section, giving cities and villages the right to construct portions of the street not included in the trunk highway system, independently of any contract with the commissioner of highways, tends to support this view, as does also the second subdivision of the section, giving cities and villages the right to maintain the extra widths or to pay the commissioner for maintaining them.

Your inquiry must be answered in the negative in so far as it relates to cities of the third class.

What has been said applies with equal force to cities of the fourth class, except as the situation may have been altered by the designation of a street within a city of the fourth class as a state aid road, under the provisions of section 2560, subdivision 4. In case a trunk highway is located upon a street in a city of the fourth class which has been designated as a state aid road, the county may act under section 2557 in improving such part of a street as lies outside the normal trunk highway width. Such expenditure would be controlled by the statutory provisions relating to the improvement by counties of state aid roads so far as those provisions are applicable.

G. A. YOUNGQUIST,
Assistant Attorney General.

August 17, 1925.

197

HIGHWAYS—Culverts for abutting owners.

The County Attorney, Lac Qui Parle County.

You inquire whether G. S. 1923, section 2612, limits the number of culverts to one for each abutting owner or to one for each approach to abutting lands. While it speaks of the installation of culverts rendered necessary for a suitable approach upon highways over driveways from abutting lands, it is my opinion that the language of the statute requiring the town to install one substantial culvert for an abutting owner limits the duty of the town to the installation of a single culvert for each owner regardless of the number of driveways he may have to a single body of land. If, however, he should own several separate tracts along the road, or should two tracts be separated by the road, he would, in my opinion, be entitled to the installation of a culvert providing for a driveway to each tract.

Also you inquire whether the town board is required to make a fill for a driveway in a place where no culvert is necessary. Perhaps the section cited would not require such a fill, if it be narrowly construed. However, I believe it to have been the intention of the legislature to provide one driveway for each abutting owner and to impose upon the town the duty of building such driveway where the grading of a highway makes it necessary. Such a construction conforms to the spirit of the law, though it may not come within a literal reading of the language employed.

G. A. YOUNGQUIST,
Assistant Attorney General.

June 22, 1926.

198

HIGHWAYS—Establishment of a county road as connecting link.

John B. Baker, County Attorney.

You state that trunk highway No. 12 runs east and west through Lake Preston township in Renville county about a mile north of the south line of the township (which is also the south line of the county), that a county road extends northward from the trunk highway through and beyond the township, and that a county road of Sibley county runs northward to the south line of the township and in line with the county road in Renville county, leaving a gap of about a mile between the north end of the Sibley county road and the intersection of the Renville county road with the trunk highway.

Upon this state of facts you inquire whether the county board of Renville county has jurisdiction over the establishment of a county road to bridge the gap, and refer to G. S. 1923, section 2582, subdivision 4.

The statute mentioned gives the county board jurisdiction over the establishment of a road

> "wholly within a town, which constitutes a direct connecting link with two or more roads in the towns adjoining the town in which said road is * * * to be located."

The proposed road will constitute a direct connecting link between the Sibley county road on the one hand and the Renville county road and the trunk highway on the other. All of these roads run through towns adjoining the town in which the road is proposed to be established.

In the case of the two county roads, the proposed road joins together two roads running in the same direction; and in the case of the Sibley county road and the trunk highway, it constitutes in effect a cross road connecting the two. In re Appeal of Ondrachek, 154 Minn. 178, it was held that the county board had jurisdiction over the establishment of a road wholly within a town which connected two existing parallel roads running through and beyond the town. (See also Nelson vs. Nicollet county, 154 Minn. 358.) Your question should be answered in the affirmative, the fact that one of the adjoining towns lies in another county does not change the situation.

G. A. YOUNGQUIST,
Assistant Attorney General.

December 3, 1925.

199

HIGHWAYS—Establishment of part of road petitioned for.

Theodor S. Slen, County Attorney.

You state:

> "A petition was presented to the town board asking for the establishment of a town road over a course one and one-half miles long. When the day of hearing came it was found by the town board that it preferred to establish the road over the course only a distance of a mile, leaving out half a mile at one end of the course petitioned for.
>
> "Now the board wonders whether it has authority to establish the road over the one mile of the course on the petition presented. The mile that the board is in favor of establishing connects at each end with a traveled public highway."

It is my opinion that the town board has no such authority. G. S. 1923, section 2583, subdivision 1, requires that the petition shall set forth the "point of beginning, general course and termination."

> "The board in acting on such petition may exercise a reasonable discretion in varying the route proposed as the public interests may require, provided they adhere to the point of beginning, the general course and the termination." State vs. Thompson, 46 Minn. 302, 48 N. W. 1111.
>
> Johnson vs. Town of Chisago Lake, 122 Minn. 134, 136.

In the Thompson case it is held that by reason of the use in the statute of the term "general course" the town board may make "such reasonable variations from it, between the termini, as public interests require."

In the case of Dahlin vs. Town Board of Eddy, 125 Minn. 359, cited by you, the court quotes with approval Elliott on Roads and Streets, section 380, to the effect that

> "the order laying out the road must conform with substantial accuracy to the description contained in the petition."

The conclusion reached is that the petition must be substantially followed at least as to point of beginning and point of ending, and that the town board has no authority to end the road at a point half a mile away from the termination petitioned for.

G. A. YOUNGQUIST,
Assistant Attorney General.

May 24, 1926.

200

HIGHWAYS—Establishment on line between more than two townships.

The County Attorney, Wadena County.

You state:

> "Section 2587, G. S. 1923, provides for the laying out of a highway on the line between two townships. There is no provision, however, for the laying out of a highway on the line between more than two townships; as, for instance, on the line between four townships. If the petitioners desire to lay out a continuous highway extending on the line between four townships would they have to proceed by two petitions or under section 2582, subdivision 4, before the county board? Or could they proceed by one petition and have the town boards of the four townships, or a majority thereof, meet and dispose of the road?"

There is no question but that a petition under subdivision 4, section 2582, providing for the establishment of a road by county boards would furnish the necessary machinery for the laying out of a continuous highway between four townships. In view of this it is at least doubtful whether section 2587 **supra** need be invoked in proceedings for the construction of a road lying between more than **two townships.** The section referred to might be employed by treating the improvement as two highways, when proceedings could be carried on between two townships concerned with a part and two others concerned with the remaining portion. Either course is open, but the former is recommended.

VICTOR E. ANDERSON,
Assistant Attorney General.

July 8, 1926.

201

HIGHWAYS—Grade crossings established before present law enacted.

Railroad and Warehouse Commission.

You inquire whether or not chapter 134, Laws 1923, is applicable where the road in question was laid out and constructed prior to the passage of said law.

Chapter 134, **supra,** provides in part:

> "Provided, that no highway **shall hereafter be laid** out over any railroad so as to cross the same at grade until such crossing has been approved by the Railroad and Warehouse Commission."

The road in question was laid out and established by the town board in the year 1922 and crosses the railway right-of-way of the N. P. R. Co., but that up to the present time no crossing has been constructed.

It seems clear that the above quoted provision of the law has no application to a road such as was established and laid out by the town board in question since that road was laid out and established in the year 1922 and the law above referred to was not approved until April 3, 1923. Therefore, the approval of your commission is not required to compel the construction of the grade crossing in question.

VICTOR E. ANDERSON,
Assistant Attorney General.

September 11, 1926.

202

HIGHWAYS—Petition—Acting on town road.

Chairman, Board of Supervisors.

You state that a road peition was filed with the town board about twenty months ago; that notices were served and other proceedings, including a hearing, were had according to law. At the time of the hearing no action was taken in the way of granting or rejecting the petition, and you inquire as to whether the town board may now legally act upon this petition, or whether a new hearing should be had.

It is my opinion that the town board can at this time act upon the petition. I am assuming, of course, that all of the preliminary and jurisdictional requirements of the law have been complied with.

WILLIAM H. GURNEE,
Assistant Attorney General.

April 30, 1925.

203

HIGHWAYS—Sand, gravel and soil may be used on roads in places not adjoining farm from which taken.

Minnesota Highway Department.

You state that there is an old road four rods in width, of which 33 feet are on A's land, and that the same has been designated as a portion of trunk highway No. 1, and that in the construction of this trunk highway, some of the earth opposite A's land will be taken and used for a fill on the same road on adjoining land, and A asks that the state pay for the same before it can be moved and used.

Have examined the plans and profile of the contemplated highway improvement at the place in question and therefrom note that from the grade line established by the commissioner of highways opposite this property there are some places where there will be a slight cut and in other places there will be a corresponding slight fill, that ditches will be constructed alongside the road when completed whether there is a fill or cut, and that all of the earth taken from any of the cuts will be used to make a fill so that a uniform grade line of the road when completed will be had, and that it is necessary to make this improvement.

That being the situation, I know of no law whereby the land owner is entitled to pay for such earth when taken from within the limits of an heretofore established public highway, and a close examination of the opinions of this office on inquiries of this nature fail to disclose that this office has ever held that a party so situated is entitled to compensation. This office, however, has held that where there are gravel deposits within the four rod right-of-way limit of a public highway, and where it was not necessary to use the same in the improvement of such highway and the same was hauled off and used on other roads, the land owner was entitled to compensation therefor. (See opinion 341, report 1918, and No. 618, report 1920.) However, in neither of these opinions were the facts the same as those disclosed in your communication. In the matter now before us it appears that the road improvement, as determined by the commissioner of highways, requires

the making of the fills and the slight cuts in order that a road of uniform width and grade can be constructed and maintained. The determination of the commissioner of highways of the necessity of making this improvement was not before this office when the above opinions were written.

"According to some of the cases soil may be taken from one part of the highway and used upon another part, or even upon a different highway which is within the jurisdiction of the same authorities, both highways being regarded as parts of one plan of public improvement, while in other cases it is stated that there is no right to remove soil from one part of the highway in order to improve the highway at another place unless such removal is necessary for the proper construction or repair of the part from which it is removed, or unless the improvement of the highway to which it is removed is a part of the general plan of improvement as that of the highway from which it is taken."

29 C. J. p. 545.

We find no case in this state holding to the contrary, and the decisions of our court in the cases of Viliski vs. Minneapolis, 40 Minn. 304, Town of Rost vs. O'Connor, 145 Minn. 81, Rich vs. City of Minneapolis, 37 Minn. 423, and Town of Glencoe vs. Reed, 93 Minn. 518, heretofore relied upon in the opinions given on the subject are clearly distinguishable from the facts in the instant case. My own views are that there can be no good reason why the law as stated in Corpus Juris should not be applicable and controlling. It has the support of well-considered decisions in a number of other jurisdictions, among the same being Illinois, Massachusetts, Michigan, Wisconsin, Georgia and New York, and 13 Ruling Case Law, section 112. In a Massachusetts case on the subject it was stated as follows:

"The public in the case of a highway has the right, acting through proper officers, for the purpose of repairing the same highway, turnpike or railroad, to take earth, gravel or stone from one part and deposit them on another, although if the officer applies them to other uses he may become liable as a trespasser."

Denniston vs. Clark, 125 Mass. 216.

It is therefore my opinion that the commissioner of highways has the right to take the earth and soil within the road right-of-way limits from the farm in question and use the same as contemplated in the construction and improvement of trunk highway No. 1, and this regardless of the fact that a portion thereof may be deposited and placed elsewhere than on the road abutting upon A's farm.

VICTOR E. ANDERSON,
Assistant Attorney General.

July 27, 1925.

204

HIGHWAYS—Temporary trunk—Not included in permanent trunk.

The County Attorney, Houston County.

You state:

"A public highway leading from the village of Caledonia to the village of Spring Grove in Houston county, was originally laid out by the respective towns and thereafter the county board designated this

road to be a state aid road and for several years maintained and improved it as such. After the passage of chapter 323, Laws of 1921, the commissioner of highways designated this road as temporary highway No. 44. Thereafter a change was made in the permanent trunk highway No. 44 and portions of the road constituting the original state aid road and the temporary trunk highway were abandoned."

You inquire:

1. Whether under chapter 323, Laws 1921, the county or the respective townships are compelled to maintain these small stretches of road which cannot be vacated as they serve a number of farmers?

2. If the county is compelled to maintain this road, can it in conjunction with the state highway department vacate that portion of the road formerly constituting a part of the state aid road as a state road as provided by section 2559, subdivision 6, G. S. 1923, thereby placing the obligation upon the townships?

You further call attention to the fact that there are a number of these small stretches of roads which if the county is compelled to maintain will cause it a great deal of expense and that they could be more easily maintained by townships.

Your inquiries will be answered in the order stated.

1. I know of no provision of law which has been in effect since state aid has been provided in the maintenance of public highways which requires that the same must be expended only upon county roads. Section 2505, G. S. 1913, provides that "the county board may with the consent of the highway commission designate any established road as a state road," etc. The making of the order by the highway commissioner fixing the permanent location of a trunk route, in my opinion, automatically sets aside the temporary designation and thereupon such road used as a temporary trunk highway upon notice automatically reverts to the municipality charged with its maintenance at the time it was designated a temporary trunk highway. Under the facts presented in your letter that would be the county.

2. There is no reason that I know of that the revocation of the state aid designation cannot be made. Section 2560, subdivision 6, G. S. 1923, provides how this may be done by joint action of the state highway commissioner and the county board. If that is done and the roads in question were township roads prior to designation as temporary trunk highways or as state aid roads then the revocation thereof as such, would cause these highways to revert back to the townships in which they were established as township roads. If proceedings along that line were effected there would be no further obligation for the maintenance thereof by the county or the state as a state aid proposition.

VICTOR E. ANDERSON,
Assistant Attorney General.

April 1, 1925.

205

HIGHWAYS—Temporary trunk reverting to county or subdivision thereof—Notice by Commissioner necessary.

F. W. Root.

You call attention to section 2554, G. S. 1923, and state that the conclusion has been reached that upon a filing with the auditor of the county of a certified copy of the order of the commissioner fixing the final and definite location of a trunk highway or portion thereof, such portion of the trunk highway as was not included in the final and definite location reverted automatically to the county, so that thereafter the commissioner became relieved from responsibility as to such portion. You further state that as you read this statute it might well be claimed that this reversion takes place only upon notice from the commissioner of highways to the county originally charged with the care thereof. In other words, the mere certifying to the county auditor of the order of definite location is not such notice as is required by this section of the statute.

You call attention to a situation near Red Wing where a change was made from the temporary trunk highway to a definite location, leaving a portion of the old highway apart from the definite location and leaving four crossings formerly a part of the temporary trunk highway and which you desire to have closed but the commissioner has not yet given notice to the county that this portion is not included in the final location, and you do not know to whom you should apply for authority to close these crossings.

A careful consideration of the provision of the statute referred to in your communication clearly contemplates the giving of notice in a situation such as is presented by you. This subdivision of the statute requires the commissioner to designate temporary trunk highways until final and definite location of any trunk highway has been by him determined, which he shall designate by order. The statute further provides that the county board of any county interested may ask for a hearing on the final location, and then states:

> "A copy of such order shall be certified to the county auditor or auditors of the county or counties wherein such highways are located and such counties or subdivisions thereof shall thereupon be relieved from responsibilities and duties thereon, provided that in case the final location should be other than the location of the temporary trunk highway, the portion of such temporary location which is not included in the final location shall upon notice from the commissioner of highways revert to the county or subdivision thereof originally charged with the care thereof."

From the foregoing it seems clear that the filing of a certified copy of the order in the office of the county auditor relieves the counties or subdivisions thereof of the road included in the permanent trunk highway system. That is all that is necessary as to such road included in the permanent trunk highway, and then such portion of the temporary location which is not included in the final location reverts to the county or subdivision thereof only upon notice from the commissioner of highways. It there-

fore follows that for the state to be relieved from the maintenance of such portion of the temporary trunk highway it is necessary that notice be given as provided by this statute.

VICTOR E. ANDERSON,
Assistant Attorney General.

July 19, 1926.

206

HIGHWAYS—Town line roads—Location of off town line.

William Liimatain, Chairman.

You inquire:

1. Whether a town line road can be legally established wholly within the limits of a town.

2. Whether, for the establishment of a town line road, inhabitants of the town adjoining may join in the petition.

3. How the three-mile distance from the road is to be determined.

Answers:

1. G. S. 1923, section 2587, provides for the establishment of town line roads. It reads in part thus:

> "Whenever any town board receives a petition similar to that required for establishing a town road, praying for the location, alteration, or vacation of a road on the line between that and an adjoining town, it shall immediately notify the town board of such adjoining town, and the town board of each of said towns, or a majority of each acting together as one board, shall determine said petition."

If the question were to be determined according to the language as it now stands, I should say that there is no authority to establish a town line road on a location that does not at any point touch the town line. This language, however, must be considered in connection with previous statutes. G. S. 1894, section 1824, relating to town line roads, provides:

> "Whenever the supervisors of any town receive a petition praying for the location of a new road, or the altering or discontinuing of an old one, on the line between two towns, such road shall be laid out, altered or discontinued by two or more of the supervisors of each of said towns, either on such line or as near thereto as the convenience of the ground will admit; and they may so vary the same either to one side or the other of such line as they think proper."

This was carried forward in the 1905 Revision as section 1179, R. L. 1905, which reads substantially the same as the present statute. The report of the statute revision commission does not indicate an intention to change the 1894 statute. The change made by the 1905 revision may, and I think should, be ascribed to a purpose to condense and simplify the statute. Considering the history of the statute, and there being no evidence of an intent to change it, it is my opinion that the law as it now exists should be deemed to mean the same as existed in 1894. The conclusion that we draw is that the so-called town line road established under the provisions of G. S. 1923, section 2587, may run on a location away from the town line where the character of the ground upon the town line is such that it will not admit of the con-

struction of a road thereon. The extent to which the location may depart from the town line is a question of fact. It must in any case lie as near the town line as is practicable. I do not undertake to say how far away from the town line the road may lie and still be a "town line road." The principal consideration for the joining of two towns in the building of a road is the accommodation for travel that the road affords to the residents of both towns, and for that purpose a town board may expend money for the construction and maintenance of a town line road on parts of it that lie beyond the borders of the town. See Town of Mount Pleasant vs. Town of Florence, 138 Minn. 359. The petition should call for the establishment of a road on the town line and should contain a recital to the effect that, if the ground along the town line is such that it will not admit of the construction of a road thereon, then the road be established as near the town line as the convenience of the ground will permit.

2. The petition may be signed by any voter who owns real estate or occupies real estate under the homestead or preemption laws, or under contract with the state, within three miles of the road proposed to be established. They may live in either town. In view of the form of your question, you are advised that if a town road, as distinguished from a town line road, is to be established and there are not as many as eight voters who own or occupy real estate within three miles of the proposed road, the petition may be signed by a less number of voters. See G. S. 1923, section 2583.

3. The three-mile distance is to be measured by a straight line and not by the distance that would have to be traveled by road between the proposed highway and the land owned by the petitioner.

G. A. YOUNGQUIST,
Assistant Attorney General.

November 8, 1926.

207

HOLIDAY—When same falls on Sunday.

The City Attorney, Virginia.

You call attention to the circumstance that two legal holidays fall on Sunday this year, and ask in effect whether the following Monday is to be regarded as a holiday, on which day a newspaper carrying public advertisements need not be published. You advise that on May 31, which was Monday, following a Sunday holiday, your official paper was published and issued, pending an answer to the question now submitted as to July 4.

The course pursued was correct. The provision of statute relating to the observance of a holiday on the following Monday, when the holiday falls on Sunday, has relation only to commercial paper.

Answering your specific inquiry, you are advised that July 5 of this year will not be a legal holiday. Commercial paper falling due on that day may be met without default the following day, which is Tuesday.

The law relating to newspaper publication will be found in section 10937, G. S. 1923:

> "When the publication day of any newspaper falls upon Thanksgiving Day or upon any legal holiday, the publication of any summons,

order or process in judicial proceedings may be made either the day before or the day after Thanksgiving Day, or the day before or the day after such legal holiday."

JAMES E. MARKHAM,
Deputy Attorney General.

June 11, 1926.

208

INCOMPATIBLE OFFICES—Clerk probate court—Clerk district court.
County Attorneys.

"Public offices are incompatible when their functions are inconsistent, their performance resulting in antagonism and a conflict of duty, so that the incumbent of one cannot discharge with fidelity and propriety the duties of both. Kenney vs. Goergen, 36 Minn. 190, 31 N. W. 210; State vs. Hay, 105 Minn. 399, 117 N. W. 615."

State vs. Sword, 157 Minn. 263, 196 N. W. 467.

See very complete discussion and numerous authorities in L. R. A. 1917, A, page 211, and note, pages 216, et seq.

It may be suggested: 1. The appointment of the probate court clerk is filed in the office of the clerk of the district court, so as clerk of the district court the clerk of the probate court, if the same person, would file and have the custody of his own instrument of appointment. See section 8699, G. S. 1923.

2. The probate court clerk may authenticate and certify copies of the probate court records. Fitzpatrick vs. Simonson, 86 Minn. 140, 148. As clerk of the district court he may be called upon to file and have the custody of papers and records certified by himself as clerk of the probate court.

3. As clerk of the district court he may be called upon to enter judgments or decrees modifying or reversing orders of the probate court, of which he is also an officer. Section 8990, G. S. 1923.

4. As clerk of the district court he keeps the minutes thereof, and as clerk of the probate court he may keep the records of that court and make entries therein. Davis vs. Hudson, 29 Minn. 27, 38. The entries in the records of the probate court may be in question in proceedings in district court.

5. As clerk of the district court he may, under the order of the court, be required to issue a writ of prohibition, mandamus or certiorari, directed to the judge of probate whose appointment placed and keeps him on the public payroll; he may be called upon to issue a writ of certiorari involving records kept by him as clerk of the probate court; he may be required to issue commitment papers in contempt proceedings, in which he as clerk of the probate court is named as respondent.

6. As clerk of the district court he may have custody of records of the probate court "issued" by himself and received in evidence, the form or contents of which may be in question in proceedings in district court. Section 8711, G. S. 1923.

7. As clerk of the probate court he may be called upon to certify to transcripts of papers and proceedings to be returned and filed with himself as clerk of the district court. Section 8986, G. S. 1923.

8. The relations between the clerk of a court and the judge thereof are necessarily somewhat confidential, but while both courts are constitutional courts (Const. art. 6, section 1) the district court is an appellate court as respects the probate court. So the same person would be sustaining a confidential relation to the judges of the two courts, to one of which he owes his place on one payroll, and to the other of which he may, temporarily, at least, owe his place on another payroll. Section 200, G. S. 1923.

9. It is conceivable that the judge of probate might direct his clerk to perform certain duties (section 8699, G. S. 1923) which the district court directed him not to perform.

10. Both courts may be in session at the same time, requiring the clerk to be present in each. While the clerk of the district court may act by deputy, if there be one, there appears to be no provision for a deputy clerk of probate in counties of the class to which yours belongs. This situation was considered in State vs. Lusk (1871) 48 Mo. 242, in connection with the offices of clerk of the county court and clerk of the circuit court, but the decision that the offices were not incompatible was based largely upon the fact that in one or even in both courts the clerk might appear by deputy. And it is conceivable that the district court judge might not approve the appointment of a deputy. Section 193, G. S. 1923.

Another element taken into consideration by the courts is a "due regard for the public interest."

State vs. Anderson (1912) 155 Ia. 271, 136 N. W. 128, Ann. Cas. 1915A, 523.

A similar element is "considerations of public policy." State vs. Wittmer, (1914) 50 Mont. 22, 144 Pac. 648.

The question is not free from doubt, it is largely one of fact, and triers of fact differ in their conclusions, as will be noted by reading a few of the cases cited or referred to on this question in L. R. A. 1917 A, supra.

In my judgment the offices of clerk of the probate court and clerk of the district court are incompatible.

ALBERT F. PRATT,
Assistant Attorney General.

December 31, 1926.

209

INCOMPATIBLE OFFICES—County Attorney and City Attorney.

The County Attorney, Fairmont.

You are advised that the offices of county attorney and city attorney are incompatible. One person may not hold both offices at the same time. See opinion 391, Report 1910. The circumstance that the office of city attorney is an appointive one is immaterial. The test is, may the duties of the two offices be exercised by one person without any antagonism or repugnancy.

ROLLIN L. SMITH,
Assistant Attorney General.

May 23, 1925.

210

INCOMPATIBLE OFFICES—County attorney and village clerk are.

Chas. A. Swenson.

You state that you are at the present time a village clerk and that your term of office would not expire until April, 1927. At the last election you were elected county attorney and will assume your duties next January.

You inquire as to whether the two offices are incompatible.

You do not state under what law the village in question is organized. If it is organized under the general laws the village clerk is a member of the council. It frequently happens that the village has claims against the county. The county attorney would be called upon to pass upon the legality of these claims for the county board. Under the circumstances stated the two offices would be incompatible. I think it would be altogether advisable that you resign as village clerk.

WILLIAM H. GURNEE,
Assistant Attorney General.

November 22, 1926.

211

INCOMPATIBLE OFFICES—County Commissioner and member of school board.

The Commissioner of Education.

You inquire whether the offices of county commissioner and member of school district board are incompatible.

In opinion 415, attorney general reports, 1922, it was held that the offices are incompatible, but the ruling was based in part upon the provisions of chapter 236, Laws 1919, authorizing petitions to the country board for annexation of territory to school districts to be signed by the members of the school district boards, in certain cases.

That act has since been repealed by the legislature, and accordingly your inquiry required and has received careful consideration in the light of the law presently existing.

> "Public offices are 'incompatible' when their functions are inconsistent, their performance resulting in antagonism and a conflict of duty so that the incumbent of one cannot discharge with fidelity and propriety the duties of both."
>
> State vs. Sword, 157 Minn. 263.

On page 264 opinion in this case, the court said:

> "The duties of members of a county board and of members of a school district board are administrative and legislative in character. A member must exercise his best judgment in behalf of the board of which he is a part. The county board has to do with the organization of school districts; it may change their boundaries; it proceeds upon notice to the school district; it hears evidence and exercises judgment; it apportions debts and property; and an officer of a school district may in certain cases appeal to the district court. (from the decision

of the county board) (G. S. 1913, sections 2672-2680, G. S. 1923, sections 2743-2748). A member common to both boards is not in a position to render such service as the law exacts. There is antagonism between the boards and an inconsistency in one officer acting for both. The antagonism is illustrated by Laws 1919, chapter 236, in force when this proceeding was instituted, but repealed before its conclusion. There the school board was authorized to petition the county board for the annexation of land in a special instance. **The offices of school district treasurer and county commissioner are incompatible.** * * *

The attorney general now contends that the two offices are incompatible because of the duties cast upon the incumbent by both of the statutes which we have cited; (referring to the above cited general statutes as well as to chapter 236, Laws 1919); and we concur in his view."

It follows that notwithstanding the repeal of chapter 236, Laws 1919, the offices of county commissioner and of member of a school district board are incompatible.

CLIFFORD L. HILTON,
Attorney General.

May 27, 1926.

212

INCOMPATIBLE OFFICES—Justice of the peace and deputy sheriff.

C. A. Couillard.

You are advised that the office of justice of the peace and deputy sheriff are incompatible.

CHARLES E. PHILLIPS,
Assistant Attorney General.

April 20, 1926.

213

INCOMPATIBLE OFFICES—Member school board and member state board of pharmacy are not.

Commissioner of Education.

We know of no statute which prevents a member of the state pharmacy board from holding the office of trustee of a school district, nor do we know of any duties of the offices that are incompatible.

CHARLES E. PHILLIPS,
Assistant Attorney General.

December 31, 1926.

214

INCOMPATIBLE OFFICES—Member of water, light, power and building commission and member of school board—Under facts stated.

Leighton R. Simons, Village Attorney.

It appears that a member of the water, light, power and building commission, appointed by the village council, was lately elected a director in the school district of which the village comprises a large part. The village

maintains a heat, light, power and water plant or plants, and furnishes to the school district heat, light, power and water, for which the district pays annually about $19,000.00. It does not appear what authority fixes the rates to be charged to the school district, but presumably the commission has something to say about it, by recommendation or otherwise. The district owns its heat main connecting with the village plant.

You inquire if under such circumstances the offices are incompatible.

The test (of incompatibility) is the character and relation of the offices; that is, whether the functions of the two are inherently inconsistent and repugnant. 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. Kenney vs. Goergen, 36 Minn. 190, State vs. Hays, 105 Minn. 399.

> "Public offices are incompatible when their functions are inconsistent, their performance resulting in antagonism and a conflict of duty, so that the incumbent of one cannot discharge with fidelity and propriety the duties of both. The acceptance of a second incompatible office works a vacation of the first." State ex rel vs. Sword, 157 Minn. 263, 196 N. W. 467.

On the facts stated and assumed it appears that the offices are incompatible. On the one hand it is the duty of a member of the water, light, power and building commission, as a village officer, to fix or recommend the fixing of rates, conditions of service and the collection of charges for water, light, heat and power, which will result in a profit, or at least in the successful maintenance and operation of the plant or plants supplying the same, as a loss resulting from the service to the district necessarily increases the taxes upon property in the village, with a corresponding lessening of taxation upon property within the district but without the village, if such there be; while on the other hand, it is the duty of a member of the school board to secure such rates, charges and conditions of service as will be advantageous to the district and to the taxpayers thereof.

In final analysis the same person, as a public officer, acting in one capacity, will be required to bargain and contract with himself, as a public officer acting in an adverse capacity, in connection with the official duties of the respective offices. He will represent both buyer and seller.

ALBERT F. PRATT,
Assistant Attorney General.

July 22, 1925.

214½

INCOMPATIBLE OFFICES—Municipal judge and justice of the peace are not.

Chas. Dealy, County Attorney.

You inquire whether the offices of judge of municipal court, organized under the laws of 1895, and justice of the peace, are incompatible.

We have been unable to find any duties of such respective officers that render the two incompatible. However, there are many practical reasons why it would seem ill-advised for the same man to be both municipal judge and justice of the peace within the same county.

CHARLES E. PHILLIPS,
Assistant Attorney General.

February 13, 1926.

215

INCOMPATIBLE OFFICES—Town supervisor and clerk of school district are not—School director and village assessor are not.

D. A. Scott, County Attorney.

You are advised that the offices of town supervisor and clerk of a common school district in the same town are not incompatible and may be held at the same time by the same person. The same rule applies to the offices of school director and village assessor.

CLIFFORD L. HILTON,
Attorney General.

July 27, 1926.

216

INCOMPATIBLE OFFICERS—Town treasurer and town overseer.

The County Attorney, Duluth.

I beg to state that the town treasurer may lawfully hold the office of town road overseer. It is otherwise as to the town clerk. That officer may not also act as town overseer. See opinion 294, our Report 1914.

ROLLIN L. SMITH,
Assistant Attorney General.

March 16, 1925.

217

INCOMPATIBLE OFFICES—Village constable a member of the village water commission.

Julia Manier, Village Clerk.

You inquire whether the village constable may act as village water commissioner.

I can find nothing in the duties of these two respective offices that are inconsistent. I am of the opinion, therefore, that the offices are not incompatible.

CHARLES E. PHILLIPS,
Assistant Attorney General.

December 11, 1925.

218

INSTRUMENTS—Place of filing—Assignment of wages.

Harold S. Nelson, County Attorney.

You are advised that assignment of wages should be filed with the city clerk, pursuant to section 4138, G. S. 1923. Section 8364, G. S. 1923 relates to bills of sale, instruments evidencing a lien on or reserving title

to personal property and satisfaction of liens on personal property. Assignment of wages does not come within any of the class of instruments therein mentioned.

CHARLES E. PHILLIPS,
Assistant Attorney General.

April 12, 1926.

218½

INSURANCE—Liability—Authority of cities—County boards of education and others to use public funds to pay for.

Public Examiner.

You inquire as to the right of cities, county boards of education and county sanatoriums to use public funds for the payment of liability insurance on automobiles used by such organizations.

This department has held that a political or governmental agent or subdivision of the state may lawfully take out liability insurance covering automobiles owned and used by the same only where such agency or subdivision would be liable for an injury resulting to a third person or damages to property of a third person. Therefore, when such city, board of education, or county sanatorium, confines itself to the performance of governmental functions and the automobile in question is used in carrying on such duties, because of the principle of law which exempts it from liability, it may not expend its funds in the payment of premium on liability insurance. However, a city or municipality may undertake within certain limitations the functions which are not strictly of a governmental nature. For instance, our supreme court has held that a city or village owning and operating a water plant operates the same in a proprietary rather than a governmental capacity, and hence may under certain facts and conditions be liable for negligence. I apprehend that a city or village using an automobile in connection with the maintenance of its water works might under some circumstances be liable for injury to a third person thereby. If such be the case it may lawfully take out liability insurance to protect itself. It therefor follows that the question may not be answered yes or no, but the right of a city to take out such insurance and to pay the premium thereon depends upon the specific facts of the case.

CHARLES E. PHILLIPS,
Assistant Attorney General.

November 12, 1925.

219

MARRIAGES—Common law—Validity of.

Superintendent, Minnesota State Reformatory.

You inquire relative to the marital status of M, 6207. It appears that on September 17, 1919, M was a married man, his wife was living and not divorced, but had applied for a divorce in 1918, decree entered in 1919, subsequent to September 17.

On that date M and Miss S "agreed to enter upon a common law marriage until such time as M's wife obtained her divorce." Thereafter and until shortly before April, 1924, they lived together and were known and

called Mr. and Mrs. M, and several children were born to them. M was received in your institution on April 9, 1924 and he had informed the authorities that he and Miss S were man and wife.

Prior to January 4, 1926, and while M was sojourning in the institution, Miss S became pregnant by one C and on that date C and Miss S, without obtaining a divorce from M, entered into the relation of matrimony, pursuant to a duly conducted marriage by ceremony, with license duly issued.

You inquire (a) if the union of M and Miss S was a valid marriage; (b) if Miss S committed bigamy when she married C; (c) if the children of the union of M and Miss S are legitimate or illegitimate?

No one but a court and jury, with all the facts before them, can answer (a) and upon the answer to (a) the answers to (b) and (c) in large part depend.

Marriage, in law, is a civil contract, and whether or not that contract was entered into in any particular case depends upon the facts of that case, as they are susceptible of proof.

A "common law marriage" is as valid in Minnesota as is a marriage by ceremony. The difficulty comes in proving the marriage contract where there is no license or ceremony or record. A "common law marriage" is simply the contract between a man and a woman who are at the time eligible to enter into the marriage relation, that they are, in praesenti, husband and wife. Subsequent living together or holding out to the world as husband and wife, or the raising of a family, is not necessary to constitute a "common law marriage." A written contract, receivable in evidence, of the present entering into the marriage contract, between the persons then eligible to marry, might alone prove the contract and a "common law marriage," as valid, in law, as any other marriage. There have been such contracts. More often the contract has to be proven by circumstantial evidence, living together, holding out to the world as husband and wife, raising a family and so on. But all those matters are matters of evidence only, and the court or jury has to find as a fact therefrom whether or not the marriage contract was made.

In the case you mention, as the facts are stated, the parties were not eligible to enter into the marriage contract on September 17, 1919, but became eligible sometime later.

That presents an additional element for consideration. The original relation was clearly meretricious. There are two lines of decisions on the legal effect of living together, holding out, etc., after the disability is removed, as to whether or not there was a common law marriage. None in Minnesota. One line holds that the original meretricious relation is presumed to continue, and that a common law marriage cannot be shown by proof of subsequent cohabitation, etc., without showing as a fact that a new contract of marriage was made after the disability was removed; the other line holds in effect that after the disability is removed the presumption of a continued meretricious relation does not follow, and that the contract may be proven as though the parties were eligible to marry when the relation began and the original contract, if any, was made. This second line is

based largely upon proof that one party was ignorant of the disability. As you state the facts, that the parties, at a time one was not eligible to marry, "agreed to enter upon a common law marriage until such time as M's first wife obtained her divorce," proof would likely have to be confined to a new contract following removal of disability, as the original contract as stated was not a "common law marriage" at all, and could not be, under the law. If, however, they then agreed to live together until disability should be removed—which was all they could agree to at that time, and that agreement was unlawful—and further agreed to marry when the disability should be removed, and then after such removal they then agreed to be husband and wife, **in praesenti**, and a court or jury should so find on the evidence—then there may be a case of common law marriage. A large and more or less interesting book could be—and several have been—written on the various ramifications of the "common law marriage" subject, without covering it all. On the facts presented one court or jury might decide one way, another to the contrary. The evidence based upon continued cohabitation, holding out, raising a family, etc., over a period of some four and one-half years, is quite strong—if it is available—to the effect that there was a marriage by contract, a "common law marriage."

(b) What is said under (a) applies here. If there was a valid and subsisting marriage between M and S when S married C, then S committed bigamy when she married C. But the chance of conviction depends on what can be proven. Suppose both deny any "common law marriage contract." And likely if M should claim that there was a marriage, in a criminal case against S upon the charge of bigamy, his testimony in large part would be barred by the statute. That is what happened recently in a similar case which was dismissed for lack of proof. In that case there was long cohabitation and holding out and a grown up family. The result might have been different in a civil case.

(c) What is said above under (a) and (b) also applies here. If there was a valid marriage at any time between M and S, the children born during the existence thereof are legitimate and those born prior to the entering into of the valid contract were legitimatized by the subsequent marriage of their parents. See section 8579, G. S. 1923. 22 Minn. 351, 149 Minn. 79, 200 N. W. 742.

Perhaps for your purposes it makes no difference whether these children are legitimate or illegitimate. If it can be proven that M is their father he is liable for their support and maintenance, and in case he fails to support or maintain or deserts them he may be proceeded against under the non-support statute or the child desertion statute, respectively.

ALBERT F. PRATT,
Assistant Attorney General.

March 6, 1926.

220

MARRIAGE—Minister's Credentials.

To Clerks of Court.

Section 8566, G. S. 1923, provides:

"Ministers of the gospel, before they are authorized to perform the marriage rite, shall file a copy of their credentials of license or ordination with the clerk of the district court of some county in this state."

There is nothing in the law that requires a minister to be a citizen of the United States when he files his credentials or performs the marriage ceremony, so long as his license or credentials are properly filed.

CLIFFORD L. HILTON,
Attorney General.

October 27, 1925.

221

MARRIAGES—Place of filing certificate.

The Clerk of District Court, Mankato.

You call attention to sections 8572 and 8573, G. S. 1923, and state that some confusion has arisen as to the proper county for the filing of marriage certificates. You ask for an opinion of this department thereon.

Section 4778, Statutes of Minnesota 1894 provided that such 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 the Revised Laws of 1905 as section 3562 with no change therein. At the legislative session of 1905, which was the session which adopted the Revised Laws of 1905, section 4778, G. S. 1894 was amended in certain particulars, but the provision thereof requiring that the certificate should be filed and recorded in the office of the clerk of the county where the marriage was performed remained unaffected. Section 5504, Revised Laws 1905 expressly provides that the Revised Laws shall not be construed as abrogating any act passed at the session of 1905, all of which, so far as they differ from the Revised Laws shall be construed as amendatory thereof or supplemental thereto. Therefore, at the close of the 1905 session the law on the subject matter was section 3562, Revised Laws 1905, as amended by chapter 294, Session Laws 1905. Chapter 386, Session Laws 1909 amended section 3562, Revised Laws 1905 so as to require such certificate to be filed and recorded in the county in which the license was issued.

This is the present law on the subject, and you are therefore advised that the certificate should be filed and recorded in the office of the clerk of the district court of the county in which the license was issued.

CHARLES E. PHILLIPS,
Assistant Attorney General.

May 6, 1926.

222

MOTOR VEHICLES—Penalties—Not imposed when last day for payment of tax falls on Sunday or legal holiday.

The Secretary of State.

You direct attention to chapter 386, Laws 1925, providing that when the last day for the payment of a tax falls on Sunday or a legal holiday the tax may be paid on the next succeeding business day without penalty, and you inquire whether this applies to motor vehicle taxes.

You are advised that it does.

You also inquire whether, in case the default is extended, the Sunday or holiday is to be included in the statutory penalty for delay in transfer or registration and payment of the tax.

This presents a question of doubtful construction. Laws imposing a penalty are strictly construed. In view of this rule, we hold that the Sunday or holiday is not to be included in the penalty charge.

JAMES E. MARKHAM,
Deputy Attorney General.

May 11, 1926.

223

NOXIOUS WEEDS—Rate per hour for inspection work.

The Department of Agriculture.

You inquire in reference to section 7, subdivision (c) chapter 377, Laws 1925.

> "What rate per hour may the town chairman charge in submitting his itemized and verified account of weed inspection work, if the other members of the town board refuse or fail to fix the amount the chairman may charge for this work?"

The section mentioned in your letter provides:

> "If the several town chairmen become the local weed inspectors as above provided, then and in that event the compensation shall be fixed by the respective township boards and paid from the general revenue fund of the township, said compensation shall not be less than 25 cents nor more than 50 cents per hour and the necessary traveling expenses in addition thereto."

It is evident from your inquiry that the township board has wholly failed to take any action on the compensation in question. Therefore such board has not complied with the law and fixed the compensation. However, the law provides that such compensation and expenses shall be paid from the general revenue fund of the township. If no formal action is taken by the township board on the subject and the town chairman presents a bill based on a compensation of say 40 cents per hour, and the same is allowed, that would automatically fix the compensation at such rate per hour. It would seem that compensation can be fixed at any time. It must be at not less than 25 cents per hour or more than 50 cents per hour. Where the township board refuses to fix by resolution the salary in question, the town

chairman could compel action by mandamus proceedings, but until compensation is fixed either before the claim is presented or at the time the claim is acted upon, it cannot be determined what the compensation should be within the above range of figures. Certainly the compensation did not become fixed at 25 cents per hour nor at 50 cents per hour by reason of the town board's failure to act.

VICTOR E. ANDERSON,
Assistant Attorney General.

December 31, 1925.

224

NOXIOUS WEEDS—Service of notice.

Commissioner of Agriculture.

You inquire if notice to cut down, destroy or eradicate noxious weeds, issued under section 8 (9), chapter 377, Laws 1925, should be served upon the occupant or upon the owner, in case the land is "resident land," as defined in section 2 (c) of said chapter.

Under section 3 of the act it is made the duty of "every occupant of land, or if the land is unoccupied, the owner thereof or his duly accredited resident agent, to cut down * * *" the noxious weeds upon the land and upon the one-half of the highway adjoining. (Note—See chapter 194, Laws 1927.)

So the primary duty rests upon the occupant.

Section 8 (a) says that the notice shall be served upon the "owner or occupant."

Taken alone, that would mean that service on either one would be sufficient.

But section 8 (b) provides for service upon the owner of "non-resident" lands, and, as stated above, section 3 places the primary duty on the occupant, whether owner or not, to destroy noxious weeds, and sections 11 and 12 provide penalties for failure by any person to comply "with a notice served upon him." Which last means a notice required by law to be served upon him, and duly served.

Accordingly reading the provisions together, it follows that in the case of "resident lands" as defined in the statute ("all lands which are occupied or which are owned by persons resident within the county") the service should be upon the occupant, who may or may not be the owner.

As a practical matter I would recommend notice by mail or otherwise to the owner as well as to the occupant, so that the owner will know what is going on and get after the occupant, or destroy the weeds himself, so as to prevent his lands being assessed for the cost of destroying the weeds.

This statute being penal in some of its provisions, and permitting the levy of what amounts to special taxes upon real property, under other of its provisions, involves both personal and property rights and liabilities, and must be carefully followed or jurisdiction to enforce the penalties for noncompliance is not acquired.

ALBERT F. PRATT,
Assistant Attorney General.

July 29, 1925.

225

PEDDLERS—Auctioneers—Hawkers—Licensing of by municipalities.

Frank F. Michael, City Attorney.

You inquire if the city of Luverne by ordinance may require resident (as well as other) auctioneers to take out and hold city licenses therefor, when they are holders of county auctioneers' licenses issued under sections 7322, et seq. G. S. 1923.

Answer: If your city charter or the law under which you are incorporated authorizes the municipality to license and regulate auctioneers, your inquiry is answered in the affirmative. When so authorized the municipality may require a license in addition to the county license.

See Village of Minneota vs. Martin, 124 Minn. 498; City of Mankato vs. Fowler, 32 Minn. 364; City of Duluth vs. Krupp, 46 Minn. 498; Wright vs. May, 127 Minn. 150 (and cases there cited).

ALBERT F. PRATT,
Assistant Attorney General.

July 6, 1925.

226

PEDDLERS—License—Validity of ordinances.

J. N. Johnson, City Attorney.

It appears that your city is organized and operated under sections 1045, et seq. G. S. 1894, and the council desires to enact an ordinance regulating and licensing hawkers, peddlers, solicitors, etc. It appears that the special powers of the council do not include that authority.

A city has certain implied powers. Your city possesses the general powers possessed by municipal corporations at common law, in addition to those specifically granted.

In the Duluth case, 43 Minn. 435, it was stated to the effect that peddling, while a legitimate business, was recognized as one which might become a nuisance and that it was therefore subject to reasonable licensing and regulation.

The Portland case and the Bellingham case, involving the validity of ordinances attempting to license and regulate "solicitors," were reversed by the U. S. Supreme Court on May 25, 1925, upon the ground of interference with interstate commerce. So whether or not a charter is broad enough to cover the licensing and regulating of "solicitors," under those and other decisions, there is but little chance of making an ordinance of that character stand up. Hawkers and peddlers are in a different class. They are defined in St. Paul vs. Briggs, 85 Minn. 290.

Of course, licensing and regulatory provisions, even of hawkers and peddlers, must be reasonable, and you will find numerous decisions of our supreme court on that subject.

See St. Paul vs. Traeger, 25 Minn. 248; State vs. Wagener, 69 Minn. 206; State vs. Finch, 78 Minn. 118; State vs. Parr, 109 Minn. 147, 151; Kansas City vs. Overton, 68 Kan. 560, 75 Pac. 549; Lebanon vs. Zanditon, 75

Kan. 273, 89 Pac. 10; People vs. Hotchkiss, 118 Mich. 59, 76 N. W. 142; Muskegon vs. Zeeryp, 134 Mich. 181, 96 N. W. 502; People vs. Grant, 157 Mich. 24, 121 N. W. 300; Re: White, 43 Minn. 252; State vs. Schoenig, 72 Minn. 528, State vs. Jensen, 93 Minn. 88; State vs. Foster, 22 R. I. 163, 50 L. R. A. 339; Walla Walla vs. Ferdon, 21 Wash. 308, 57 Pac. 796. See note to People vs. Wilson, 249 Ill. 195, 35 L. R. A. (n. s.) 1074, where a large number of cases are cited covering excessive and unreasonable fees or restrictions. See especially the available cases of State Center vs. Barenstein, 66 Iowa 249, 23 N. W. 652; Chaddock vs. Day, 75 Mich. 527, 42 N. W. 977; Brooks vs. Mangan, 86 Mich. 576, 49 N. W. 633.

See a very complete discussion in Duluth vs. Krupp, 43 Minn. 435, and the cases therein cited and also the Minnesota cases cited in the other Minnesota cases noted above.

ALBERT F. PRATT,
Assistant Attorney General.

September 12, 1925.

227

PEDDLERS—Licensing of.

E. J. Larsen, City Attorney.

Referring to section 18, article 1 of the constitution, which provides that "any person may sell or peddle the products of the farm or garden occupied or cultivated by him without obtaining a license therefor," to section 7334, G. S. 1923, and to a peddlers' licensing ordinance, containing similar provisions, you inquire if the exemption extends to one not a resident of the state. Please see opinion 658, 1912 Report, which answers the inquiry in the affirmative.

You inquire if such a producer may reasonably be required to furnish an affidavit showing that the products which he is selling or peddling, or about to sell or peddle, are within the exemption.

Assuming that your charter contains the usual authority, the inquiry is answered in the affirmative. The municipality possesses certain police powers which may be exercised by way of reasonable regulations in the interest of the public welfare, without being in conflict with the constitutional provision. For example, the exemption from the requirement of a license would not go to the extent of permitting selling or peddling with a calliope or otherwise in a manner to interfere with the public health, comfort or repose, or selling or peddling decayed produce.

The ordinance, of course, would have to contain the regulatory provisions.

ALBERT F. PRATT,
Assistant Attorney General.

September 14, 1925.

228

PEDDLERS—Who are—Merchant peddling his goods.

Henry L. Soderquist, County Attorney.

You state:

"X conducts a general merchandise business in Isanti county. He owns a store and does ordinary retail business with the exception of the fact that he desires to use a truck and peddle some of his merchandise from house to house in the country districts. In other words, he is desirous of taking a portion of his merchandise from time to time, transport it to the country and sell and deliver it directly to the consuming public from house to house. He inquires whether or not under the circumstances he is required to make application for and take out a peddler's license under the laws of this state."

Sections 7328-7336, G. S. 1923 (amended in part by chapter 227, Laws 1925) do not define a "hawker or peddler."

In City of St. Paul vs. Briggs, 85 Minn. 290, 291, 292, the court said:

"It is said in 34 American Law Regulations 569, in an article relating to this subject, that there are four elements required to constitute a peddler, namely: (1) That he should have no fixed place of dealing, but should travel around from place to place; (2) that he should carry with him the wares he offers for sale, not merely samples thereof; (3) that he should sell them at the time he offers them, not merely enter into an executory contract for future sale; and (4) that he should deliver them then and there, not merely contract to deliver them in the future. To these should be added a fifth, to the effect that the sales made by him should be to consumers, and not confined exclusively to dealers in the articles sold by him. It is generally held that, if any one of these elements be absent from the regular dealings of a vender, he is not a peddler, whatever else he may be."

The above seems to be the last expression of our courts on the subject, and is quite definite and complete.

Each and every element appears to be present, and it follows that the activities described constitute "peddling," and that the inquiry should be answered in the affirmative.

It will doubtless be contended that element No. 1 is absent, in that this party has a fixed place of dealing. Obviously, "fixed place of dealing" must refer to a fixed place of conducting the sales in question. This he does not have, as he travels and deals from place to place, in connection with that branch of his merchandising activities.

Were another legal construction permissible, there would be very few "peddlers," as they would all have a place of business or warehouse somewhere, where they exposed goods for sale. And in the case you cite the merchant could have his store in your county where he offers goods for sale, and then travel and "peddle" throughout the state, so perhaps disposing of many times as much merchandise by peddling as from the store and get by without a license.

You will find numerous Minnesota cases recognizing the legitimate character of the occupation of peddling, but sustaining statutes and ordinances licensing and regulating such occupation upon the various grounds therein stated.

It will, however, be noted that the state law, section 7328, G. S. 1923, requires a license only of one who engages in or follows the "business or occupation of a hawker or peddler."

There may be certain activities otherwise in the nature of "peddling" which are so closely and legitimately connected with, and necessarily incidental to, the sale of goods from a fixed place of business, as not to amount to engaging in or following the business or occupation of a hawker or peddler, and where the line is to be drawn in any particular case between such activities, and "engaging in or following the business or occupation of a hawker or peddler," may be determined only as a question of fact, under the special circumstances of each such case, and not as a question of law.

In L. R. A. 1916 B, pps. 1293-1307, will be found numerous citations on "who is a peddler," covering all sorts of circumstances and cases.

In Woolman vs. State (1852), 3 Swan (Tenn.) 354, it is held that one is a peddler although he has a fixed business domicil, when he goes from place to place and house to house selling goods at retail.

In the later case of DeWitt vs. State (1913), 155 Wis. 249, 144 N. W. 253, it is stated that "he (the dealer) may have a fixed business domicil and yet be a peddler, and he may be such regardless of whether he carries the whole or a part of his stock of goods with him. The essential thing is that he must do business by going about from place to place, selling and delivering merchandise in a retail way to such individuals as he may be able to deal with. While doing that he is a peddler, though he may at the same time have a business domicil to which he occasionally resorts. It is the method of disposing of the goods which makes the person a peddler. A peddler is simply one who peddles, and anyone peddles who sells at retail from place to place, going from house to house, carrying the goods to be offered for sale with him."

State vs. Jensen, 93 Minn. 88, 100 N. W. 644, may also be of interest.

In that case the court held that a person who was selling and delivering his farm produce from house to house without a license was "exercising the vocation of a peddler," in violation of an ordinance requiring a license for exercising such vocation.

Here the point was strenuously urged that the farmer selling his own products from house to house was not engaged in the business of peddling as an occupation, but only as incidental to his occupation of farming.

The court held to the contrary, and it took a constitutional amendment to take the farmer out from under the peddling license law. (Section 18, article I, Minn. const.)

See also State vs. Wagner, 69 Minn. 209, and other cases cited in the Jensen case.

It seems quite clear that if (prior to the amendment) a farmer, owning and occupying a farm, and paying taxes thereon, could not sell and deliver the products of his own farm on the streets or from house to house in a city,

without being a "peddler," the storekeeper in a city cannot sell and deliver his goods from house to house in Isanti county, or elsewhere, without being a "peddler." If your client may peddle in Isanti county without a license, so many every storekeeper in the Twin Cities, as a matter of law. To which your client doubtless would object.

ALBERT F. PRATT,
Assistant Attorney General.

April 7, 1926.

229

PHARMACY—Retailers may sell Paris green when properly marked.

George A. Barnes, County Attorney.

You inquire whether Paris green and such drugs may be sold by anyone other than a registered pharmacist doing business as such and conducting a drug store.

You are advised that anyone doing a general retail business may sell Paris green, providing the same is sold in a sealed package distinctly marked, as provided by section 5805, G. S. 1923.

CHARLES E. PHILLIPS,
Assistant Attorney General.

July 10, 1925.

230

TAXATION—Abatement—Special assessments.

J. A. Walstrom, County Attorney.

You state the following facts: A certain lot has been assessed for street improvements. The amount thereof, with interest and penalties accrued, is $207.79. Upon application of the owner the city council passed a resolution authorizing the compromise of the claim by cancelling the penalties and interest, and requested the county auditor to cancel the interest and penalty from his records in accordance with the resolution. You inquire whether he should do so.

Answer: No. See G. S. 1923, section 1983; State ex rel. Kasper vs. Minnesota Tax Commission, 137 Minn. 37. The owner should make application for abatement of penalties and interest, have it approved by the board of review or similar taxing authority of the city of Two Harbors, and submit it to the county board and the county auditor. If the local authorities act favorably upon the application, it will then be transmitted by the county auditor to the Minnesota Tax Commission for final action.

CLIFFORD L. HILTON,
Attorney General.

December 30, 1926.

231

TAXATION—Annuities—Income of.

Minnesota Tax Commission.

G. S. 1923, section 1979, subdivision 7, defines personal property subject to taxation as including "the income of every annuity, unless the capital of the annuity be taxed within this state."

Section 1980 defines credits as including "every annuity or sum of money receivable at stated periods, due or to become due."

The foregoing are definitions that appear in the general tax law. In sections 2337, et. seq. (Laws 1911, chapter 285, as amended), relating to the taxation of money and credits, the definition just quoted from section 1980 appears. The money and credits tax act supersedes the previously existing general tax statute, and the definition last given controls over that which appears in section 1979. See State vs. Minnesota Tax Commission, 117 Minn. 159, 161.

You do not inquire concerning the taxability of the principal from which the annuity is paid, or concerning the value at which it may be taxed, if it be taxable. The answer to that question may depend upon whether the annuity is a charge upon the principal, or whether it consists of an obligation not secured by any fund or property, or whether by other statutes the principal is exempt. None of those considerations affect the taxability of the annuity, so-called, in the view we take of the law.

There is a line of cases in New Jersey, beginning with State vs. Cornell, 31 N. J. L. (2 Vroom.) 374, in which, under a statute making liable to taxation personal estate including all debts due or owing whether on contract, note, bond, or mortgage, it is held that only the annuity payments that are already due or payable are subject to assessment, on the theory that since the value of the future annuities is dependent upon the life or death of the annuitant the value of anything beyond what is actually due and unpaid is incapable of ascertainment. The same court in the later case of State vs. Melroy (N. J. L.), 19 Atl. 732, criticises the holding, saying that since the interest of the remainderman in the principal is taxed at its present value on the basis of the expectancy of the life of the annuitant the value of the annuities not yet due can be readily determined on the same basis. The supreme court of Oklahoma, in Wilkin vs. Board of County Commissioners of Oklahoma County, 77 Okla. 88, 186 Pac. 474, held under a statute taxing annuities, that the payments owing but not yet due are taxable at their present value. In that case the continuance of the annuity payments was not wholly dependent upon the life of the annuitant, but the court treats the contract as a pure annuity contract.

But aside from these authorities, and regardless of whether the continuance of the annuity payments depends upon the life of the annuitant, or whether it consists of a personal obligation or a charge on the principal, or whether the right be called an annuity or not, it seems to me clear, under our statute, that the future annuity payments are subject to taxation at their present fair cash value on May 1st of each year. Section 2337 makes taxable every annuity or sum of money **receivable** at stated periods. The word has relation to the future, not to payments already due, for the latter are no longer "receivable at stated periods." If that were not enough, the act makes it even more specific by subjecting to taxation not only the payments that are due but also those that are "to become due." Our supreme court so construed it in the case of State vs. Royal Mineral Association, 132 Minn. 232, 236-237. And, of course, money derived from annuities and in the hands of the annuitant, and payments past due, are taxable at full value.

There is no difficulty in ascertaining the present value of future payments on the basis of the expectancy of life of the annuitant. That is now a well-established method recognized by the courts, and, in the case of inheritance taxes at least, adopted by statute (section 2294).

CLIFFORD L. HILTON,
Attorney General.

October 14, 1925.

232

TAXATION—Certificates—Assignment of—After issuance of notice of expiration and before period for redemption expires.

The County Attorney, Bigstone County.

It appears that one M was the holder of a state assignment certificate on which notice of expiration of time of redemption was duly issued; prior to the expiration of the period of redemption M assigned the certificate to H; certificate that the time for redemption has expired has not been made upon the tax certificate, although such time has expired; the owner of the land now wants to redeem.

You inquire if the auditor is authorized to receive the redemption money and certify redemption.

Not if the period for redemption has actually expired.

You state that all necessary steps were properly taken and if the affidavit concerning service on mortgagees and other lien holders was included and the sixty day period has run from and after the time of filing of proof of service and the affidavit, then the answer to your inquiry is in the negative.

You further inquire if H gets the benefit of the expiration of redemption proceedings. Yes.

You further inquire if the assignment during the running of the period of redemption invalidated the proceeding. No.

ALBERT F. PRATT,
Assistant Attorney General.

July 8, 1926.

233

TAXATION—Certificates—Existence of should be noted by treasurer although presumably outlawed by failure to serve notice or to record.

Department of Taxation.

It appears that the holder of certain tax certificates, one of the 1919, the other of the 1922 sale vintage, presented them to the county auditor for the purpose of having the notices of expiration of redemption issued thereon. The auditor issued the notice on the 1922 sale certificate, but refused to issue on the 1919 sale certificate, on the ground that the latter was outlawed under the statute.

The auditor was correct, if in fact more than six years had run since the sale at the time the 1919 sale certificate was presented.

You inquire if the interest or lien of the 1919 certificate holder is extinguished.

In the case of Hutchinson vs. Child, 204 N. W. 648, which was an action to determine adverse claims to real property, it was held that "failure to give notice of expiration of the time for redemption, and the failure to file the tax certificate, within the times provided, operates to extinguish the lien for taxes included in the certificate, and for subsequent taxes paid by the holder of the tax title. The statutes are statutes of limitation, provide a reasonable time for giving notice and recording the certificate, and are not unconstitutional as impairing vested rights." Which I think answers your inquiry.

However, you further inquire whether or not in turning over the tax duplicates to the treasurer on the first Monday in January, and stamping opposite the lands "sold for taxes," tax sale certificates remaining unredeemed which date more than six years back, should be considered.

Notwithstanding the provisions of the statute and the decision above referred to, the tax duplicates should nevertheless continue to show that this land was sold for taxes.

Otherwise the auditor, or treasurer in your case, runs the risk of being caught with a situation such as existed in the case of Blakeley vs. Mann Land Company, 153 Minn. 415, where the tax certificate itself was invalid and a notice of expiration could not have been given thereon, and the tax lien still existed.

The safe way is to show the facts and let the land owner or his attorney apply the law and take his own risks.

ALBERT F. PRATT,
Assistant Attorney General.

July 13, 1925.

234

TAXATION—Certificates—Official certificates of county auditor as to—When claimed to be outlawed.

J. H. Mark, County Attorney.

Referring to tax certificates and tax liens thereunder, presumably outlawed under chapter 169, Laws 1919, or its predecessors, because notice of expiration was not served within six years from the date of sale or the certificate recorded within seven years from said date, you inquire if the county auditor, in officially certifying to taxes, tax certificates and tax liens on real property, should continue to cover such taxes, certificates and liens in his certificates furnished for abstract or other purposes.

He should continue to show such taxes, tax certificates and tax liens on his certificates.

One reason is that the auditor cannot determine as a matter of law that such tax liens have been finally extinguished, or that such certificates are wholly invalid. His certificates should show the facts as they exist. It is up to the examiner of the title to decide whether or not such liens have been entirely extinguished. Another reason is that if the auditor fails to show the facts, and it should develop that liens still exist, he and his bondsmen might be subjected to liability.

As an example showing what may happen, in some cases at least, see the case of Blakeley vs. Mann Land Co., 153 Minn. 415, 190 N. W. 797.

The auditor should be careful to show the facts.

ALBERT F. PRATT,
Assistant Attorney General.

December 31, 1924.

235

TAXATION—Certificate—Surrender of.

Henry L. Soderquist, County Attorney.

You state:

1. "X acquired a state assignment certificate covering certain property for the unpaid taxes of the years 1920 and 1921. Notice of expiration of redemption was served on this certificate according to law. The time for redemption expired and after the expiration of such time X presented his certificate to the county auditor who attached his certificate of no redemption. Y now presents a quit claim deed executed by X covering all of X's right, title and interest in and to the premises in question, to the register of deeds for record. The county auditor is requested to certify thereon as to the payment of taxes. Taxes subsequent to 1921 have been paid."

and inquire:

1. "Should the county auditor at the time of the presentation of the certificate by X after the time for redemption had expired, have transferred the title of the property to X?"

The county auditor has nothing to do with transferring title. He is supposed to keep a book (sections 2149, 2211, G. S. 1923) in which he enters transfers of land upon presentation of deeds or other instruments conveying land and certification of payment of taxes. This is largely for convenience in connection with tax matters, and has nothing to do with title, whether he makes such entries or not.

In this case, as a matter of practice, upon presentation of the tax certificate and payment of taxes, he would enter the transfer to X, and probably add, in parenthesis or otherwise, (T. T., T. C., or tax cert.) or something to indicate the character of the instrument, the last simply for convenience and to refresh his recollection when someone inquires about the land. The auditor is not required by law to know anything about who actually owns land or how the title stands, but his constituents think he should know a lot about it, (he usually does) and if he keeps his transfer book up as indicated he can answer many questions—and may save some campaigning.

You further inquire:

2. "Assuming that the auditor failed to do this can he now transfer the title to the premises to X without requiring a surrender of the certificate above referred to?"

Answer, Yes. The "transfer" may be made as of the date when the certificate was originally presented and marked "tax paid by sale of land described within, and transfer entered."

You further inquire:

3. "What effect, if any, does the execution of the quit claim deed by X to Y of the premises in question and the recording thereof have upon the necessity, if there is such a necessity, of requiring a surrender of the tax certificate?"

Answer, none. The auditor will treat the deed the same as any other instrument of conveyance, see that the taxes are paid, mark it "taxes paid by sale of land described within, and transfer entered," and enter the transfer to Y. Might add for his own convenience (Q. C. D. from X dated.....) if he wants to.

But whether he enters or does not enter either transfer has no effect whatever on the title. If X and Y get in a dispute over who has the title they will have to settle it on grounds other than the entries in the auditor's "transfer book."

See also sections 2133, 2134, 2135, G. S. 1923, relating to record of assignments or transfers of tax certificates before expiration of period of redemption. That is another matter, and involves assignments and transfers of the certificate as such, to be entered on the tax sale book and not on the transfer book, as the title is not transferred. All there is prior to expiration of redemption, is a lien.

It may be added that it is doubtful if after expiration of time of redemption the auditor may accept a surrender of the certificate for cancellation. It has then become a conveyance of title, and title once acquired ordinarily cannot be passed or cancelled by a surrender back of an instrument of conveyance. Besides, the wife or husband, if any, then may have an interest, and so on.

ALBERT F. PRATT,
Assistant Attorney General.

December 12, 1925.

236

TAXATION—Delinquent real estate taxes—Chapter 155, Laws 1925.

To the County Attorney:

Since the issuance by the attorney general of his letter of May 15, 1925, additional inquiries have been received as to the interpretation of the provisions of chapter 155, Laws 1925, relating to delinquent real estate taxes and penalties thereon. It is therefore deemed advisable to recall that letter and make certain additions to the conclusions announced therein and state them all as follows:

(a) If the land owner pays the entire tax prior to June 1 no penalty accrues.

(b) If the tax payer pays no part of the tax prior to November 1 penalties accrue on the whole thereof as follows: 5 per cent on June 1 and 1 per cent on the first day of each month thereafter to November 1, making a total penalty of 10 per cent after November 1 and before the first Monday in the next following January.

(c) If the land owner pays no part of the tax before June 1, he may pay one-half thereof at any time prior to November 1; together with penalties accrued on one-half so paid, being 5 per cent on June 1 and 1 per cent

per month thereafter; as set out in paragraph (b). After paying such half the remaining half may be paid without penalty at any time prior to November 1. If the remaining half be not then paid, a penalty of 10 per cent is added. In this case the penalty on the second half is the same in amount and accrues at the same time as if the first half had been paid prior to June 1.

If the land owner pays no part of the tax before June 1, he may pay the whole amount at any time before November 1, together with penalty on one-half the tax accrued to date of payment, being 5 per cent on June 1 and 1 per cent per month thereafter; the penalty being the same as if he were paying only one-half the tax.

(d) If the land owner pays one-half of the tax before June 1, he may pay the remaining half at any time before November 1 without penalty. If the remaining half be not paid before November 1 a penalty of 10 per cent is added thereto.

(e) In case there remains unpaid $100.00 or more of the principal of any tax after November 1, the land owner may discharge the same before the next tax judgment sale by paying installments of not less than 25 per cent of the principal amount remaining unpaid on November 1, plus penalties and costs on the whole amount of the tax which have accrued at the time payment is made, and thereafter penalties, interest and costs accrue only on the part remaining unpaid. Of course, no additional penalty or interest accrued between the first Monday in January and the second Monday in May.

(f) The phrase "tract or parcel" as used in the statute under consideration means any body of land assessed as one parcel, whether it consists of a single lot or government subdivision, or of a number of contiguous lots or government subdivisions. It follows that the amount that may be paid after November 1 is not less than 25 per cent of the tax on the entire body of land assessed as a tract or parcel, plus penalties and costs accruing on the whole amount to date of payment.

(g) If part payment of the tax is made after the filing of the delinquent list with the clerk of court and before entry of judgment thereon, the amount for which judgment is entered should be reduced by the amount paid. If the payment is made after entry of judgment and before the sale, notation of the payment should be made on the real estate tax judgment book. The statement of the amount for which the land is to be sold should be the amount remaining unpaid, and it should be sold to the person who offers to pay that amount plus such interest as may be bid. (See G. S. 1923, section 2128). The procedure outlined in G. S. 1923, section 2126, might serve as a guide.

CLIFFORD L. HILTON,
Attorney General.

June 15, 1925.

237

TAXATION—Distress warrants—Time of return—Directory.

George A. Barnes, County Attorney.

You inquire whether the statutory limitations of time within which distress is to be made on delinquent personal property tax warrants and returns made thereon are mandatory or directory.

Answer: They are directory and not mandatory.

ALBERT F. PRATT,
Assistant Attorney General.

May 29, 1925.

238

TAXATION—Exemption—Property of corporation organized for "mutual improvement in moral, literary and social culture of its members and their families."

Minnesota Tax Commission.

You submit an application made by a Camp Association for exemption of its property from taxation, and inquire whether or not such property is entitled to such exemption.

Section 1 of article 9 of the state constitution, which is the authority relating to exemption from taxation, reads as follows:

> "The power of taxation shall never be surrendered, suspended or contracted away. Taxes shall be uniform upon the same class of subjects, and shall be levied and collected for public purposes, but public burying grounds, public school houses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property and houses of worship, institutions of purely public charity, and public property used exclusively for any public purpose, shall be exempt from taxation, and there may be exempted from taxation personal property not exceeding in value $200.00, for each household, individual or head of a family, as the legislature may determine."

The association has adopted and filed its articles for record in the office of the register of deeds of Pine county, where it appears that its property is situated.

The articles provide that, "the general purpose and plan of said corporation shall be mutual improvement in moral, literary and social culture of its members and their families."

The capital stock is $5,000.00. The corporation "in addition to its other powers, may acquire by purchase, gift, grant, or devise, and hold, use and convey, any real or personal property whatever, and may lease, mortgage or use the same in any manner most conducive to its interests and prosperity." Nothing is stated with reference to its being "non-profit."

The association, in its articles, purports to be organized "under the laws of the state of Minnesota." In the application it is stated that it is organized as "purely a camp association" and "pursuant to General Laws 1881 of said state, chapter 138." It is elsewhere stated that said chapter is now sections 7909, 7910 and 7911, G. S. 1923.

These sections relate to the formation of "camp or grove meetings, Sunday school assemblies, or any societies for religious instruction or worship, and for mutual improvement in moral, literary or social culture."

Section 7910 provides that all property necessarily used by any such corporation, and not leased or used for profit, shall be exempt from taxation. It is also stated in the application that a "Sokol" is an "athletic out-and-indoor institution."

The constitution and by-laws recite that "we, the members of the Sokol Societies of Minnesota, do hereby join ourselves together into an association and incorporate in accordance with the general laws of 1881, chapter 138, codified in General Laws of the state of Minnesota, sections 7909, 7910 and 7911, and carry on the Sokol educational and recreational work as outlined by Dr. M. Tyrs and J. Fuegner, the founders of the Sokol Organizations, in accordance with the articles of incorporation and the following by-laws."

In article II of the by-laws it is stated that "the object of this association shall be the mutual improvement in moral, literary and social culture of members of the Sokol societies affiliated with the American Sokol Union, and furthermore, to promote physical education, dramatic and musical art and to provide outdoor and indoor recreation of educational nature, for said members and their families under the direction of competent instructors and in accordance with general principles of the American Sokol Union. It shall be our aim to develop the best standard of manhood—the strongest physical and the highest moral qualities in the members of our organization."

By article III the members consist of the stockholders, but no person shall be permitted to purchase any stock except a member, in good standing, of one of the Sokol societies affiliated with the American Sokol Union, except that Sokol societies may also become stockholders.

Voting is based on number of shares held, voting by proxy is authorized, but not more than two stockholders may be represented by one proxy.

The property owned by the association, as shown by the application, consists of seven lots in Pine county, presumably lake shore property.

The application refers to section 7910, G. S. 1923, supra, in support of the claim for exemption. Unless authority for the exemption purported to be granted by section 7910 is found in the constitution, the attempted exemption is of no effect.

Faribault vs. Misener, 20 Minn. 396 (347).
Le Due vs. Hastings, 39 Minn. 110.
State vs. Gorman, 40 Minn. 232.
State vs. Pioneer S. & L. Co., 63 Minn. 80.
State vs. Thayer, 69 Minn. 170.
Little Falls Co. vs. Little Falls, 74 Minn. 197.
State vs. Duluth Ry. Co., 77 Minn. 433.
Drew vs. Tift, 79 Minn. 175.
State vs. Harvey, 90 Minn. 180.

Constitutional and statutory provisions exempting property from taxation are to be strictly construed.

St. Peters Church vs. Scott, 12 Minn. 395 (280).
Hennepin County vs. Bell, 43 Minn. 344.
State vs. Redwood Falls, 45 Minn. 154.

Ramsey County vs. Church of Good Shepherd, 45 Minn. 229.
State vs. Cooley, 62 Minn. 183.
Washburn vs. State, 73 Minn. 343.
State vs. Bishop Seabury Mission, 90 Minn. 92.

This association, so far as appears, is organized chiefly, for "moral, literary and social culture," to promote physical education, dramatic and musical art, and to provide outdoor and indoor recreation of educational nature. Its objects, as stated in its articles and by-laws, are most praiseworthy. But going back to the constitutional provisions conferring exemption, quoted supra, the question is whether or not the provisions thereof clearly confer exemption.

The property owned by the association clearly does not constitute "public burying grounds, public school houses, public hospitals, academies, colleges, universities or seminaries of learning." Nor is it comprised within "churches, church property and houses of worship." Nor is it "public property used exclusively for any public purpose."

If to be exempt at all its claim must be based upon the exemption of "institutions of purely public charity."

The term "charity" as used in law has a rather broad signification.

County of Hennepin vs. Brotherhood of the Church of Gethsemane, 27 Minn. 460.

The association in question may or may not operate an institution of "charity," depending on the existence or non-existence of many facts not appearing. But one prime element of a "public charity" is that the institution is one the benefits of which the public generally are entitled to enjoy. Id.

Here that element is lacking. Only the members of a certain association and the members of their families are entitled to the benefits of the institution. In that respect it is a close corporation. The cases are numerous denying exemption to lodges and other organizations whose activities are largely benevolent, but whose benevolences are confined to the members and their families or dependents.

On the showing made it appears that the purposes of this organization are confined largely to furnishing athletic, social and recreational facilities to its members, composed of a limited class, and of which no considerable portion of the public may take advantage. There are other elements lacking which must appear in order that the institution may be said to be one of "purely public charity."

Notwithstanding the provisions of section 7910, G. S. 1923, which may or may not, so far as the legislature is concerned, attempt to grant exemption, the institution or its property is not within the constitutional provisions whereby exemption from taxation is conferred.

Your inquiry is answered in the negative.

If the organization feels that the law confers exemption the question may be readily and finally answered by presenting all the facts in evidence in proceedings for the collection of taxes, and securing a decision of the courts thereon.

ALBERT F. PRATT,
Assistant Attorney General.

November 18, 1925.

239

TAXATION—Forfeited sales—Special assessments included in.
To County Officials.

You are advised of a ruling construing chapter 208, Laws 1925, relating to delinquent tax sales. The inquiry submitted:

> "At the absolute sale, now being held at this office, some village property is offered, which has been delinquent since and including the year 1914. Included in the delinquent tax are sewer assessments since and including the year 1919. I have been tendered payment of this delinquent tax on the basis of one-fifth of the original taxes including the sewer assessments. The village council in the village where these lots are located have not filed any statement or ordinance stating the minimum for which said parcels may be sold.
>
> "Under these circumstances, am I allowed to accept the one-fifth as tendered or must the full amount of the sewer assessment with penalties and interest be paid?"

This is the answer given in response to the submitted inquiry:

"The act of 1925 amends section 2139, G. S. 1923. The provision, which appeared as section 1616, G. S. 1894, provided that no forfeited lands should be sold for less than the amount of taxes, penalties, interest, and costs due thereon, unless that amount should exceed the actual value of the property, in which case the state auditor was authorized to sell the land for less. This section was re-enacted, without substantial change, as section 54, chapter 2, Extra Session Laws 1902, and as thereafter amended was carried forward as section 937, Revised Laws 1905, and as section 2138, G. S. 1913. As therein provided the reduced price for which the land might be sold was fixed by the county board and the state tax commission. Laws 1907, chapter 430, introduced the provision for a sale in certain cases for one-half the amount of the taxes as originally assessed. Later the provision for a sale for one-fifth was introduced. No mention was made of ditch assessments nor of special assessments, using the latter term to denote assessments levied by cities and villages for local improvements.

"On August 22, 1917, this department rendered an opinion to the effect that by reason of the provisions of section 5548, G. S. 1913, making the provisions of law in relation to the collection of real estate taxes applicable to the collection of ditch assessments, the amount of ditch assessments were to be treated in the same way as general taxes in arriving at the price for which the land might be sold. At the next session of the legislature chapter 337, Laws 1919, was enacted. This amended section 2128, G. S. 1913, by inserting the proviso relating to ditch assessments. It will be noted that the proviso requires that the full amount of ditch assessments due be collected in every case.

"By chapter 386, Laws 1921, there was added, immediately after the proviso relating to ditch assessments, this language.

> 'And provided further, that where any parcel subject to sale as aforesaid, contains as a part of said tax the full amount or a portion of any special assessment for local improvements levied under and pursuant to municipal authority, the governing body of such municipality

may, by ordinance or resolution, determine and fix the minimum amount of such assessment to be included in addition to the amounts hereinbefore provided as the minimum for which any such parcel may be sold; provided that a copy of such resolution or ordinance, describing each tract and fixing each such minimum amount, shall be served upon the county auditor at least thirty days before the date of sale.'

"It is provided in section 2076, G. S. 1923, that the county treasurer shall collect special assessments when empowered by law so to do, at the time he collects other taxes. There is, however, no provision in the statute making the general tax laws applicable to the collection of special assessments, as there is with reference to ditch assessments. The method of levy and collection of special assessments is controlled by the charter or the general or special act under which they are imposed. It is not possible to cover in an opinion all of the varying provisions that may occur in the charters of different cities. It may be that in some cases the language of the charter is such that special assessments should be treated as general taxes in all respects. Here, however, is considered only the general question of the application of section 2139, G. S. 1923, to those cases where the general tax laws are not specifically made applicable to the collection and enforcement of special assessments. The question for determination is, then, whether such assessments are taxes within the meaning of the phrase 'taxes as originally assessed,' which occurs in the section under consideration.

"The term 'tax' may or may not include special assessments. Whether it does or not depends on the context. State vs. Tax Commission, 137 Minn. 39. Special assessments are ordinarily not included. Page & Jones on Taxation by Assessment, section 39. It may be said that, since the paramount purpose of the forfeited tax sale is to clear up charges of long standing and get the land back on the active tax list, special assessments should, in order that the purpose be accomplished, be subjected to the same discount as general taxes. On the other hand, since these assessments are the source to which the municipality looks for reimbursement for money it has spent in making improvements that benefit the property, it may be argued that the legislature did not intend to deprive the city of the right to complete reimbursement, especially in view of the fact that it must be presumed that the value of the property has been enhanced to the extent of the benefits assessed against it and that such enhancement, resulting directly from the local improvement, leaves a value sufficient to pay the special assessment in full. The first proposition finds support in the application of the proviso to cases where the

'parcel subject to sale as aforesaid contains as a part of said tax'

a special assessment, and in the right of the council in fixing a minimum to make it the full amount of special assessments due. The second finds support in the provision that the minimum fixed by the council shall be

'included in addition to the amounts hereinbefore provided as the minimum for which such parcel may be sold.'

If in arriving at the amount 'hereinbefore provided as the minimum' the one-half or one-fifth, as the case may be, of the special assessment has been

included already, it cannot be that it is intended to include 'in addition' to such minimum amount the sum that the council may determine shall be collected.

"There is nothing in section 2139, G. S. 1923, leaving the proviso out of consideration, which indicates an intention to class special assessments with general taxes. The language of the proviso confuses rather than clarifies. The practice varies in different counties. In some the full amount of special assessments is included where the council has not acted, and in others they are discounted with the general taxes. The conclusion reached is that, except in cases where charter provisions require a different construction, the statute means that the full amount of the special assessment due at the time of sale must be included in the sale price unless the council shall have fixed a smaller amount as permitted by the proviso. The question is not absolutely free from doubt, and a determination of it by the courts would be desirable." (Note—See C. 119, Laws 1927.)

CLIFFORD L. HILTON,
Attorney General.

September 12, 1925.

240

TAXATION—Gross earnings—Interest on mortgages and securities.

The Minnesota Tax Commission.

You have submitted to us a trust certificate and an affidavit made on behalf of a trust company wherein claim is made that the trust company is now in process of liquidation by the commissioner of banks; that during 1925 the company received as interest on mortgages and securities held as trustee the sum of $5,576.61; that it paid out more than this amount during the same period to holders of the trust certificates; that in handling the interest on these mortgages and securities the company acted only as trustee for the benefit of the holders of the certificates; that the only income of the company in this connection was the difference between the interest earned on the mortgages and securities over and above the interest required to be paid to the holders of the trust certificates; that during 1925 more money was paid to these holders than was realized on the securities. The trust company has deducted the sum of $5,938.23, being the interest paid to the holders of trust certificates, from its total receipts and wishes to pay the gross earnings tax of 5 per cent, as provided by chapter 251, General Laws 1925, upon the difference between the two amounts, claiming that the sum of $1,247.29 represents the gross income of the trust company.

You ask our opinion as to the right of the company to make this deduction.

Assuming the truth of the statements contained in the affidavit, and after a consideration of the copy of the trust certificate attached thereto and the statement of the income of the company, I am of the opinion that the trust company is not obliged to pay a gross earnings tax upon the sum of $5,576.61 received as interest from these mortgages. The gross amount of interest received from the mortgages and securities held under the trust is

not, properly speaking, income of the company. The income of the company is represented by the difference between what it receives as interest from the securities held in trust and the amount paid to the holders of the trust certificates.

WILLIAM H. GURNEE,
Assistant Attorney General.

April 26, 1926.

241

TAXATION—Inheritance taxes—Duties of county treasurer—Wills in safe deposit boxes.

County Treasurers.

Referring to sections 2282, 2290 and 7258, G. S. 1913, as to the duties of the county treasurer in connection with a will of a decedent found in a safe deposit box upon opening the same pursuant to the provisions of section 2282.

Under section 2290 the county treasurer is in effect and in law the collector of inheritance taxes in his county. His county has a direct interest in the collection of such taxes. He may as county treasurer apply for letters testamentary or of administration, in proper cases.

The treasurer may open envelopes found in a safe deposit box opened pursuant to section 2282, and list the contents thereof, and make copies of endorsements, and of the contents, if believed to have a bearing upon the transfer of property or collection of the tax; or may do whatever else may be reasonably necessary in the performance of his duties as tax collector and representative of the interests of his county.

I doubt if the treasurer is entitled to personal possession of a will there deposited. There can be no legal objection to his copying a will or making notes of its contents, if believed to be called for in the performance of his duties.

His practice of personally seeing that the will gets to the probate court, or at least to the executor, is very proper. Strictly speaking, if they should refuse to deliver the will to the judge of probate or to the executor upon his request, it is probable that his legal recourse would be by application for a citation under section 7258. There can be no question of his right to that remedy, as inheritance tax collector and representative of the county's interests. In case of refusal it would be especially proper to make a copy of the will for possible future reference.

ALBERT F. PRATT,
Assistant Attorney General.

February 28, 1925.

242

TAXATION—Mortgage registration—Assignment of contract for deed—Not payable when tax paid on contract.

The County Treasurer, Minneapolis.

You report that a certain contract for deed of real property of date March, 1926, has been recorded in the office of the register of deeds of your county and mortgage registration tax thereon duly paid. An assignment of the contract by the sole vendor to a third party as collateral security for the

payment of a certain $3,500.00 note, payable to such third party, has now been presented for record, and you inquire if the mortgage registration tax is payable upon the assignment before the same is entitled to record.

The inquiry is answered, and in the negative, by a recent decision of the supreme court, VanDam vs. Bakker, 162 Minn. 124. The syllabus reads:

> "Where the mortgage registration tax has been paid upon a contract for the sale of real estate no additional tax is required upon an assignment of such contract by the vendor, no matter whether such assignment is an outright sale of the vendor's interest or was collateral security for a pre-existing debt."

ALBERT F. PRATT,
Assistant Attorney General.

June 4, 1926.

243

TAXATION—Mortgage registration tax on option contract—Lease.

County Attorney Lovell.

You state:

> "Enclosed you will please find a copy of a lease. The original lease properly signed, witnessed and acknowledged, was presented to this office for record. On page 3 of this lease there is an option purchase clause. (1) Is this lease subject to a mortgage registration tax? (2) May this lease be recorded without payment of a mortgage registration tax?"

The lease is a ten years' lease of parts of certain city lots, improved; lessee is required to pay all taxes and assessments; privilege of remodeling premises at lessee's expense is given; option is given to purchase the premises for a certain price and on certain terms, within ten years; and lessors agree to repair or rebuild in case of damage or destruction by fire, explosion, or tornado.

A "mortgage" in the mortgage registration tax law, section 2322, G. S. 1923, is defined as meaning "any instrument creating or evidencing a lien of any kind on such (real property, real estate, land) property, given or taken as security for a debt * * *. An executory contract for the sale of land, under which the vendee is entitled to or does take possession thereof, shall be deemed, for the purposes of this act, a mortgage of said land for the unpaid balance of the purchase price."

I am unable to see wherein the lease constitutes a "mortgage" under either branch of the above definition. It is a lease with option to purchase.

In my opinion your first inquiry should be answered in the negative and your second inquiry in the affirmative.

ALBERT F. PRATT,
Assistant Attorney General.

April 16, 1925.

244

TAXATION—Mortgage registration—Rate of—Instalment mortgages.

The County Attorney, Lyon County.

Referring to the mortgage registration tax law (sections 2322, et seq. G. S. 1923) and to a mortgage payable in installments, the maturities of some of which are fixed at dates within five years and sixty days after the date of

the mortgage, and the maturities of others of which are fixed at dates more than five years and sixty days after the date of the mortgage, you inquire if the tax should be computed on the whole amount of the mortgage on the 25-cent rate, or partly on the 15-cent and partly on the 25-cent rate.

The portions whose maturities are fixed at dates within five years and sixty days after the date of the mortgage are taxable on the 15-cent rate, and the portions whose maturities are fixed at dates more than five years and sixty days after the date of the mortgage are taxable on the 25-cent rate.

> "A tax of fifteen cents is hereby imposed upon each hundred dollars, or portion thereof, of the principal debt or obligation * * * provided further that if the maturity of any portion of said debt secured by said mortgage, as therein stipulated, shall be fixed at a date more than five years and sixty days after the date of said mortgage, then and in that case the tax to be paid on such portion shall be at the rate of twenty five cents on each hundred dollars or fraction thereof."
>
> Section 2323, G. S. 1923.

It will be noted that the maturity dates are those fixed and stipulated as such in the mortgage, and not those which may depend upon the happening of some contingency. So far as I can see, in the particular mortgage under consideration, the only payments whose maturities are fixed in the mortgage are the one dollar payments, payable weekly.

ALBERT F. PRATT,
Assistant Attorney General.

June 22, 1926.

245

TAXATION—Mortgage registration—Trust deed—Leasehold interest—Whether subject to.

Auditor of State.

It appears that a trust deed has been presented to you, executed by an Iowa corporation in favor of Minnesota trustees, to secure the payment of $1,250,000.00 bonds, of which $1,000,000.00 are presently to be issued, whereby certain real and personal property is "granted, bargained, sold, conveyed, assigned, transferred and delivered" unto the trustees.

The property described comprises real property of a large value situate in Iowa, "all the right, title and interest and estate" of the trustor in certain "leases" on real property in Minnesota, and "all other real estate, leaseholds and rights and interests therein, wherever situated, now owned or hereafter acquired" by the trustor, and all buildings, plants, factories, etc., wherever situate, now owned or hereafter acquired or constructed by the trustor.

The "leases" or "leasehold estates" in Minnesota comprise a lease on real property in Duluth, dated February 28, 1924, terminating April 30, 1934, and leases on real property in Minneapolis, dated in part January 23, 1917, terminating March 1, 1932, and in part December 14, 1918, terminating March 1, 1932.

You inquire whether or not the mortgage registration tax is payable upon the security evidenced by the conveyance and mortgaging of the Minnesota leasehold interests.

The statute, section 2323, G. S. 1923, imposes the mortgage registration tax upon the "principal debt or obligation which is, or in any contingency may be, secured by any mortgage of real property situate within the state. * * * Provided further, that if any such mortgage shall describe any real estate situate outside of this state, such tax shall be imposed upon such proportion of the whole debt secured thereby as the value of the real estate therein described situate in this state bears to the value of the whole of the real estate described therein, as such value shall be determined by the state auditor upon application of the mortgagee."

As to the basis of computation on trust deeds or mortgages, with bonds or other obligations not all presently to be issued, see section 2325, G. S. 1923.

The question therefore is whether or not these Minnesota leases or leasehold interests or estates are "real property" or "real estate" within the meaning of the Minnesota mortgage registration tax law.

Under section 10933, subdivision 9, G. S. 1923, "the words 'land,' 'lands,' 'realty,' and 'real estate' shall include lands, tenements, and hereditaments and all rights thereto and interests therein."

Under section 8195, G. S. 1923, the word "conveyance" as used in the chapter relating to conveyance of real estate, "shall include 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 leasehold interest in land is "real estate" within an incorporation act prohibiting the organization of corporations to hold real estate.

Imperial Bldg. Co. vs. Chicago Open Board of Trade, 87 N. E. 167, 169, 238 Ill. 100.

Within a statute providing that "real property" for the purpose of taxation, shall be construed to include the land itself and all rights and privileges thereto belonging or in anywise appertaining, a leasehold is assessable as "real property."

Moeller vs. Gormley, 87 Pac. 507, 508, 44 Wash. 465, citing and adopting Reilley vs. Anderson, 73 Pac. 799, 33 Wash. 58.

See Chicago Attachment Co. vs. Davis Sewing Machine Co. 31 N. E. 438, 142 Ill. 171, 15 L. R. A. 754.

McKee vs. Howe, 31 Pac. 115, 18 Colo. 538.

Under a statute providing that no power of attorney or other authority from a wife to her husband "to convey real estate or any interest therein" should be of any force, it was held that the word "interest" includes the estate of a lessee, and that therefore, a husband cannot, as his wife's attorney or agent, make a valid lease of her real property.

Lanford vs. Johnson, 24 Minn. 172.

Under the statutory definition and the decisions it seems quite clear that the leases or leasehold estates or interests in question are real property or real estate within the meaning of the mortgage registration tax law, and that the tax should be computed and imposed accordingly.

ALBERT F. PRATT,
Assistant Attorney General.

November 23, 1925.

246

TAXATION—Payment at local bank without transmission of money.

C. W. Stites, County Attorney.

You state that it has been the practice in your county for many tax payers to pay their taxes through the local banks by paying the amount thereof to the bank; the bank, if it is a designated depository of county funds, crediting the county therewith by merely sending the county treasurer a deposit slip, there being no actual transmission of the money.

You inquire as to the propriety of this practice. In my opinion there are several legal reasons why the practice should not be continued.

Under the law, the county treasurer is the public official authorized to receive taxes, and this power to accept money cannot be delegated.

Legal payment is effected only when the amount thereof has been paid in lawful money to the treasurer, unless the treasurer, at his own responsibility, elects to accept a check, draft, cashier's check, or other instrument of similar import. In the latter case, especially if a tax receipt is delivered, so far as the county is concerned, the taxes are paid and the treasurer becomes liable to the county as for money received. Therefore, for his own protection and for the protection of the county, no practice should be indulged in which attempts to recognize a payment of the taxes without the money actually coming into the hands of the treasurer.

Again, there are many complications that are liable to arise under the practice mentioned. When is payment effected? Is it when the bank credits the account of the county therewith, or when the treasurer receives the deposit slip and accepts and approves of the deposit?

A day or several days may intervene between the time when credit is given by the bank and the time when the treasurer actually receives the deposit slip. This question may become of vital importance, as in the case where the credit is given on the last day for payment without penalty, but the deposit slip is not received by the treasurer for a day or two thereafter. Also, if the taxpayer pays the bank the correct amount and credit is given to the county, but the bank closes before the treasurer receives evidence of the credit and recognizes the deposit. Is the money so deposited the county's money, or the money of the taxpayer? These are not idle speculations in view of the many bank failures during the last two or three years.

The treasurer may under the law deposit in banks duly designated as depositories for county funds only the amount specified by statute. The practice suggested may often times result in excessive deposits as where the bank receives substantial sums from taxpayers after its deposits have reached the maximum limit. Again, some banks are stronger than others, and yet the weaker banks may be the ones to receive the larger payments of taxes.

Confusion may also arise in cases where the bank receives and credits the county with an incorrect amount. This is a frequent occurrence in payment of the last half of taxes where the same includes drainage assessments which require the computation of interest from June 1 to the time of pay-

ment. On the whole I feel that the public examiner is acting wisely and in accordance with law when he disapproves of the practice prevailing in your county.

CHARLES E. PHILLIPS,
Assistant Attorney General.

March 2, 1925.

247

TAXATION—Payment through bank—Effect of cashier's check not cleared at time bank fails.

R. J. Stromme, County Attorney.

You state that banks in the remote part of the county have been permitted to collect taxes in their locality, and then after November 1 to send in a list of taxes paid to them, with a cashier's check to cover, the treasurer then making out and sending tax receipts to those who thus paid.

You further state that you are advised that the county treasurer is holding a cashier's check for approximately $8,000.00 of taxes paid by property owners to such bank, and that such bank was closed yesterday.

You inquire whether the taxes are paid.

No. The county treasurer is not authorized to delegate the collection of taxes. He is the officer designated by statute to collect the same, and taxes may be paid only by payment to him in money. The payment of the amount of the taxes to the bank merely made the bank an agent of the property owners in the premises, and did not constitute a payment of the taxes. The receipt of the cashier's check by the treasurer was a conditional payment of the same, at the very most, and did not constitute a final payment. I call your attention to the case of Eggleston vs. Plowman, 44 A. L. R. 1231, and the annotations immediately following the same. You will find a very thorough discussion of the matter in that case and in the annotations.

So far as the public is concerned, the taxes remain unpaid and the treasurer should proceed to collect them in the usual manner.

CHARLES E. PHILLIPS,
Assistant Attorney General.

November 12, 1926.

248

TAXATION—Payment of taxes when Memorial Day falls on Sunday.

The County Attorney, Winona.

You direct attention to the proclamation of the governor, suggesting that inasmuch as Memorial Day falls on Sunday the usual services in honor of the nation's dead be held on the following day, May 31. It happens that this is the last day for the payment of taxes without penalty, and you inquire whether the treasurer's office should be kept open for the purpose of receiving such payment.

Yes. The governor does not proclaim a holiday. He merely requests that the usual exercises which otherwise would be held on Sunday be deferred until the following day.

CLIFFORD L. HILTON,
Attorney General.

May 17, 1926.

249

TAXATION—Receipts—Printing of rates on back of—Section 2077, G. S. 1923.
Lucius A. Smith, County Attorney.

You inquire if the printing of a tabulated statement of rates of taxation on the back of tax receipts is mandatory, or optional with the county board and county treasurer.

Such printing is mandatory, and the treasurer must have the same printed, without any direction from the county board. The printing or not printing in a newspaper is subject to the direction of the county board. A slight change in the phraseology of the law would change its legal meaning in this respect, but that is for the legislature to consider.

What penalty, if any, follows failure to comply strictly with the law is another question.

ALBERT F. PRATT,
Assistant Attorney General.

March 6, 1926.

250

TAXATION—Redemption from tax sales by owner of specific part.
Graham M. Torrance, County Attorney.

You inquire:

(1) "Where several platted lots have been assessed to one owner and the lots have been sold and bid in by the state for one total amount may the owner of such lots redeem one of such lots under the provisions of sections 2158 and 2160, G. S. 1923?"

These sections appear to cover the situation quite fully and to require an affirmative answer to your inquiry.

(2) "In case such owner may redeem one of such lots, could the purchaser from the state cause to be issued a valid notice of expiration of the time to redeem the other two lots for the balance due under such tax sale certificate?"

Section 2136, G. S. 1923, as amended by chapter 63, Laws 1925, requires an affirmative answer to this inquiry. The 1925 amendment appears to have been enacted to cover this situation, although the practice indicated had theretofore been followed, at least in some counties.

(3) "In case the certificate of sale for such lots has been assigned to a purchaser, may the original owner, or his grantee of one of such lots, after service of notice of expiration of redemption, redeem one of said lots under the provisions of sections 2160 and 2161, G. S. 1923? If so, is the certificate holder entitled to notice?"

Section 2161, G. S. 1923, is hardly applicable here. That is a later law passed to cover payment of taxes on parts less than the whole of a tract of land as listed for taxation, rather than to cover redemption after sale. But sections 2158 and 2160 would seem on principle to be applicable. The right of redemption exists until the time for redemption has fully expired, and the policy of the law as indicated by the decisions is to construe liberally the statutory provisions for redemption.

The principal difficulty from a legal standpoint lies in treating several lots as a "parcel of land sold for taxes," and one lot of the several as a "part of" the "parcel," but they have been listed and assessed as a "parcel," and offered for sale and sold as a "parcel," and logically one lot is a part of several lots which include such lot.

The certificate holder would seem to be entitled to notice, as one of the "all parties interested." And besides, the public may be benefited by having him in on the proceedings, as he will naturally object to the redemption of a valuable part of the "parcel" on a relatively small valuation.

ALBERT F. PRATT,
Assistant Attorney General.

April 15, 1926.

251

TOWNS—Authority to settle actions, and employ attorney.

John Johnson, Chairman, Town Board.

Section 1002, G. S. 1923, authorizes the voters at their annual town meeting to direct the commencement and defense of all actions in which the town is a party and to employ agents and attorneys for the prosecution or defense of the same and to raise such sums of money for that purpose as they deem necessary. I assume that the voters of the town authorized the commencement of the action to which you refer, hence no settlement should be made without a vote of the electors or ratification by them. The town chairman, as such, has no authority to settle the lawsuit, neither have the attorneys, without the affirmative vote at a town meeting. The electors of the town have a right to decide whether this case shall be prosecuted or settled, and the attorneys for the town must be guided by their instructions. If they refuse to act in accordance with such instructions, they may be discharged.

If a settlement of the case is proposed, I would think that the proper course would be to call a town meeting to consider the question.

WILLIAM H. GURNEE,
Assistant Attorney General.

September 22, 1925.

252

TOWNS—Band—May not levy tax for support of.

Ray Webster, Clerk.

You state that the board of trustees of Reis township has instructed you to write us for an official opinion in regard to a matter submitted by your letter.

You state that the village of Beltrami is located in Reis township; that there is a band in the village under the name of the Beltrami Concert Band, about half of the members thereof living in the village and the rest in the country but within the township of Reis; that the village has levied a tax of $200.00 for the support of the band; that at the last election voters of the township voted favorably on the proposition to give $300.00 for the support of the band.

You inquire whether the town, by a vote of the electors, may levy a tax or appropriate money for the support of the band in question.

Your inquiry is answered in the negative. I have been unable to find any statute authorizing a town to levy a tax or appropriate money for the proposition in question. Cities and villages have been expressly authorized so to do by statute.

Answering your questions specifically, I will say that the action of the board in submitting the proposition to the electors is without avail and that a favorable vote upon the proposition so submitted does not authorize the levying of the tax in question.

You further inquire whether in case the tax was levied, could suit be brought against the board for collection of the full amount of the tax and costs of suit. I do not know that I understand the question that you intended to submit by this inquiry. The levy of this tax being illegal, any taxpayer may contest the same in the manner provided by law for the determination of alleged illegal tax levies. If the tax is levied and collected, the board would lack authority to appropriate or use the same for the purpose suggested.

CHARLES E. PHILLIPS,
Assistant Attorney General.

April 3, 1925.

253

TOWNS—Funds—Transfer of.

J. J. Hadler, City Attorney.

The right of the town board to transfer moneys from one fund to another is controlled by section 1146, G. S. 1913. You will note that by unanimous vote thereof, the board may transfer any **surplus beyond needs of the current year** from one fund to another. It is my opinion that a town board may not transfer funds levied and collected and placed in a sinking fund for the future retirement of bonds, unless there is in such fund moneys not needed for that purpose. I do not believe that the board could be authorized to transfer simply because there were no bonds maturing during the current year. The spirit of the entire statute is that the board may transfer moneys from one fund to another when not needed in the fund from which it is transferred.

Unless there is a charter provision or some statute specifically authorizing it to be done, I am of opinion that a city council may not transfer funds levied and collected and placed in the sinking fund for the specific purpose of retiring bonds in the future. I have not, of course, examined your charter and am not familiar with its provisions, but I assume from your statement that there is no authorization therein for such a transfer.

CHARLES E. PHILLIPS,
Assistant Attorney General.

March 14, 1925.

254

TOWNS—Hall—Ownership of—Upon separation of village from town.

M. S. Protosavage, Chairman.

You state that the town of Sturgeon Lake acquired a site and built a town hall within the village of Sturgeon Lake before the separation of the village from the town.

You inquire whether the village can now compel the township to remove the town hall from the village.

This inquiry is answered in the negative.

You further inquire whether the town may continue to hold its town meetings in such hall notwithstanding it is located within the village. See opinion 889, 1920 Report.

CHARLES E. PHILLIPS,
Assistant Attorney General.

February 27, 1925.

255

TOWNS—Hall—Sale of—Vote required.

The Town Board, Mound Township.

You state that your town has a town hall; it has not been in use for some time; some of the voters want to dispose of it, others do not; a special town meeting has been called to vote by ballot on the question whether the town hall, and the land on which it stands, should be sold and disposed of; the town proposes to use another hall, more centrally located, as a town hall.

You inquire as to the vote required to be in the affirmative at such meeting in order to authorize such sale and disposition.

Assuming that the special meeting is duly called and held (see section 1124, G. S. 1913, being section 1031, G. S. 1923, which you no doubt have in your town manual) and assuming that the question to be submitted is whether or not the town board shall be authorized to sell and convey the town hall alone, or the town hall and the tract of land on which it is located, then the affirmative vote required is a majority of the votes duly cast at the meeting so called and held. This under section 1100 (8), G. S. 1913, being section 1002 (8) G. S. 1923.

But if the proposition involves a change of site for the town hall (and under your statement of facts it may) then an affirmative vote of two-thirds of the votes duly cast at the meeting is required. This under section 1100 (9), G. S. 1913, being section 1002 (9), G. S. 1923, which was amended by chapter 158, Laws 1925, so as to read:

> "The electors of each town have power at their annual town meeting (or special town meeting called for the express purpose): * * *
>
> 9. To authorize the town board to build a town hall or other building for the use of the town, and to determine by ballot the amount of money to be raised for the purpose, but if a site for a town hall is once obtained it shall not be changed for another site except by vote therefor designating a new site by two-thirds vote cast at such election of the legal voters of the township."

If there is any question about the proposition to be voted on, you would better have your town attorney look into it and advise you with all the detailed facts before him.

ALBERT F. PRATT,
Assistant Attorney General.

June 15, 1926.

256

TOWNS—Meeting—Moderator—Fees of.

C. O. Wing, Town Clerk.

By order of the town board you inquire if the moderator at the annual town meeting is entitled to compensation for his services as such.

A careful search of the statutes does not disclose that any provision has been made therein or thereby for the allowance or payment of compensation for the services of the moderator at the annual town meeting.

It is the universally recognized rule of law that payments may be made out of public funds only in cases provided for by law, and that public officers may receive compensation for public services only in case the payment thereof is provided for by law.

Which answers your inquiry in the negative.

ALBERT F. PRATT,
Assistant Attorney General.

March 24, 1926.

257

TOWNS—Park—Joint ownership and maintenance with village.

M. A. Brattland, County Attorney.

You state that a valuable tract of ten acres was given to the village of Hendrum and to the town of Hendrum for park purposes and you inquire whether the village and the town may jointly maintain and improve the same for such purpose.

Your attention is called to subsection 11 of section 1002, G. S. 1923, which authorizes a town, either by itself or in conjunction with other towns, to acquire land for park purposes and to maintain and improve the same. You will further note that chapter 197, Laws 1919, authorizes a village to acquire lands for such purpose, either within or without the corporate limits, and to improve and maintain the same for park purposes.

There is no specific statutory provision, so far as I can ascertain, which expressly authorizes a village and a town jointly to own, maintain, and improve land for park purposes. However, I think they may do so where each possesses authority to acquire and maintain a park separately. I call your attention to the case of White vs. Chatfield, 116 Minn. 371. I see nothing inconsistent in the joint ownership and use of this tract for park purposes, and think that the case may be easily distinguished from some of the other cases mentioned and discussed in the White case.

CHARLES E. PHILLIPS,
Assistant Attorney General.

April 3, 1925.

258

TOWNS—Poor—Must support paupers of village not a separate assessment district and which has no poor fund.

Arthur L. Wagner, Town Clerk.

You state that a certain pauper has been a resident of the village of Fisher during her residency in this vicinity; that she has been supported by the town of Fisher approximately ten years; that the village exercises the right of franchise within the town of Fisher. You inquire whether it is the duty of the village or of the town to support this person.

I assume that the village of Fisher is not a separate election and assessment district, and has not levied any tax for poor purposes. Under these facts you are advised that it is the duty of the town to support the person in question out of the town poor fund which is contributed to by the owners of the taxable property within the village.

CHARLES E. PHILLIPS,
Assistant Attorney General.

June 5, 1925.

259

TOWNS—Roads—Power of electors to determine where money may be spent.

Theodor S. Slen, County Attorney.

You inquire whether direction of a town meeting by formal or informal vote, relative to the places and manner of expenditure of town road money, on roads which are subject to maintenance and repair by the town, are binding on the town board.

Answer: Such directions, whether by formal or informal vote, have no legal effect. They are in the nature of recommendations to the town board. The town board is charged with the exercise of official judgment and discretion with respect to the places where and manner in which the town road money is to be expended. Subject, of course, to the statutory limitations and restrictions found in the road law.

ALBERT F. PRATT,
Assistant Attorney General.

May 29, 1925.

260

TOWNS—Supervisors—Vacancies.

The Village Attorney, Hibbing.

You ask what procedure is to be followed in filling vacancies in the office of town supervisor when two such vacancies exist at the same time.

G. S. 1923, section 1086, to which you refer, provides that a vacancy in the office of town supervisor "shall be filled by the remaining supervisors and town clerk until the next annual meeting, when his successor shall be elected to hold for the unexpired term." This section creates a special appointing body to fill vacancies in the office of town supervisor consisting of the remaining supervisors and town clerk. The statute does not require a unanimous vote of this body to make an appointment, from which it is to be inferred that a majority vote, that is, any two out of the three members

of this body, would control, and consequently that such majority would constitute a quorum to act in filling a vacancy. From this it follows that as long as there remain in office two out of the three members of the appointing body, that is, one of the supervisors and the town clerk, those two constitute a quorum and would have power to fill the vacancies in the offices of the other supervisors. You are, therefore, advised that the remaining supervisor and the town clerk have power to fill the vacancies in your case.

In this connection, it might be noted that if there should be a vacancy in the offices of supervisor and town clerk at the same time, the proper procedure would probably be for the two remaining supervisors first to fill the office of town clerk by appointment, and then act with the clerk, after he has qualified, to fill the other vacancy in the office of supervisor. However, this is not to be construed as saying that the clerk's vote is necessary to a choice. The clerk and the remaining supervisors have equal authority on the appointing body. If there were a single vacancy in the office of supervisor, and the two remaining supervisors should vote for one candidate and the clerk for another, or should the clerk refuse or fail to act as a member of the appointing body, when notified to do so, the vote of the two remaining supervisors would be effective to fill the vacancy.

As you will note from the statute, any person so appointed to fill a vacancy holds office only until the next annual meeting, when a successor should be elected to hold for the unexpired term.

Should there be left in office no members of the appointing body, or only one member, who, of course, would have no power to act alone, or should the appointing body fail to fill any vacancy within a reasonable time after it occurred, the proper procedure would be to call a special town meeting to fill the vacancy, as provided by G. S. 1923, section 1031. This section does not state whether an officer elected at such a meeting would hold office only until the next annual meeting or would serve out the unexpired term. However, it seems to be implied in the following section, 1032, providing for notice of such special meeting, that an officer elected at such meeting shall serve out the unexpired term as this section requires the notice of the special meeting to state when the legal term expires. As a general rule any action lawfully taken at a special town meeting has the same effect as if taken at a regular annual meeting. It would, therefore, seem that an officer elected to fill a vacancy at a special town meeting would serve out the unexpired term.

CHESTER S. WILSON,
Assistant Attorney General.

November 17, 1925.

261

TOWNS—Taxation—Certification of taxes voted in 1925 for inclusion in the 1926 taxes, due in 1927.

Wm. M. Wood, County Attorney.

It appears that at the annual town meeting held in a certain town on March 10, 1925, it was voted to raise by taxation $3,000.00 for a community hall, intended to be used also for town hall purposes. "The tax vote was not reported to the county auditor until December 7, 1926, too late to extend it on the tax list for the year 1926."

You inquire if the county auditor lawfully may now extend the said levy of $3,000.00, voted at the annual town meeting in 1925, on the 1926 assessment list of taxes due in 1927, along with the other amounts voted by this town for town revenue, town road and bridge, poor fund, etc., at the annual town meeting held on March 9, 1926.

The levy, as shown by the certificate was specifically "voted to be raised by taxation of said town (as appears from the records in my office) for the year 1925, viz: * * * ($3,000.00). Three thousand dollars for a building fund to be used to build a community hall."

It does not appear whether or not the 1925 town meeting voted "to authorize the town board to purchase or build a town hall or other building for the use of the town," and "determined by ballot the amount of money to be raised for that purpose." Section 1002 (9), G. S. 1923. If the town meeting did so vote to authorize and did determine by ballot the amount of money to be raised therefor, (which I take it means the total amount which the board is authorized to expend for such purpose) it appears that the tax levies necessary from time to time to carry out the purpose, would be made by the town board, and not by the town meeting. See section 1009, G. S. 1923.

On the showing made I doubt very much if the action attempted to be taken in this connection at the 1925 annual town meeting was in compliance with the statute, even assuming that a "community hall" is a "building for the use of the town," within the meaning of the statutes above referred to. The idea as expressed in the certificate appeared to be to "create a building fund to be used (by somebody in some way) to build a community hall," and not to authorize the board to build a "town hall or other building for the use of the town" and to determine by ballot the total amount of money to be raised therefor.

It may have been the intention to act under section 1002 (12) G. S. 1923, "to vote money to aid in the construction of community halls, to be erected by farm bureaus, farmers' clubs or other like organizations," but that purpose does not clearly appear from the certificate.

Whether or not the action attempted to be taken was ineffective as not being in compliance with one or the other of the above noted subdivisions, it is not necessary to determine at this time, but on the information at hand it appears doubtful if such action was sufficiently in accord with either one.

There is no question that the requirements of section 2058, G. S. 1923, relating to the time when tax levies shall be certified to the county auditor for extension on the tax assessment lists, are directory and not mandatory. But this levy was voted specifically to be raised by taxation of said town for the year 1925 (payable in 1926) and for no other year. The voters at the 1926 annual town meeting knew, or, in law, are presumed to have known, that the tax had not been levied. They might easily have straightened the matter out at the 1926 town meeting, if they desired the levy to be made for 1927. Presumably they concluded that they had better await a more favorable time for making or confirming the levy. Likely they took into account in levying other taxes payable in 1927, that this additional $3,000.00 was not a part of the 1926 tax and, by reason of no further action taken by the 1926 town meeting, that it would not be levied as a part of the 1927 tax, and they

may have levied other taxes (for 1927) in larger amounts than they otherwise would have levied. Other considerations of a practical nature will suggest themselves to you.

All this aside, in my judgment the directory application of section 2058, G. S. 1923, cannot be extended so as to put on the 1926 tax assessment list for payment in 1927, a tax voted in March, 1925 "for the year 1925" but not certified to the county auditor until December, 1926, and proposed to be placed on the tax assessment list for payment in 1927.

On the ground last above stated your inquiry is answered in the negative.

If the town board, on the strength of the 1925 vote, has taken action, such action may perhaps be ratified at the March, 1927 annual town meeting, under authority of 99 Minn. 286. The best way, if the electors want to build a "town hall or other building for the use of the town," or to vote money to "aid in the construction of a community hall" is to start over at the annual town meeting in March, 1927, and proceed in accordance with the provisions of the statutes above referred to, which will be found in the town manual.

ALBERT F. PRATT,
Assistant Attorney General.

December 13, 1926.

262

TOWNS—Telephone systems—Who locates central.

Bessie M. Wells, Town Clerk.

You state:

> "Our township is about to construct a telephone line; at our annual town meeting we took a vote on where our central was to be, and the majority voted for P, which is our nearest town south. Now a good many of the people in the north half of our town say they have no business south and wish to be allowed to connect with B, which is north, but still allowing those who wish to do so to connect to P. The town board claim that they cannot change the central as it was voted by the people. The question is does the town board have the right to allow those who wish to connect to B, to do so, or will they have to call a special meeting and take another vote, and if so, should the voting be done by ballot."

The town telephone law, chapter 439, Laws 1921, is none too clear on the point raised by you—as well as some other points.

Section 1 provides that the electors have power to "authorize the town to construct, or otherwise acquire and to operate and maintain a township telephone system * * * and by itself or in conjunction with one or more other towns to construct, equip, operate and maintain a local telephone exchange, or one or more trunk lines of wires connecting such town or towns with said local exchange, or with a local exchange owned by some other corporation, person or persons, and to determine by ballot the amount of money to be raised for the purposes aforesaid."

All of the above seems to be subject to the authority of the electors at the town meeting.

Under section 8 the town board "is hereby vested with all necessary authority to manage, maintain and operate any township telephone system constructed under the provisions of this act, and, to that end, may, among

other things, contract for the connection of such township lines with exchanges owned by others for switching, local exchange and toll connections * * * ."

If the town meeting had not voted specifically for a certain connection, it doubtless would have been within the authority of the board to make contracts for two connections or "trunk lines connecting such town or towns with said local exchange, etc.," but the electors having so voted, as I understand your letter, I think that the electors will have to act before the board has authority to construct two connecting lines. One reason is that naturally two lines will cost more than one; the board may levy as taxes and expend only the amount of money voted by the electors; the electors have voted "an amount of money to be raised for the purposes aforesaid," that is, for one connection. Two connections may require a vote of more money, and might even run over the limit of five mills fixed by section 3 of the statute. So my best judgment is that there will have to be a vote of the electors reconsidering the action for one connection, and authorizing two connections, and voting money therefor (if necessary) before the board can act otherwise than as originally directed.

The notice of a special meeting must, of course, fully cover the business proposed to be taken up at the meeting, as no matters not covered by the notice may be taken up at a special meeting. The voting should be by ballot.

ALBERT F. PRATT,
Assistant Attorney General.

May 5, 1925.

263

WATERS—Riparian owners—Rights of in meandered.

Commissioner of Drainage and Waters.

You inquire:

1. "Is it legally possible for a private individual or corporation to secure quiet title to a meandered lake in Minnesota?"

Answer: No, not as long as it is a public lake.

2. "Does the securing of the riparian rights from all of the owners of the property abutting on a meandered lake by a person or corporation secure to him or it the title to the lake, and may he treat the use of the lake by anyone else for any purpose without his permission or consent as a trespass?"

Answer: No. Of course, if a person owns all the land around a meandered lake and there is no public way either by land or water to get in, crossing such land without such owner's permission would be a trespass, but the lake itself is public waters, which the public may use for proper public purposes if it can get there.

You further inquire if public roads may be laid to meandered lakes for the purpose of giving the public access thereto.

Answer: Yes, under the general road laws, by town boards, county boards, and the courts. Additional power is given to county boards to establish such roads, by chapter 129, Laws 1923, under certain conditions. Certain trails between lakes are also declared to be public ways by chapter 115,

Laws 1923. See also provisions in the Ordinance of 1787 for the government of the Northwest Territory; also section 2 of the "act authorizing a state government"; also section 2 of Act 2 of the constitution.

I might add that the state has certain rights in the beds of meandered lakes. See State vs. Korrer, post.

If you wish to get a line on the rights of riparian owners on meandered and non-meandered waters, among the numerous decisions bearing thereon, you might consult the following Minnesota cases:

Lamphrey vs. State, 52 Minn. 181;
In re County Ditch No. 34, 142 Minn. 37;
Bradshaw vs. Mill Co., 52 Minn. 59;
Union Depot vs. Brunswick, 31 Minn. 297;
Hanford vs. Railway Co., 43 Minn. 112;
Schurmeier vs. Ry. Co., 10 Minn. 82;
Morrill vs. St. A. F. W. P. Co., 26 Minn. 222;
State vs. Minneapolis Mill Co., 26 Minn. 229;
Water Power Co. vs. St. Paul Water Board, 56 Minn. 485;
St. A. F. W. P. Co. vs. City, 41 Minn. 270;
In re Lake Minnetonka Improvements, 56 Minn. 513;
Minn. Loan & Trust Co. vs. St. A. F. W. P. Co., 82 Minn. 545;
State vs. Korrer, 127 Minn. 60;
Sanborn vs. Peoples Ice Co., 82 Minn. 43;
Whittaker vs. Stangvick, 100 Minn. 386;
Lamprey vs. Danz, 86 Minn. 317;
L. Realty Co. vs. Johnson, 92 Minn. 363.

ALBERT F. PRATT,
Assistant Attorney General.

July 22, 1925.

Index to Opinions

References are to Opinion Numbers, not Page Numbers.

CITIES AND VILLAGES—Continued

CITIES AND VILLAGES—Continued

CITIES AND VILLAGES—Continued

COUNTIES—Continued

COUNTY OFFICERS—Continued

CRIMINAL LAW—Continued

EDUCATION—Continued

EDUCATION—Continued

ELECTIONS—

STATUTES—Continued

Revised Laws of 1905

Section	Opinion
606	75
698	12
717	12
777	141
777	147
937	239
985	89
1179	206
2697	90
3562	221
3648	117
3770-1-2	119

Laws of 1907

Chapter	Opinion
412	18
430	239
445	168

Laws of 1911

Chapter	Opinion
285	231
352	12

Laws of 1913

Chapter	Section	Opinion
143	3	83
145		141
371		89
519		70

General Statutes of 1913

Section	Opinion
336	170
474	183
647	56
674	56
675	56
679	64
696	91
696, sub. 7	91
842	96
974-5	133
1016	93
1091	193
1100	255
1124	255
1146	253
1348-9	181
2066	72
2128	239
2138	239
2192	89
2494	193
2505	204
2508	193
2672-80	211
2710	157
2719	158
2720	159
2747	168
2796	165
2902	160
5548	239
6813	89
7635-6-7	119
9235	117

Laws of 1915

Chapter	Opinion
35	89
36	100
111	155
315	179
321	77
360	11

Laws of 1917

Chapter	Opinion
48	7
91	82
230	170
285	8
397	108
406	7

STATUTES—Continued

Laws of 1919

Chapter	Opinion
65	141
128	99
162	176
169	234
192	30
192	31
197	257
229	58
229	60
236	211
245	93
337	239
400	188
400	189
400	190
445	47
487	63

Laws of 1921

Chapter	Section	Opinion
13	6	184
145	19	12
233		50
295		89
323		204

Chapter	Section	Opinion
328	2	152
351		83
361		66
386		239
417	2	167
425		10
435	1	73
439		262
447		93
478		137
484	7	71

Laws of 1923

Chapter	Section	Opinion
17		19
78	3, 4	163
115		263
127		170
129		263
134		201
139		137
139	4	136
139	10	138
143		158
241		77
293		95
305	6	183
321		165
326		5
366		64
416	9	91
416	9	135
416	25-A	133
421		141
421		142
421		143
426		188
433		155

General Statutes of 1923

Chapter	Opinion
8	38
9	7
9	38
41	37

Section	Opinion
115	63
160	107
192	57
192	59
193	208
200	208
223	114
235	115
257	118
293	96
294	170
306	177
352	170
428	173

STATUTES—Continued

STATUTES—Continued

STATUTES—Continued

Section	Opinion
Section	Opinion
8986	208
8990	208
9004	107
9013	107
9129	105
9345-9351	22
9419-9422	22
9485	103
9636	90
9679	2
9687	95
9693	98
9700	2
9702	2
9707	104
9970	165
9995	92
10034	127
10098	92
10135	124
10136	124
10164	138
10185	128
10209	131
10237	107
10395	125
10492	131
10567	107
10701	128
10702	102
10933	245
10933, sub. 6	107
10933, sub. 22	30
10937	207

Laws of 1925

Chapter	Section	Opinion
25	3	61
47		45
48		166
60		77
63		250
68		4
91		53
91	11	93
124		162
126		185
143		65
155		236
158		255
173		139
173		142
173		143
173		144
173		145
173		147
208		239
216		174
251		240
265		141
302		138
306		51
309		7
309		41
352		88
355		109
375		184
377		223
377		224
380		188
380		190
386		222
415		149
415		150
416	26	104
420		177

STREETS—

See CITIES AND VILLAGES

TAXATION—

See Banks.

TAXATION—Continued